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Filial Responsibility Laws: Requiring Children to Support Aging Parents

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In a prior article written for this publication, the author analyzed federal statutes which prohibit a nursing facility from requiring third party guarantees of payment for admission, or continued stay in, the facility.[1] The legal analysis, including a review of applicable cases, revealed the following: in order to obtain a lawful third party guarantee of payment, the nursing facility must ensure that the third party's consent is given voluntarily, with full knowledge of all provisions of rights afforded by law, and that an additional obligation is imposed on the guarantor as responsible party which is bargained for, exchanged and supported by sufficient consideration.[2] In order to prove that a third party's consent is both voluntary and knowing, the nursing facility should ensure an adequate display of understanding by the third party "of the third party guarantee prohibition; safe discharge plan and discharge notice requirements; the prohibition against a written or oral assurance that the resident is not eligible, and will not apply for, Medicare or Medicaid benefits; and the numerous other rights afforded the resident by federal and state law."[3] Given that all of this information must be imparted to the third party in order to obtain a lawful third party guarantee, the author concluded that the only third party likely to voluntarily assume personal liability for another individual's payment to a nursing facility is a child who feels a moral obligation to support his parent.[4]

Some states have legislated this moral obligation and created laws which impose a duty on a child to support his or her indigent parents.[5] These filial responsibility laws differ in their definition of the duty owed, the factors to be considered when making a determination of the amount owed, the available defenses, and the penalties for refusal to support. However, these laws share a common theme: the recognition by the state of the need to create a duty of support owed to family members. This article will explore the roots of this recognition and duty, review a new approach taken by Pennsylvania, and analyze the defenses raised by children to prevent enforcement of these statutes.

The passage of these laws implies a legislative understanding that the state cannot shoulder on its own the burden of health care costs for the indigent, particularly the elderly. As the graying of America comes to fruition, the need to allocate partial burden for health care increases each day. In a statistical profile of older Americans aged 65 and above, the Administration on Aging reported that the number of Americans aged 45 to 64, who will reach age 65

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over the next two decades, increased by 39% during this decade.[6] In addition, the population aged 85 and above is projected to increase from 4.2 million in 2000 to 8.9 million in 2030.[7] Combine these figures with the following: the median income of older persons in 2004 was $21,102 for males and $12,080 for females, Social Security benefits accounted for 39% of the aggregate income of the older population in 2003, and most older persons have at least one chronic health condition, but many have multiple conditions.[8]

These numbers reflect a rapidly aging population, with limited income dependent greatly on Social Security, and increased risk for health care needs. Unfortunately, increased risk for health care needs can increase an individual's chances of requiring long-term care assistance, and diminished income equals a higher likelihood of needing public assistance for support. In 2004, Medicaid programs financed approximately $93 billion for long-term care services across the nation.[9] These conditions, coupled with the rising cost of health care, particularly long-term care costs, clearly indicate the state cannot bear alone the massive burden of caring for our elderly.[10]

At common law, an adult child was not required to support a parent. Such an obligation could only be created by statutes, which trace their beginnings from England.[11] As noted by the Supreme Court of California, the duty is deep rooted and of venerable ancestry and "can be traced back over almost four centuries to the year 1601, when it emerged as part and parcel of the Elizabethan Poor Law."[12] In addition, the court noted "that 'legal liability of relatives (imposed by the Elizabethan Poor Law) was designed to indemnify the public and to minimize its costs in relieving the poor.'"[13]

This sharing of the social burden has roots in religious ideology as well. One commentator stated that Judaism, Christianity, and Islam each impose legal and financial obligations on children and parents, in addition to moral duties.[14] These obligations become moral duties for the children when the parents are unable to provide for their own care. In equating the parent-child relationship to an individual's relationship with God, these religious traditions heighten the duty upon the younger generation to care for their elders, just as their God takes care of his children in need.[15]

However, our secular notions are conflicted. One point of view holds that children are indebted to their parents because they provided life, care and comfort when the children needed it and in return, children owe the same care to parents.[16] In contrast, other scholars opine that children have no duty to parents, because they have made no decision by which a legal responsibility could be voluntarily assumed or invoked.[17] Our Western idea of legal emancipation at the age of majority is firmly entrenched in our social and legal structures.

The enactment of the Medicaid program and the rise of the welfare state have led to the decline in use of filial responsibility laws.[18] Federal law prohibits states from considering resources of children: In making Medicaid eligibility decisions, "except for a spouse of an individual or a parent for a child who is under 21 or blind or disabled, the agency must not consider income and resources of any relative as available to an individual."[19] Once a state decides to participate in the Medicaid program, it must comply with federal law and administrative regulations.[20] In order to ensure continued receipt of federal Medicaid dollars, some states repealed their filial responsibility laws.[21]

However, since Medicaid was enacted in 1965, costs for the program have dramatically increased. In 1968, Medicaid costs were approximately $3.45 billion, rising to $16.35 billion in 1977, then $21.02 billion in 1980;[22] as noted above, in 2005, $93 billion was spent simply for long-term care services. As is common in times of budget constraints, alternate sources of revenue begin to be considered.

On July 7, 2005, the state of Pennsylvania recodified its filial responsibility law by shifting it into the existing Domestic Relations Code.[23] This move has the potential to revitalize a mostly dormant statutory support obligation running between adult children and parents.[24] In addition, this shift has been recognized by advocates as "mov[ing] the possibility of family liability for matters such as daily living expenses, health care and long-term care from a metaphorical back closet to center stage."[25]

The Pennsylvania statute was enacted as follows:

> [A]ll of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge:
>
> (i) The spouse of the indigent person.
>
> (ii) A child of the indigent person.

(iii) A parent of the indigent person.[26]

The duty is imposed at the time the person becomes indigent, regardless of whether the person is a public charge. Although being indigent is commonly defined as meaning impoverished, the statute does not contain a specific definition. In a case decided prior to the recodification, the Superior Court of Pennsylvania stated that status as an indigent person under the statute did not require the person to "be helpless and in extreme want, [or] so completely destitute of property, as to require assistance from the public."[27] Further, indigent persons are those who do not have sufficient means to pay for their own care and maintenance.[28] Using this interpretation, it stands to reason that a person could become indigent simply because their legitimate needs, particularly medical needs, exceed their resources.

However, this provision shall not apply if an individual does not have sufficient financial ability to support the indigent person.[29] Further, a child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of 10 years during the child's minority.[30] At first glance, these statutory defenses appear to provide a reasonable balance between the needs of the child and the parent. However, the question of sufficient financial ability calls for specific fact-based analysis and subjective interpretation by the court. In one such case, the Superior Court of Pennsylvania affirmed the trial court's finding that a son who had taken over the family's business was liable for monthly payments toward his mother's health care debts, in spite of evidence that his expenses exceeded his monthly income.[31]

The statute places an additional task on the court with the following provision: "the amount of liability shall be set by the court in the judicial district in which the indigent person resides."[32] The legislature attempted to provide a modicum of guidance to the court by providing:

> For medical assistance for the aged other than public nursing home care ... the following apply:
>
> (i) Except as set forth in subparagraph (ii), the amount of liability shall, during any 12-month period, be the lesser of:
>
> (A) six times the excess of the liable individual's average monthly income over the amount required for the reasonable support of the liable individual and other persons dependent upon the liable individual; or
>
> (B) the cost of the medical assistance for the aged.
>
> (ii) The department may, by reasonable regulations, adjust the liability under subparagraph (i), including complete elimination of the liability, at a cost to the Commonwealth not exceeding those funds certified by the Secretary of the Budget as available for this purpose.[33]

It is interesting to note the last provision, which seems to state that the administrating agency has the ability to promulgate regulations which waive the liability, either in part or in full, perhaps in a case where undue hardship exists. Whether this action has been or will be taken is beyond the scope of this article, but the provision clearly indicates the possibility of departmental control over the liability.

In a similar manner to child support provisions, the enforcement provision of the Pennsylvania statute provides for a contempt hearing if an individual liable for support fails to comply.[34] If the court determines that the individual has intentionally failed to comply, contempt may be found and the court may sentence the individual to up to six months' imprisonment.[35] This contempt power applies regardless of whether the indigent person is confined in a public institution.[36] Since a petition for liability may be brought by any indigent person, or any other person or public body or public agency having any interest in the care, maintenance or assistance of the indigent person, it is possible for medical providers, including nursing facilities, to threaten imprisonment for non-payment.[37]

A potential risk of imprisonment highlights the necessity of defenses. The abandonment defense is common among the various forms of filial responsibility laws. The Ohio statute expressly provides an affirmative defense if the parent abandoned the accused or failed to support the accused as required by law, while the accused was under age 18, or was mentally or physically handicapped and under age 21.[38] Similarly, Rhode Island refuses to find neglect or refusal to support a parent unreasonable, if the child was not reasonably supported by the parent.[39]

The statute adopted by California allows a child to preempt a parent's claim for support by filing a petition requesting the court order the child free from the obligation imposed by law to support the parent.[40] The court must grant the relief requested if it finds all of the following:

(a) The child was abandoned by the parent when the child was a minor.

(b) The abandonment continued for a period of two or more years before the time the child attained the age of 18 years.

(c) During the period of abandonment the parent was physically and mentally able to provide support for the child.[41]

These specific findings might be difficult for an adult child to prove. In *Petition of Stark*, the California Court of Appeal affirmed the trial court's ruling that the daughter had failed to prove that her mother had intentionally disrupted their relationship, in spite of evidence that the father became the child's custodian at the time she was three; the mother visited her daughter only three or four times a year; and the mother never paid support because she "was never called upon to support them."[42]

The express affirmative defenses are not the only arguments used by children to counter a statutorily imposed duty to support. An equal protection claim was raised by an adult son in *Americana Healthcare Center, a Div. of Manor Healthcare Corp. v. Randall*, who argued that the South Dakota statute imposing a duty on him to support his parents discriminated against adult children of indigent parents.[43] The Supreme Court of South Dakota disagreed with the son, and applying the rational basis test, determined that the statute does not make an arbitrary classification. Instead, the court noted "it is the moral as well as the legal duty in this state, of every child, whether minor or adult, to assist in the support of their indigent aged parents."[44] Further, "an adult child is liable under [this statute] upon the same principle that a parent is liable for necessary support furnished to their child."[45]

The court found a legitimate state interest exists in providing for the welfare and care of its elderly citizens.[46] Since the primary purpose of the statute is to place financial responsibility for indigent parents on their adult children when a parent requires such assistance, the court reasoned that it serves a legitimate legislative interest, especially under the facts of the case, where indigency was voluntarily created by a trust (owning the mother's residence with a value of $30,000, and $100,000 in mutual funds) and there would have been sufficient assets to pay for her care had the trust not been created.[47] Although the trust produced $5,000 to $6,000 of income per year, it was used to pay for legal fees for guardianship, a bankruptcy filing, and pursuit of Medicaid benefits, rather than for mother's medical expenses.

One interesting aspect of the case is that, at trial, the son's motion for directed verdict was granted on the grounds that the nursing facility had failed to establish either an oral or written contract to act as guarantor for his mother's nursing home bills.[48] In other words, the court found no personal liability assumed by the son which could qualify as a third party guarantee. Absent the provisions of South Dakota's statute, S.D. Codified Laws § 25-7-27, imposing a duty on an adult child to provide necessaries for a parent, the son would have no legal obligation.

From the adult child's perspective, the difficulty in the pursuit of an equal protection claim is overcoming the rational basis standard. It has been stated that the main purpose of the statute seems to be to protect the public from the burden of supporting people who have children able to support them.[49] As noted by the Supreme Court of South Dakota:

> It is certainly reasonable to place a duty to support an indigent parent on that parent's adult child because they are direct lineal descendants who have received the support, care, comfort and guidance of that parent during their minority. If a parent does not qualify for public assistance, who is best suited to meet that parent's needs? It can reasonably be concluded that no other person has received a greater benefit from a parent than that parent's child and it logically follows that the adult child should bear the burden of reciprocating on that benefit in the event a parent needs support in their later years.[50]

As long as this purpose is identified as a legitimate interest of the state, the rational relationship for the filial responsibility statute exists. Regardless, the question remains whether application of filial responsibility laws will provide a reasonable and workable solution for the anticipated needs of our elderly population. In addition to the questions raised in this article, many other queries should be raised: will these laws cause an increase in financial exploitation or abuse and neglect; are children likely to bring parents into their homes to minimize the support requirement; are parents likely to be abused or neglected in these environments; if so, does this place a greater burden on social service agencies to investigate and respond? More importantly, are there other solutions available — instead of searching for alternate sources of payment for medical expenses, particularly long-term care, perhaps the answer is contained in a review of the high cost of the medical expense itself. At this juncture, the only clear point is the need for a solution.

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1. Donaldson, An Alternate Source of Payment for Long-Term Care: Lawful Third Party Guarantees, Elder Law Advisory, Issue 187 (Sept. 2006), available on Westlaw at 187 Elder Law Advisory 1.

2. Donaldson, An Alternate Source of Payment for Long-Term Care: Lawful Third Party Guarantees, Elder Law Advisory, Issue 187 (Sept. 2006), available on Westlaw at 187 Elder Law Advisory 1.

3. Donaldson, An Alternate Source of Payment for Long-Term Care: Lawful Third Party Guarantees, Elder Law Advisory, Issue 187 (Sept. 2006), available on Westlaw at 187 Elder Law Advisory 1.

4. Donaldson, An Alternate Source of Payment for Long-Term Care: Lawful Third Party Guarantees, Elder Law Advisory, Issue 187 (Sept. 2006), available on Westlaw at 187 Elder Law Advisory 1.

5. For examples of these types of laws, see:

California: Cal. Fam. Code §§ 4400 to 4404, 4410 to 4414 (providing that "an adult child shall, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work");

Indiana: Ind. Code Ann. §§ 31-16-17-1 to 31-16-17-5 (providing that "[a]ny individual (1) whose father or mother provided the individual with necessary food, shelter, clothing, medical attention, and education until the individual reached sixteen (16) years of age; and (2) who is financially able due to the individual's own property, income, or earnings; shall contribute to the support of the individual's parents if either parent is financially unable to furnish the parent's own necessary food, clothing, shelter, and medical attention");

Montana: Mont. Code Ann. §§ 40-6-301 to 40-6-303, 40-6-214 (providing that "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding.");

Pennsylvania: 23 Pa. Cons. Stat. Ann. §§ 4601 to 4606 (providing that "the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge: (i) The spouse of the indigent person. (ii) A child of the indigent person. (iii) A parent of the indigent person.");

South Dakota: S.D. Codified Laws § 25-7-27 (providing that "Any adult child, having the financial ability to do so, shall provide necessary food, clothing, shelter, or medical attendance for a parent who is unable to provide for oneself.").

6. Administration on Aging, U.S. Department of Health and Human Services, A Statistical Profile of Older Americans Aged 65+ (Mar. 1, 2006), available at http://www.aoa.gov/PRESS/fact/pdf/Attachment_1304.pdf.

7. Administration on Aging, U.S. Department of Health and Human Services, A Statistical Profile of Older Americans Aged 65+ (Mar. 1, 2006), available at http://www.aoa.gov/PRESS/fact/pdf/Attachment_1304.pdf.

8. Administration on Aging, U.S. Department of Health and Human Services, A Statistical Profile of Older Americans Aged 65+ (Mar. 1, 2006), available at http://www.aoa.gov/PRESS/fact/pdf/Attachment_1304.pdf.

9. U.S. Government Accountability Office, Report to Congressional Requesters, MEDICAID: Transfers of Assets by Elderly Individuals to Obtain Long-Term Care Coverage, Pub. No. GAO-05-968, at Highlights Page (Sept. 2005), available at http://www.gao.gov/new.items/d05968.pdf.

10. Note that the United States is not the only country facing this problem. The population of Singapore age 60 and above is projected to rise to 26% of the total population by 2030. See Lee, Note and Comment: Singapore's Maintenance of Parents Act: A Lesson to be Learned from the United States, 17 Loy. L.A. Int'l & Comp. L.J. 671 (Apr. 1995) (citing Wallace, "Aging Asia Faces Painful Choices," *L.A. Times*, Aug. 19, 1994, at p. A1, A9).

11. See *Swoap v. Superior Court*, 10 Cal. 3d 490, 503-504, 111 Cal. Rptr. 136, 144-145, 516 P.2d 840, 848 (1973).

12. *Swoap*, 10 Cal. 3d at 503-504, 111 Cal. Rptr. at 144-145, 516 P.2d at 848.

13. *Swoap*, 10 Cal. 3d at 503-504, 111 Cal. Rptr. at 144-145, 516 P.2d at 848-849 (quoting tenBroek, California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I, 16 Stan. L. Rev. 257, 283 (Mar. 1964)).

14. Moskowitz, Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective, 86 Marq. L. Rev. 401, 406 (2002).

15. Moskowitz, Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective, 86 Marq. L. Rev. 401, 406 (2002).

16. Wise, Note: Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly, 5 N.Y.U. J. Legis. & Pub. Pol'y 563, 568 (2002) (quoting Lindemann Nelson and Lindemann Nelson, Frail Parents, Robust Duties, 1992 Utah L. Rev. 747, 751 (1992)).

17. See Moskowitz, Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective, 86 Marq. L. Rev. 401 (2002) (citing Locke, Second Treatise on Government 141 (C.B. Macpherson ed. 1980)).

18. Kline, A Rational Role for Filial Responsibility Laws in Modern Society, 26 Fam. L. Q. 195, 196 (Fall 1992).

19. 42 U.S.C.A. § 1396a(17)(D); 42 C.F.R. § 435.602(a)(1).

20. *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 2680, 65 L. Ed. 2d 784 (1980).

21. See Lee, Note and Comment: Singapore's Maintenance of Parents Act: A Lesson to be Learned from the United States, 17 Loy. L.A. Int'l & Comp. L.J. 671, 681 (Apr. 1995).

22. Indest, III, Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents through State Financial Responsibility Statutes A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act, 28 Soc. Sec. Rep. Serv. 728, 734 (Apr. 1990) (citing Wing, The Impact of Reagan-Era Politics on the Federal Medicaid Program, 33 Cath. U. L. Rev. 1, 16 n. 54 (1983)).

23. 23 Pa. Cons. Stat. Ann. §§ 4601 et seq.

24. Pearson, Re-Thinking Filial Support Laws in a Time of Medicaid Cutbacks—Effect of Pennsylvania's Recodification of Colonial-Era Poor Laws, 76 Pa. B. Ass'n Q. 162, 166 (2005).

25. Pearson, Re-Thinking Filial Support Laws in a Time of Medicaid Cutbacks—Effect of Pennsylvania's

Recodification of Colonial-Era Poor Laws, 76 Pa. B. Ass'n Q. 162, 166 (2005).

26. 23 Pa. Cons. Stat. Ann. § 4603(a)(1).

27. *Verna v. Verna*, 288 Pa. Super. 511, 518, 432 A.2d 630, 633 (1981).

28. *Verna v. Verna*, 288 Pa. Super. at 518, 432 A.2d at 633.

29. 23 Pa. Cons. Stat. Ann. § 4603(a)(2)(i).

30. 23 Pa. Cons. Stat. Ann. § 4603(a)(2)(ii).

31. *Savoy v. Savoy*, 433 Pa. Super. 549, 641 A.2d 596 (1994).

32. 23 Pa. Cons. Stat. Ann. § 4603(b)(1).

33. 23 Pa. Cons. Stat. Ann. § 4603(b)(2).

34. 23 Pa. Cons. Stat. Ann. § 4603(d).

35. 23 Pa. Cons. Stat. Ann. § 4603(d)(1).

36. 23 Pa. Cons. Stat. Ann. § 4603(d)(2).

37. 23 Pa. Cons. Stat. Ann. § 4603(c).

38. Ohio Rev. Code Ann. § 2919.21(E).

39. R.I. Gen. Laws § 15-10-1(b).

40. Cal. Fam. Code § 4410.

41. Cal. Fam. Code § 4411.

42. *Petition of Stark*, 182 Cal. App. 2d 20, 5 Cal. Rptr. 839 (1st Dist. 1960).

43. *Americana Healthcare Center, a Div. of Manor Healthcare Corp. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994).

44. *Americana Healthcare Center*, 513 N.W.2d at 572 (internal quotations omitted).

45. *Americana Healthcare Center*, 513 N.W.2d at 572 (citation omitted).

46. *Americana Healthcare Center*, 513 N.W.2d at 573.

47. *Americana Healthcare Center*, 513 N.W.2d at 573.

48. *Americana Healthcare Center*, 513 N.W.2d at 570.

49. *Swoap v. Superior Court*, 10 Cal. 3d 490, 503-504, 111 Cal. Rptr. 136, 145, 516 P.2d 840, 849 (1973).

50. *Americana Healthcare Center, a Div. of Manor Healthcare Corp. v. Randall*, 513 N.W.2d 566, 573 (S.D. 1994) (citation omitted).

Recent Case Summaries

Testamentary Trust Which is Determined to be a Support Trust is an Available Asset for Purposes of Medical Assistance Eligibility

In **In re Decision of Com'r of Human Services in Appeal of Flygare for Medical Assistance, 725 N.W.2d 114 (Minn. Ct. App. 2006)**, the Court of Appeals of Minnesota held that a testamentary trust, created by the spouse of an individual applying for medical assistance benefits, and which directed the trustee to use the trust assets as the trustee deemed necessary to provide for that individual's proper support and maintenance was a "support trust" and, therefore, was an available asset in determining an applicant's eligibility for medical assistance benefits.

Ronald Flygare, husband of Lillian Flygare, executed his last will and testament on August 20, 1993. Provided his wife survived him, Mr. Flygare's will designated a portion of his estate as the "Marital Share." The "Marital Share" consisted of the amount of an estate which was allowed to pass tax free under the marital deduction and was to be paid directly to Mrs. Flygare. The remaining assets were designated "Family Share" and were to be deposited into a testamentary trust. The trust contained a provision which limited any payment from the family share to Mrs. Flygare "in the event she would be eligible for assistance under any government funded program." After Mr. Flygare died, on December 17, 1993, the marital share was distributed to Mrs. Flygare and the family share was placed in a trust with Mrs. Flygare and her son, Marcus Flygare, appointed as trustees.

As of 2004, Mrs. Flygare had less than $3,000 of personal assets remaining. Her health had deteriorated and she required additional care. As a result, her son, acting as her attorney-in-fact and authorized representative, applied for medical assistance through the county on August 26, 2004. At this time, the principal of the testamentary trust was approximately $300,000.

On December 23, 2004, the county denied Mrs. Flygare's application and explained that the trust was counted as an asset because Mrs. Flygare had failed to prove that it was unavailable. Therefore, Mrs. Flygare was over the $3,000 limit set forth by **Minn. Stat. Ann. § 256B.056**.

Mrs. Flygare challenged the county's denial and, on March 15, 2005, a hearing was held before a referee. Mrs. Flygare argued that the testamentary trust was intended to supplement, not replace, public assistance and could not be considered an available resource for purposes of determining her eligibility for medical assistance. Relying on **Minn. Stat. Ann. § 501B.89**, which makes unenforceable as against public policy those trust provisions which allow for limitation or suspension of payment if the beneficiary is eligible for public assistance, the referee recommended that the county's denial of benefits be affirmed. That recommendation was adopted by the commissioner on May 25, 2005. In turn, the district court affirmed the commissioner's determination based on Minn. Stat. Ann. § 501B.89 and further rejected Mrs. Flygare's attempt to reform the trust in a way which would allow

her to receive supplemental distributions while receiving public assistance. Mrs. Flygare appealed. In her appeal, Mrs. Flygare conceded that the trust violated Minn. Stat. Ann. § 501B.89, however, she insisted that if the unenforceable provision was removed and the remaining trust provisions analyzed under common law, the trust should be described as a discretionary trust and, therefore, its assets found unavailable for purposes of determining her eligibility for medical assistance benefits. The Court of Appeals of Minnesota affirmed the lower court's opinion.

In this case, the Court of Appeals pointed out that:

> if the trust is a true discretionary trust, its assets are not available for purposes of determining eligibility for medical assistance and the analysis would end there; but if the trust is a support trust, its assets are available and Minn. Stat. § 501B.89 makes any provisions to the contrary unenforceable.

As such, the court focused on determining what type of trust was involved. The court relied on the definitions of these types of trusts as set forth in *Matter of Leona Carlisle Trust Created Under Trust Agreement Dated Feb. 9, 1985*, 498 N.W.2d 260, 40 Soc. Sec. Rep. Serv. 610 (Minn. Ct. App. 1993). Specifically, a support trust "directs the trustee to distribute trust income or principal as necessary for the support and maintenance of the beneficiary," whereas a discretionary trust "gives the trustee complete discretion to distribute all, some, or none of the trust income or principal to the beneficiary, as the trustee sees fit." *Carlisle*, 498 N.W.2d at 264, 40 Soc. Sec. Rep. Serv. 610 (citations omitted).

The trust created by Mr. Flygare provided that Marcus Flygare had discretion to withdraw principal where it was "deem[ed] necessary and advisable to provide for the proper support and maintenance of [Mrs. Flygare]." The court concluded that this discretion was limited to the amount and extent of the support and maintenance. The court noted that the discretion did not extend to Marcus Flygare's making expenditures to meet Mrs. Flygare's basic needs. Finally, the court recognized that the clear intent of the trust in question was to make sure that Mrs. Flygare's basic needs were met and that, as a result, Mrs. Flygare was entitled to bring an action to compel Marcus Flygare to make payments necessary for her support and maintenance. Based on these factors, the court concluded that the trust in this case was a support trust, not a discretionary trust. Therefore, the court held that the trust was an available asset for determining Mrs. Flygare's eligibility for medical assistance and affirmed the previous determination that Mrs. Flygare was not eligible for medical assistance benefits as a result.

Maryland's Grandparent Visitation Statute Was Unconstitutionally Applied Absent a Threshold Finding of Parental Unfitness or Exceptional Circumstances

In ***Koshko v. Haining*, 2007 WL 93237 (Md. 2007)**, the Court of Appeals of Maryland determined that Maryland's grandparent visitation statute, **Md. Code Ann., Fam. Law § 9-102**, was unconstitutional, based on substantive due process arguments where the statute did not require a threshold finding of either parental unfitness or exceptional circumstances before proceeding to a determination of what is in a child's best interest for purposes of deciding the issue of grandparent visitation.

Andrea Haining is the daughter of John and Maureen Haining [hereinafter "the Hainings"]. At the age of 18, Andrea left her parents' home in New Jersey and moved to Florida with her boyfriend, James Atkats, who abandoned her when she became pregnant with her first child. Andrea returned home and in September 1994 gave birth to a daughter, Kaelyn. For the first three years of her life, Kaelyn was raised in the Hainings' residence and the Hainings were active participants in her upbringing. During this time, Andrea met and dated Glen Koshko. In September 1997, Andrea and Kaelyn moved in with Glen, who lived in a town in close proximity to the Hainings. Mrs. Haining maintained a close relationship with Kaelyn during this time and visited often. In 1998, and contrary to the wishes of the Hainings, Andrea and Glen [hereinafter "the Koshkos"] eloped. In 1999, the Koshkos and Kaelyn moved to Maryland where the Koshkos had two additional children, Haley in August 1999 and Aiden in December 2002. Until October 2003, the Koshkos and Hainings visited each other approximately once a month. In October 2003, the parties had a familial dispute which resulted in Glen Koshko stating that the Hainings would no longer be allowed to see their grandchildren. As a result, John Haining threatened to assault Glen Koshko. Following the dispute, the Hainings attempted to make amends on several occasions. However, the Koshkos did not communicate with family during this time.

In February 2004, an attorney for the Hainings wrote to the Koshkos and suggested a mediation. The Koshkos responded by suggesting a single visit with the grandchildren and the possibility of scheduling other visits based upon logistical considerations. The Hainings refused and demanded a consistent visitation schedule. On April 19, 2004, the Hainings filed a grandparent visitation petition in the Circuit

Court for Baltimore County. The trial court granted the Hainings' petition, found that visitation was in the best interests of the grandchildren, and ordered scheduled visitations, as well as joint counseling sessions for the parties. After unsuccessfully moving for a new trial, the Koshkos appealed. The Court of Special Appeals affirmed the lower court's judgment. The Court of Appeals of Maryland issued a writ of certiorari on the Koshkos' petition.

Under Maryland law, grandparents may petition for "reasonable visitation." **Md. Code Ann., Fam. Law § 9-102(1)**. Such visitation may be granted where the court finds it to be "in the best interests of the child." **Md. Code Ann., Fam. Law § 9-102(2)**. After determining that the statute was valid on its face, the court turned to the issue of whether it was unconstitutional as applied to the Koshkos. The Koshkos argued that, before the wishes of the custodial parents were overcome, the Hainings should be required to demonstrate that the Koshkos were unfit parents or that exceptional circumstances existed in favor of grandparental visitation.

In beginning its analysis, the court reasoned that because the statute concerning grandparent visitation "may work a 'direct and substantial' interference with the Koshkos' fundamental right to parent, we apply strict scrutiny." *Koshko v. Haining*, 2007 WL 93237 (Md. 2007). The court reasoned that the statute allowed grandparents to intercede directly in parental determinations as to a child's best interest. Further, the court pointed out that "[i]nstead of merely creating a consequence of the parents' exercise of their right to control their child, the statute exposes the very parental decision-making process relating to the exercise of that right to the challenge of disgruntled grandparents." *Koshko v. Haining*, 2007 WL 93237 (Md. 2007).

In applying the strict scrutiny standard, the court pointed out that in order to uphold a statute, it must be determined that the statute is narrowly tailored so as to further a compelling state interest. *Ehrlich v. Perez*, 394 Md. 691, 908 A.2d 1220 (2006). In this case, the court found that the state did have a compelling interest, namely the role of the state in ensuring the well-being of its children. The grandparent visitation statute allows court action to enforce the role of a grandparent to be part of the development and happiness of a child's life. As such, the court found that the compelling interest requirement of the strict scrutiny standard had been satisfied.

The court then turned to a determination of whether the statute was narrowly tailored. In making a determination on this issue, the court noted that the statute's principal safeguard to protect parental rights is that the presumption of favoring a parental decision must be rebutted before the court begins an inquiry into the child's best interests. While this presumption saves the grandparent visitation statute from *per se* invalidation under *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the court found that it was not enough to preserve the constitutionality of the statute. The court reasoned that the presumption did not go far enough to protect parents from undue interference with their rights to parent. As the court noted, "fit parents, who are presumed to act in their children's best interests ... may be hailed into court to defend their decisions absent any showing that they are unfit and without any requirement that the grandparents challenging the parental decision plead any exceptional circumstances..." *Koshko v. Haining*, 2007 WL 93237 (Md. 2007). Further, the court noted that stronger protection of parental rights was necessary where a proceeding might result in a court's requiring that a child spend time with a third party outside of that parent's supervision and against that parent's wishes.

Finally, the court turned to child custody cases in adopting the parental unfitness or exceptional circumstances test. Relying on *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998), the court noted that "the case law ... concerning custody determinations, and the principles governing such situations, are equally applicable to visitation proceedings." In *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005), previously decided by the court in this case, it was determined that in cases of third party custody determinations, the threshold considerations should be parental unfitness and exceptional circumstances. As such, the court in this case held that these same considerations should be applied to cases of third party visitation. As a result, the Maryland grandparent visitation statute was not narrowly tailored and was determined to be unconstitutionally applied to the Koshkos absent a finding of parental unfitness or exceptional circumstances.

Accordingly, the Court of Appeals reversed the judgment of the Court of Special Appeals and remanded the case to that court with directions to reverse the judgment of the Circuit Court for Baltimore County and remand the case for further proceedings.