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Opinion No. 13-36

Duties and Liabilities of District Public Guardian

QUESTIONS

1. Could a district public guardian under the Public Guardian Program pay bills incurred on behalf of a consumer in the Program after the consumer's death if the Program can seek reimbursement from the consumer's estate in accordance with an indemnification agreement executed by the consumer and the Program pursuant to the Uniform Durable Power of Attorney Act, codified at Tenn. Code Ann. §§ 34-6-101 to -111?

2. The District Public Guardian Program is currently bonded by the State of Tennessee pursuant to Tenn. Code Ann. § 34-7-104(k). The current bond amount gives $200,000 in protection to each Public Guardian position and $100,000 for specific listed positions in each district. In light of other liability protections for the State of Tennessee and its employees under Tennessee law, are those amounts sufficient for the program?

OPINIONS

1. No. A district public guardian lacks statutory authority to make such payments.

2. The question of the appropriate level of bonds needed to "ensure the fiduciary responsibilities of the district public guardian in all court appointed cases," as required by Tenn. Code Ann. § 34-7-104(k), is necessarily a policy decision dependent on the weighing of various factors and possible risks. Liability protections for the State of Tennessee and its employees may be one consideration weighed in evaluating the appropriate level of bond coverage but is likely not the only factor that should be considered in determining the appropriate bond level.

ANALYSIS

The District Public Guardian Program is established as part of the Public Guardianship for the Elderly Law ("the Law"), codified at Tenn. Code Ann. §§ 34-7-101 to -105. The General Assembly intended as part of this Law to establish a public guardianship system "to aid disabled persons who are sixty (60) years of age or older who have no family member or friend who is willing and able to serve as conservator." Tenn. Code Ann. § 34-7-102(a). The guardianship "permits the disabled elderly to determinatively participate as fully as possible in all decisions

that affect them, . . . assists such persons to regain or develop their capacities to the maximum extent possible, and . . . accomplishes such objectives through the use of the least intrusive alternatives." Tenn. Code Ann. § 34-7-102(b).

To accomplish these goals, the Law creates a statewide program to provide guardianship for the elderly that is administered by the Tennessee Commission on Aging and Disability. Tenn. Code Ann. § 34-7-103. The Law divides the State into nine development districts, and each district has a public guardian and staff. *Id.* The powers and duties of the district public guardian are set forth at Tenn. Code Ann. § 34-7-104. While a district public guardian may accept and execute a power of attorney with a disabled elderly consumer as defined by the Law, *see* Tenn. Code Ann. § 34-7-104(a)(3), the powers of the guardian are limited to those powers granted a conservator under Tenn. Code Ann. §§ 34-1-101 to -3-109. Tenn. Code Ann. § 34-7-104(a)(2). Thus, like a conservator, the district public guardian is restricted on the payments to be made on behalf of the elderly consumer, and such payments are required to be made from the property of the elderly consumer. *See* Tenn. Code Ann. §§ 34-1-113 (payments by fiduciary), 34-1-115 (investments by fiduciary) & 34-1-116 (sale of property by fiduciary).

1. The aforementioned statutory framework governing the powers of a district public guardian does not allow the guardian to make payments from State funds to pay the debts of an elderly consumer after the consumer's death, even if the power of attorney executed by the elderly consumer allows the guardian to obtain reimbursement of such payments from the elderly consumer's estate. *See* Tenn. Code Ann. §§ 34-1-113 & 34-7-104(a)(2). Moreover, as recognized by the Tennessee Court of Appeals, the "only duty remaining to the fiduciary after the death of the conservatee involves funeral and burial for the conservatee." *In re Blessing*, No. 01A01-9712-CH-00691, 1998 WL 862480 at *8 (Dec. 14, 1998). *See also* Tenn. Code Ann. § 34-1-113(e) (stating that after the conservatee's death the fiduciary's duty continues "for the sole purpose of making reasonable and proper funeral arrangements for the disposition of the remains of the disabled person, at death"). Again, the public district guardian has no greater authority than a conservator under Tennessee law, and the guardian's powers are thus limited in the same manner as a conservator's powers. Tenn. Code Ann. § 34-7-104(a)(2).

2. The Tennessee Commission on Aging and Disability has the duty to arrange out of the program budget the purchase of a statewide bond "that will ensure the fiduciary responsibilities of the district public guardian in all court appointed cases." Tenn. Code Ann. § 34-7-104(k). The question of the sufficiency of current bonding levels can only be answered in the context of what amount will ensure the performance of those fiduciary responsibilities, and the answer to that question is a policy decision based upon the consideration of numerous factors.

One factor that might be considered is the liability limits established by the General Assembly for the State of Tennessee and State personnel acting on the State's behalf. The General Assembly has permitted claims against the State as enumerated in Tenn. Code Ann. § 9-8-307(a)(1)(A) through (V) but has placed a $300,000 statutory cap on tort claims, with a $1,000,000 limit on all claims per occurrence. Tenn. Code Ann. § 9-8-307(e). Awards on tort claims are payable out of the Risk Management Fund. Tenn. Code Ann. § 9-8-109. Any tort claims against a district public guardian for appropriate acts or omissions of state employees would be subject to Tenn. Code Ann. § 9-8-307.

However, these liability limits are not the only relevant factor for assessing the appropriate bonding level for the Public Guardian Program. Under Tenn. Code Ann. § 34-7-104(k), the bond obtained must ensure the district public guardians' present fiduciary responsibilities in all appointed cases. Other factors that could be considered include, but are not limited to, the number and types of cases handled by these guardians, the liability risk associated with these cases and the historical record whether the bonds obtained have been sufficient to ensure the performance of these guardians' fiduciary responsibilities.

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