

TennCare v. Family Farm: Bumps on the Road to Certainty

Estate of Tanner.[1] It was one of those "hold your breath" Tennessee Supreme Court decisions if you practice estate, elder or real property law. For attorneys, it would clearly establish how the State of Tennessee could pursue claims as a creditor for reimbursement from an estate for Medicaid benefits paid on behalf of a decedent. For clients, in its most basic form, it would provide the answer to a simple question: Can we keep the family farm? But, as so often happens in the world of jurisprudence, the decision resolved one issue only to raise more.

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First, some perspective on the world of estate recovery. Medicaid, funded mostly by the federal government and partially by the states, is administered in the State of Tennessee under TennCare, and has become the default nursing home insurance for those with modest means. In order to be eligible for TennCare benefits, a nursing home resident may have no more than $2,000 in "countable" assets. However, a principal residence is a "noncountable" asset to the extent the applicant's equity is less than $500,000, and there is no equity limit if the applicant's spouse or other dependent relative lives there.[2] Under Medicaid law, following the death of the benefit recipient, the state must attempt to recover from the recipient's estate for benefits properly paid.[3] Given the rules for Medicaid eligibility, the only property of substantial value that a Medicaid recipient is likely to own at death is his or her home.

Aye, there's the rub, for in that sleep of death what claims may come? Heirs naturally want to keep the home, even as the state is duty bound to claim what it can. While the ethics are debatable whether taxpayer money should provide care so that someone can leave an inheritance, the state legislature sets the rules. It is always appropriate for heirs' attorneys to advocate for whatever the law provides, and title attorneys must clear any clouds on title. Thus the issue becomes one of certainty for all parties as to the rules of engagement.

The state can recover only by filing a claim against a probate estate.[4] But *Tenn. Code Ann.* §30-2-310(b) ("Title 30")[5] bars claims against an estate by the state as an unsecured creditor unless filed within one year after death. Tennessee Courts of Appeal have been inconsistent as to whether the state is held to the one-year time limit. The courts in *Henkel, Anderson* and *Hare*[6] held that a claim filed by the Bureau of TennCare more than one year after the decedent's death is barred by the specific terms of Title 30. However, the court in *Roberts*[7] ruled that the language in *Tenn. Code Ann.*. §71-5-116(c)(2) ("Title 71")[8], whereby a personal representative is directed to file with the probate clerk a release or waiver from TennCare evidencing reimbursement for Medicaid benefits, creates an obligation by the rersonal representative separate from Title 30, in effect overriding the one-year statute of limitations.

To resolve this inconsistency, the Tennessee Supreme Court agreed to hear *Tanner*, in which the state had filed a claim against a probate estate more than one year after the decedent's death. The Court of Appeals in *Tanner* had followed *Henkel, Anderson* and *Hare* to bar recovery by the state.

The Supreme Court's eagerly awaited

opinion in *Tanner* followed *Roberts* instead. The court recognized that there were two legitimate but inconsistent statutory interpretations. The estate argued quite logically that Title 71 requires the personal representative to file a release or waiver from TennCare of reimbursement of benefits "due from the estate under law," and if the state did not file its claim before the one-year statute of limitations, then *ipso facto* there could be no reimbursements "due." The Supreme Court held instead that, while Title 30 creates a general framework for when claims must be filed, Title 71 creates a separate obligation altogether, entitling the state to file a claim against an estate until a waiver or release is obtained, regardless of the passage of time. In other words, the more specific provisions of Title 71, enacted with an explicit purpose to facilitate Medicaid recovery, establish an implied exception to the general rule of Title 30.

At first glance, the decision in *Tanner* appears simply to resolve the time bar issue by allowing the state to pursue reimbursement from the decedent's estate regardless of when the claim is filed. This would discourage the practice of deferring the opening of an estate until more than a year after death or of failing to give TennCare a notice to creditors.

However, the majority opinion in *Tanner* clearly states that the decision is based on the status of Title 71 as it existed on the date of this particular decedent's death, which was in 2004. It noted that effective Jan. 1, 2007, amendments to Title 71 added, among other things, the following language: "Personal representatives of decedents shall provide the notice to creditors specified in §30-2-306 to the bureau of TennCare, if the decedent was a TennCare recipient. *If a notice to creditors is provided to the bureau, the bureau shall file a claim for recovery in accordance with the requirements of Title 30, Chapter 2, Part 3*"[9] (emphasis added). This new language in Title 71 explicitly throws the Bureau of TennCare back under the claims statute under Title 30 for deaths on or after Jan. 1, 2007, neatly resolving the former inconsistency between the statutes.

The *Tanner* opinion specifically cited the amendment to support the court's decision that claims made by the state after one year from the decedent's death are proper only prior to the amendment. Basically, why amend at all unless the intended result of the statute was to bar late-filed claims? Thus, on a going-forward basis, *Tanner* seems merely to confirm that the new exception swallows the old rule, and *Tanner* is consigned to the dustheap of opinions limited to a prior narrow time-frame.

But serious issues remain unresolved and may deserve another legislative look.

What if the personal representative does not file a notice to creditors with the Bureau of TennCare, as required under the new statute? The language would appear to suggest that in the absence of timely notice, *Tanner* still applies to toll the statute of limitations.

What if the personal representative waits until after one year has passed to open the estate? Must he still provide the notice to creditors to the Bureau of TennCare, in order to establish that the claim has become time barred? If so, must the Bureau also file a claim for recovery, as seemingly required by the statute, despite being time barred?

Timely filing of claims aside, even after the statutory change, Title 71 obligates a personal representative to produce a release or waiver from TennCare in order to close the estate. Does the obligation still exist if the state has become time barred? If so, and if the personal representative provides the mandatory notice to creditors to the Bureau of TennCare, but the Bureau does not respond because it is time barred, how does the personal representative prove to the court that no release or waiver is forthcoming so that the estate can be closed?

If no estate has been opened during the first year after death, may the state initiate probate proceedings as a creditor pursuant to *Tenn. Code Ann.*. §30-1-302, in order to file a timely claim? If the state has become time barred by not filing within one year, can it still be considered a creditor for such purpose?

What about *Tenn. Code Ann.*. §30-2-307(d) which requires the probate court clerk to return, without filing, a claim filed more than twelve months after the decedent's date of death?

What happens to real property that passes to the decedent's heirs or beneficiaries other than by probate? Passing property by Muniment of Title (*Tenn. Code Ann.*. §32-2-111) or by Affidavit of Heirship (*Tenn. Code Ann.*. §30-2-712) are common procedures that require neither notice to creditors nor presentment of a release or waiver. For estates of decedents dying before Jan. 1, 2007, or for estates of decedents dying after that date but where the personal representative does not (or is not required to) file a notice of creditors to the Bureau of TennCare, what clouds does *Tanner* impose on title to such property, and for how long? Real property in Tennessee has been transferred outside of the probate process for years and then subsequently sold by successor owners. Can the state pursue its claim after the property has already changed ownership, and will this possible claim forever cloud the title to this real property?

Finally, is real property really subject to a TennCare claim for reimbursement anyway? Under *Tenn. Code Ann.*. §31-2-103, real property passes immediately on the date of death to the intestate heirs or to the testate takers, outside the probate estate. In *Trigg*[10], a recent Putnam County Circuit Court decision, the court reasoned that since the State of Tennessee may seek recovery only from a probate estate, and real property passes outside the probate estate, then the state cannot recover against the decedent's real property. If real property is usually the only asset remaining in an estate recovery case, and if TennCare cannot recover against the decedent's real property, then what are we arguing about in the first place? ⚖

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Notes

1. *In re: Estate of Martha M. Tanner*, No. M2006-02640-SC-R11-CV, 2009. Argued before the Tennessee Supreme Court on Feb. 5, 2009, the decision was handed down on Oct. 7, 2009.

2. There are other "spousal protections" beside the home equity exemption. If the Medicaid applicant is married, the countable assets of both the institutionalized spouse and the non-institutionalized spouse (the "community spouse") are totaled as of the date of "institutionalization," the day on which the ill spouse enters either a hospital or a long-term care facility in which he or she then stays for at least 30 days. (This is sometimes called the "snapshot" date because Medicaid is taking a picture of the couple's assets as of this date.) In general, the community spouse may keep one half of the couple's total "countable" assets up to a maximum of $109,560 (in 2009). Called the "community spouse resource allowance," or CSRA, this is the most that a state may allow a community spouse to retain without a hearing or a court order. The least that a state may allow a community spouse to retain is $21,912 (in 2009). Also, after the death of the benefit recipient, no recovery by the State of Tennessee may take place until the death of the recipient's spouse, or as long as there is a child of the deceased who is under age 21 or who is blind or disabled.

3. The United States Congress, as part of the Omnibus Budget Reconciliation Act of 1993, required all states to institute estate recovery programs to seek reimbursement for Medicaid benefits paid for an individual. 42 U.S.C. §1396p(d) sets out when such recovery can be sought and limitations on that recovery. It wasn't until 2002 that the State of Tennessee adopted a statutory framework as part of the TennCare Reform Act of 2002 for recovery of these benefits after the death of the recipient.

4. TennCare law does not provide for recovery against an "expanded estate" (such as interests in trusts, or jointly titled survivorship property) as provided in other states, nor is there any allowance in Tennessee for liens against property.

5. *Tenn. Code Ann.* §30-2-310(b) reads as follows: "(b) Notwithstanding subsection (a), all claims and demands not filed by the state with the probate court clerk, as required by §§30-2-306 – 30-2-309, or, if later, in which suit has not been brought or revived before the end of twelve (12) months from the date of death of the decedent, shall be forever barred. This statute of limitations shall not apply to claims for state taxes. Claims for state taxes shall continue to be governed by §67-1-1501."

6. *In re Estate of Henkel*, No. M2006-02641-COA-R3-CV 2007 WL 4117791 (Tennessee Ct. App. Nov. 16, 2007); *In re Estate of Anderson*, No. M 2006-02303-COA-R3-CV, 2007 WL 4116223 (Tennessee Ct. App. Nov. 16, 2007); and *In re Estate of Hare*, No. M 2007-00563-COA-R3-CV, 2007 WL 4459934 (Tenn. Ct. App. Dec. 19, 2007).

7. *In re Estate of Roberts*, M 2006-01950-COA-R3-CV, 2008 WL 2415520 (Tenn. Ct. App. June 11, 2008).

8. *Tenn. Code Ann.* §71-5-116(c)(2) provides that "[b]efore any probate estate [of a TennCare recipient] may be closed …, the personal representative of the estate shall file with the clerk of the court exercising probate jurisdiction a release from the bureau of TennCare evidencing the payment of all medical assistance benefits, premiums, or other such costs due from the estate under law, unless waived by the bureau."

9. *Tenn. Code Ann.* §71-5-116(d)(1)(D).

10. *The Estate of Ardell Trigg*, No. 08-N-0305 (on appeal from Putnam County Probate Court No. 16902), Aug. 28, 2009.

