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ELDER LAW MINUTE

Adell Hamilton Trigg died on August 5, 2006, following a 4½ year nursing home stay which was subsidized by TennCare, Tennessee's Medicaid program. Her estate consisted of a small amount of personal property and a house.

TennCare filed an estate recovery claim seeking to recoup \$22,319.09. Trigg's estate argued that the house should be exempt from recovery because under Tennessee law real property vests immediately upon the death of the testator in the devisees named in the will. See Tenn. Code Ann. § 31-2-103(2007).

TennCare's estate recovery program did not elect to expand the federal definition of estate to include property in which the decedent had any legal title at the time of death. Instead, Tennessee only considered property in the probate estate to be available for estate recovery.

The Supreme Court of Tennessee noted that just because title to real property vests immediately in the devisees, does not necessarily mean that it cannot be subject to probate proceedings in some circumstances. While property which according to deed passes by right of survivorship are not part of the probate estate, property which passes by devise can be reached by the personal representative to pay estate debts if the decedent's personal property is insufficient to pay these debts. Accordingly, the Court held in favor of TennCare holding that the house was part of the estate for recovery purposes.

In Georgia, property does not pass to devisees until the personal representative assents to the conveyance. O.C.G.A. § 53-8-15. Moreover, Georgia has adopted an expansive definition of estate for recovery purposes:

Estate means all real and personal property under the probate code. Estate also includes real property passing by reason of joint tenancy, right of survivorship, life estate, survivorship, trust, annuity, homestead or any other arrangement. DCH Regs. § 111-3-8-.02(6).

Please let me know if you have litigated this issue in Georgia.

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