

Misappropriation Of Resident's Funds: Court Places Aide On Permanent Disqualification List.

An aide caring for an elderly patient in a nursing home wrote one of the patient's personal checks to herself in the amount of \$15,000. The aide's name and the amount of the check were in the aide's handwriting. The signature on the check was genuinely the patient's own.

The aide endorsed the check on the back and deposited it in her bank account. The patient's niece, who had legal power of attorney for the patient, discovered the check about a month later and reported it to the facility's administrator. The administrator immediately contacted the state Department of Health and Senior Services. The Department called the local police who were able to arrange for recovery of the funds from the aide's bank account.

The Missouri Court of Appeals upheld the Department's decision to place the aide's name on the registry of persons permanently barred from working with vulnerable adults.

The Law Closely Scrutinizes Vulnerable Persons' Gifts To Caregivers

The aide claimed the patient voluntarily gave her the funds for a down payment on a home purchase.

The court pointed out that gifts and bequests from vulnerable persons to caregivers have to be closely scrutinized for undue influence.

Undue influence is presumed when a caregiver receives a substantial gift from a patient who is vulnerable because of age and physical and/or mental infirmity. The caregiver has the burden of proof that the gift was knowing and voluntary.

No Trusted, Independent Advice Prior to the Transaction

The most telling factor for the court was that the patient was not given the opportunity to obtain independent advice from a trusted person, such as the niece who held her power of attorney, before going ahead with the transaction of signing the check. **Miller v. Dunn**, __ S.W. 3d __, 2006 WL 327850 (Mo. App., February 14, 2006).

Misappropriation is a term used in the statutes and regulations governing the nursing home industry.

Misappropriation is not a technical legal term. In court the word is given its plain and ordinary meaning from the dictionary.

Various dictionaries define misappropriation as dishonest diversion of another person's money or property for one's own use.

Undue influence means a person uses dishonest motives to substitute his or her will for the will of another.

Undue influence is influence amounting to over-persuasion, force or coercion. The law says coercion occurs when one person exploits another person's special vulnerability.

With factors present in the donor like extreme age and impaired mental or physical condition, the courts can easily see undue influence.

Mental debility does not have to amount to full-blown incompetence to find undue influence.

Another factor is whether there was independent advice before the transaction.

MISSOURI COURT OF APPEALS
February 14, 2006