



# The Arkansas Voice

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## The Arkansas Uniform Power of Attorney Act

The Arkansas Legislature, at the recent regular session, passed the Arkansas Uniform Power of Attorney Act. The Act becomes effective January 1, 2012 and brings many changes to the current power of attorney law. This article is not intended to cover all of the changes, only some of more interesting ones. Several provisions of the Act reference a "statutory form power of attorney" that means a power of attorney substantially in the form provided in the Act.

The Act covers all powers of attorney created before, on or after January 1, 2012.

By default, the power of attorney is durable. Durable means that the power of attorney does not stop if the principal (the person executing the power of attorney) becomes incapacitated.

By default, the power of attorney is effective when signed.

The principal can cause the power of attorney to become effective upon the principal being incapacitated (commonly called "springing"). If no one is authorized to determine incapacity, then it can be made by:

- ◆ a physician,
- ◆ a licensed psychologist,
- ◆ an attorney, or
- ◆ a judge.

Anyone authorized by the principal may act pursuant to the Health Care Portability and Accountability Act (HIPAA).

The signature of the principal is presumed to be genuine if acknowledged by a notary.

When a power of attorney is presented, the person receiving the power of attorney can take the following actions:

- ◆ accept the power of attorney,
- ◆ request a certification, or
- ◆ request an opinion of counsel.

The request must be no later than 7 business days after presentation of the Power of Attorney. The power of attorney must be accepted no later than 5 days after the receipt of the certification or opinion.

(Continued on page 2)

## ABOUT US

*We are an Elder Law and Special Needs Trust Law Firm. Located in Little Rock, Arkansas, we focus on helping individuals obtain Medicaid benefits without losing their home, Long Term Care Planning for victims of Alzheimer's Disease and other related disorders, Special Needs Trust solutions for families with children with special needs, and Preserving Eligibility for Public Benefits for personal injury victims.*

## DISTRIBUTION OF THIS NEWSLETTER

*Raymon B. Harvey, P.A. encourages you to share this information with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Raymon B. Harvey, P.A.*

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A person may not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

A person is not required to accept an acknowledged statutory form power of attorney if :

- ◆ the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power,
- ◆ a request for a certification, a translation, or an opinion of counsel under § 28-68-119(d) is refused,
- ◆ the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification or an opinion of counsel under § 28-68-119(d) has been requested or provided, or
- ◆ the person makes, or has actual knowledge that another person has made a report to the Department of Human Services stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent.

A person that refuses to accept an acknowledged statutory form power of attorney is subject to: a court order mandating acceptance of the power of attorney and liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

Certain actions by the agent under a power of attorney are required to be stated in the document:

- ◆ Amend, revoke, or terminate a trust created by the principal.
- ◆ Make gifts.
- ◆ Create or change rights of survivorship.
- ◆ Create or change a beneficiary of designation.
- ◆ Delegate authority under the power of attorney to another.
- ◆ Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

The Arkansas Uniform Power of Attorney Act is Act 805 of the 2011 Regular Session of the Arkansas General Assembly.

**KTHV CHANNEL 11 ON SUNDAY, JUNE 19TH AT 10:30 PM**



**I will be the guest attorney on LawCall™ on KTHV Channel 11 in Little Rock. This will be a live 30-minute call-in show hosted by veteran television anchor, Tony Brooks, along with local personal injury attorney, Philip Duncan of the Duncan Firm.**

**I will be a guest attorney and will discuss Elder Law issues. I will take live phone calls from viewers. Sunday, June 19th at 10:30 PM. Call me at 501-907-7333 during the show.**



## PROTECTING YOUR HOUSE AFTER YOU MOVE INTO A NURSING HOME



While you generally do not have to sell your home in order to qualify for Medicaid coverage of nursing home care, it is possible the State can file a claim against your house after you die. If you get help from Medicaid to pay for the nursing home, the state must attempt to recoup from your estate whatever benefits it paid for your care. This is called "estate recovery," and 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. If possible, you should consult with an attorney before entering a nursing home, or as soon as possible afterwards, in order to discuss ways to protect your home.

In those states that have implemented the Deficit Reduction Act of 2005, the home is not counted as an asset for Medicaid eligibility purposes if the equity is less than \$500,000 (\$750,000 in some states). In all states, you may keep your house with no equity limit if your spouse or another dependent relative lives there.

**Transferring a Home** - In most states, transferring your house to your children (or someone else) *may* lead to a Medicaid penalty period, which would make you ineligible for Medicaid for a period of time. There are circumstances in which it is legal to transfer a house, however, so consult an attorney before making any transfers. You may freely transfer your home to the following individuals without incurring a transfer penalty:

- Your spouse
- A child who is under age 21 or who is blind or disabled
- Into a trust for the sole benefit of a disabled individual under age 65 (even if the trust is for the benefit of the Medicaid applicant, under certain circumstances)
- A sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home
- A "caretaker child," who is defined as a child of the applicant who lived in the house for at least two years prior to the applicant's institutionalization and who during that period provided care that allowed the applicant to avoid a nursing home stay.

While you can sell your house for fair market value, it may make you ineligible for Medicaid and you may have to apply the proceeds of the sale to your nursing home bills.

**Lien on Home** - Except in certain circumstances, Medicaid may put a lien on your house for the amount of money spent on your care. If the property is sold while you are still living, you would have to satisfy the lien by paying back the state. The exceptions to this rule are cases where a spouse, a disabled or blind child, a child under age 21, or a sibling with an equity interest in the house is living there.

**Estate Recovery** - If your spouse, a disabled or blind child, a child under age 21, or a sibling with an equity interest in the house lives in the house, the state cannot file a claim against the house for reimbursement of Medicaid nursing home expenses. However, once your spouse or dependent relative dies or moves out, the state can try to collect.

But there are some circumstances under which the value of a house can be protected from Medicaid recovery. The state cannot recover if you and your spouse owned the home as tenants by the entireties or if the house is in your spouse's name and you have relinquished your interest. If the house is in an irrevocable trust, the state cannot recover from it.

In addition, some children or relatives may be able to protect a nursing home resident's house if they qualify for an undue hardship waiver. For example, if your daughter took care of you before you entered the nursing home and has no other permanent residence, she may be able to avoid a claim against your house after you die. Consult with an attorney to find out if the undue hardship waiver may be applicable.

*(from ElderLawAnswers.com)*

## ODDS AND ENDS

### How to Avoid Long-Term-Care Insurance Claims Rejections

Recent turmoil in the long-term-care insurance industry may lead to more claims rejections. Some suggestions for avoiding such rejections:



- ◆ Read the policy's fine print before entering a facility or hiring a caregiver. For example, when a policy requires an aid from a "home health care agency," insurers may deny a claim if an aid from a "home care agency" is hired. Or the policy may define an "assisted living facility" as a place with ten or more beds.
- ◆ Know the requirements before preparing claims. For example, many older policies require a three-day hospital stay before they cover nursing home expenses.
- ◆ Enlist help from an agent or geriatric-care manager in preparing claims.
- ◆ Make sure the healthcare professional documents the disability adequately. Many policies require a nurse or doctor to certify that the disability will last at least 90 days.
- ◆ Know the elimination period and how it is calculated.
- ◆ When insurance assessors come verify the disability, don't undermine the claim to spare the elderly individual embarrassment. Senior citizens don't like admitting their lack of independence, but this isn't the time to try to comfort them.

See Anne Tergesen, *The Latest Long-Term-Care Snafu*, W.S.J., Jan. 22, 2011.

### Financial Abuse With Powers of Attorney

Elder law attorneys and prosecutors have witnessed an increase in the number of cases in which elder parents are taken advantage of by their adult children through the use of powers of attorney. In fact, many banks now refuse to honor powers of attorney because of the possibility of becoming a party to fraud.



In 2007, philanthropist Brooke Astor's son attempted to take money from her through a power of attorney. He was convicted of grand larceny in 2009 for stealing over \$1 million from his mother. MetLife estimated in 2009 that elder individuals lose \$2.6 billion annually as a result of elder financial abuse.

Legislatures are attempting to put a stop to this problem with the introduction of a bill that would create an Elder Abuse Victims Act. Local and state lawmakers are also attempting to curtail this elder financial abuse.

Nine states (including Arkansas) have adopted the Uniform Power of Attorney Act which grants bank employees more protection from civil suits, giving the employees more discretion when deciding whether or not to honor a power of attorney. Additionally, many brokerages and banks are creating heightened restrictions for power of attorney claims, rejecting documents that are outdated.

Kelly Greene and Jessica Silver-Greenberg, *Power Grab!*, The Wall Street Journal, May 14, 2011.

### New Medicare Requirement

Medicare home health care costs doubled to \$19 billion in 2009 from 2002. As a result, the Centers for Medicare and Medicaid Services (CMS) is now requiring that patients receiving home health care must meet face-to-face with their doctors in order for Medicare to reimburse the home care visits.



This new requirement, which also applies to hospice patients, requires a doctor to visit Medicare beneficiaries thirty days after or ninety days before starting the home health services. Groups representing hospice and home health industries claim this new requirement will create hardships for many patients.

CMS delayed the requirement's effective date, originally set for January 1, 2011, for three months after receiving complaints from providers. CMS also increased the timeframe for doctor visits. AARP and other provider groups will now look for a legislative solution.

See *New Rule Requires Homebound Medicare Patients to See Doctors*, ElderLawAnswers, Apr. 5, 2011.

## ODDS AND ENDS

### Facts All Women Should Know About Estate Planning

Traditionally, women have taken a back seat when it comes to estate planning, but perhaps it is time they take a more hands on approach. Women make up 42% of widowed Americans who are 65 or older, which means that women are more likely to witness the effects of an estate plan first hand.

To better understand their own estate planning desires, women should know the following estate planning facts:

- ◆ Starting this year, a deceased spouse's unused estate tax exclusion can be added to the surviving spouse's exclusions. This means that the surviving spouse's \$5 million exclusion can become as much as \$10 million. The deceased spouse's executor must file an estate tax return in order for the potential additional \$5 million exclusion to transfer.
- ◆ An individual can use a living trust to hold assets during his or her life, which can be beneficial in the case of future dementia. A living trust can also be beneficial if an individual owns real property outside the state he or she lives in. An individual will use a will to appoint a guardian for a child.
- ◆ When choosing who to appoint under a durable power of attorney, an individual should consider a close family member and should ensure that the preferred individual is willing to take on the responsibility.
- ◆ When choosing a guardian for his or her child, an individual should, again, consider family members first. It is important to consider the potential guardian's lifestyle, values, location, and household when making this decision. Additionally, an individual can split the responsibility by putting one party in charge of the child's welfare and another in charge of the child's money.
- ◆ Married couples should consider putting enough money in a joint account to cover any immediate costs if one spouse were to die. It is important to remember that if the deceased spouse has a separate bank account, the surviving spouse may not have access to that money right away. Couples can also opt to have a joint tenancy with the right of survivorship account.

Keep in mind that the \$5 million dollar estate tax exclusion (\$10 million for couples) is scheduled to drop back to \$1 million in 2012.

See Deborah L. Jacobs, *Estate Planning For Women (And the Men Who Love Them)*, Forbes, May 19, 2011.



### Seniors Could Suffer Under "Block Grant" Medicaid Plan

The Republican-led House recently passed a bill that would change the way the federal and state governments fund Medicaid. These Republican strategists hope to change Medicaid funding into a "block grant" plan as opposed to a plan that matches state Medicaid costs dollar for dollar.

Currently, the federal government will match each dollar a state spends on Medicaid. However, under the new plan, the federal government would annually give each state a fixed amount to spend on Medicaid; if the money ran out, it would be up to the states to make up the difference. The Congressional Budget Office fears that the block grants would not adequately cover state's Medicaid needs, and the plan would not allow for a state's grant to increase as a result of raised health care costs.

States would likely have to restrict eligibility for Medicaid, spend their own money, or trim down covered services if the grant money was not enough. Many predict that services for the elderly and disabled would be the first services states would cut because these services require the most money.

Based on its long experience ensuring that states do not limit eligibility and benefits, the National Senior Citizens Law Center says that the result of block granting Medicaid would mean taking health care coverage away from millions of low-income older adults and people with disabilities.

*Millions of Seniors Could Lose Medicaid LTC Coverage Under GOP Plan, Reports Warn*, ElderLawAnswers, May 18, 2011.



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### Speaker

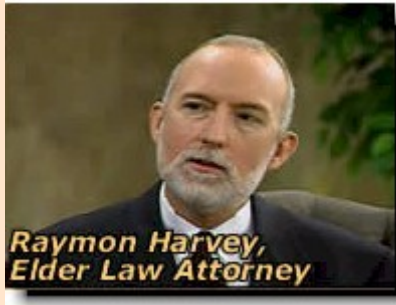
If you are interested in having  
Raymon Harvey speak at an event,  
please call:

877-221-3416.

# Raymon B. Harvey, P.A.

## Arkansas Elder Law & Special Needs Trusts

Raymon B. Harvey, P.A. is an Elder Law and Special Needs Trust Law Firm. We represent older persons, disabled persons, their families, and their advocates. The practice of Elder Law and Special Needs Trusts includes estate planning, estate and trust administration, powers of attorney, advance medical directives, guardianships, conservatorships, and public entitlements (Medicaid and SSI), disability planning, and long-term care planning. For more information about Raymon B. Harvey, P.A., please visit our web site at [www.ArkansasElderLaw.com](http://www.ArkansasElderLaw.com).



As the Arkansas member of the Special Needs Alliance, Raymon B. Harvey, P.A. assists injured plaintiffs and personal injury attorneys create special needs trusts. We also assist parents seeking supplement to their disabled child's benefits and maintain a quality of life. The Special Needs Alliance is a nationwide network of disability attorneys. For more information about the Special Needs Alliance, visit its website at [www.specialneedsalliance.com](http://www.specialneedsalliance.com).

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### MEMBER



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