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FEATURE ARTICLE

Nursing Home Care Act Cases Abate at Death

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A Statutory Cause of Action Attempted for a Violation of the Illinois Nursing Home Care Act Does Not Survive the Death of a Facility Resident and Cannot be Pursued Under the Survival Act

In *Wills v. DeKalb Area Retirement Center*, 175 Ill. App. 3d 833, 530 N.E.2d 1066, 125 Ill. Dec. 657 (2nd Dist. 1988), the Second District Appellate Court ruled that there is no Wrongful Death Act claim that can be pursued by the estate of a deceased nursing home resident for a violation of the Illinois Nursing Home Care Act (hereinafter "NHCA" and found at 210 ILCS 45/1-101 *et seq*.). The *Wills* court also ruled that recovery of the now repealed treble damages, which had been recoverable for a violation of a resident's right under the NHCA, did survive the death of the resident. However, the analysis and logic of the latter ruling is flawed. This article will examine the proper analysis of the survivability issue of that statutory cause of action and provide a logical argument to challenge such claims. Nursing homes and their defense counsel must continue to be aggressive in their challenge to this survival issue in order to eliminate one of the major incentives currently driving the increased number of suits filed against skilled and long-term care centers and the willingness of insurers to settle at an early stage – recovery of attorneys' fees.

Any statutory analysis of the survivability of a cause of action created by the NHCA must start with a review of the statute itself to determine whether it contains a provision which specifically declares its own statutory cause of action to survive. It has long been the rule in Illinois that a statutory cause of action does not survive unless specifically declared by the statute to do so. *Wilcox v. Beard*, 330 Ill.571, 162 N.E. 170 (1928); *Olson v. Scully*, 296 Ill. 418, 129 N.E. 841 (1921); *and People ex rel. Rude v. LaSalle County*, 310 Ill. App. 541, 34 N.E.2d 865 (3rd Dist. 1941), *aff'd* 378 Ill. 578, 39 N.E.2d 25 (1941). The NHCA does not contain any such provision.

Second, the Illinois Survival Act, 755 ILCS 5/27-6, does not specifically provide that a cause of action under the NHCA survives. Other statutory causes of action are specifically mentioned and included in the relief provided under the Survival Act, but not the NHCA. Also, the Survival Act has been amended occasionally. In 1982, it was amended to specifically *include* actions for personal injury pursuant to the Dram Shop Act. The NHCA was initially enacted in 1980 and subsequently the Survival Act has been amended, but not to add or include actions provided for in the NHCA.

In *Froud v. Celotex Corp*.,98 Ill. 2d 324, 334, 456 N.E.2d 131, 136, 74 Ill. Dec. 629,634 (1983), the Illinois Supreme Court cautioned:

> The Survival Act shields from abatement only those claims which are specifically set forth in it; which claims abate and which survive is the result of legislative judgment to which this court is not free to annex new provisions or substitute different ones to provide exceptions, limitations or

> conditions which are different than the plain meaning of the statute. . . . Our conclusion in this case depends on the scope of the Survival Act unaided by a statutory regulatory scheme such as that contained in the Public Utilities Act, and this court is not free to read into the Survival Act its own views of the types of claims which should be permitted to survive.

The analysis should end there. With no provision in the NHCA allowing its own statutory causes of action to survive and no reference to the NHCA in the Survival Act, all statutory causes of action and any statutory remedy or penalty abate upon the death of the nursing home resident.

Any judicial attempt to construe a statute must analyze the statute as it exists and should not supply omissions, add exceptions, or remedy apparent or suspected defects in the statute under the guise of statutory construction. *Toys "R" Us, Inc. v. Adelman*, 215 Ill. App. 3d 561, 574 N.E.2d 1328, 1332-33, 158 Ill. Dec. 935, 939-40 (3rd Dist. 1991). Also, statutes that are in derogation of the common law must be strictly construed, and nothing is to be read into them by way of intendment or implication. *In Re Estate of Edwards*, 106 Ill. App. 3d 635, 435 N.E.2d 1379 (2nd Dist. 1982). The so-called "Resident's Bill of Rights" contained in Part 1 of Article II is certainly in derogation of common law. These rights do not exist at common law.

Further, when the "duties" imposed by the statute are examined as set forth in Part 6 of Article III, the legislature actually *reverses* common law principles of agency. Section 3-601 holds a facility employer *strictly liable* for all intentional torts of their employees which result in injuries to a facility resident. This statutory language sets forth this liability whether or not the intentional conduct was within or without the scope of the employment and regardless of whether there was any arguable benefit to the facility for the intentional acts. This is in derogation of common law.

Some plaintiff personal injury attorneys in Illinois agree on this point. *See, Illinois Bar Journal*, January 1996, "Protecting the Rights of Nursing Home Residents Through Litigation" at 40, 54 wherein those authors note:

> In a reversal of common law agency principles, the NHCA imposes strict liability for both intentional and negligent torts . . . However, a nursing home is strictly liable for an employee's physical or sexual assault committed on a resident without establishing negligent hiring or other direct negligence. Nursing home residents seeking recovery from the facility for a criminal act resulting in personal injury need only establish that the Act was committed by the facility's employee or agent rather than a fellow resident or non-employee of the facility.

While this author may disagree on the exact interpretation by those plaintiff personal injury lawyers, there is no disagreement that the NHCA is in derogation of common law. Thus, any analysis must be strictly limited. The Legislature organized the NHCA into a scheme of three Articles with each Article divided into Parts. In no section of the NHCA is there any provision which expressly states that any cause of action granted under that Act survives the death of a facility resident. In fact, the only provision which allows for the recovery of any type of damages is § 3-602 of the Act, which was amended, effective July 21, 1995, to read as follows:

> 45/3-602. Actual damages; costs and attorney's fees.
>
> § 3-602. The licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated.

That section does not expressly provide for a cause of action to survive the death of a facility resident. Furthermore, this section only provides a cause of action for a violation of rights which are

specifically defined and located in one section of the Act, and one section only, namely Part 1 of Article II. Part 1 of Article II consists only of Sections 2-102 through 2-113, inclusive. In no provision within those sections in Part 1 of Article II is there any reference to any cause of action surviving the death of a facility resident. In fact, the only reference in Article II to the death of a resident appears in § 2-201(10), which provides for the handling of funds of deceased residents. Section 2-201(10) is not found in *Part 1* of Article II of the Act, and it only and specifically provides for the return of a resident's funds "upon the death of a resident."

The Legislature in this one situation dealing with a death situation clearly refers to "the executor or administrator of the *resident's estate*." (emphasis added) Thus, whenever the legislature was dealing with the death of a resident, it clearly referred to executors and administrators, by name and by function, and there should be no reason to infer, without those specific references and expressions, that any "cause of action" accrues and survives as an asset in a decedent's estate.

It is with this proper discussion of statutory background that the Second District's decision in *Wills v. DeKalb Area Retirement Center*, 175 Ill. App. 3d 833, 530 N.E.2d 1066, 125 Ill. Dec. 657 (2nd Dist. 1988), should be examined and noted to be legally and logically flawed. The specific question of the overall survivability of any statutory cause of action under the Illinois Nursing Home Care Act was not directly addressed in *Wills*. However, the *Wills* case did allow the recovery under the *old* § 3-602 to survive and for the estate of a deceased resident to recover the treble damages/punitive damages potentially recoverable for a violation of a resident's rights. It is also noted that the clear argument raised herein that even the old § 3-602 was limited only to a violation of the resident's potential rights found solely in Part 1 of Article II was never raised in *Wills*.

In addition, the flawed logic of the *Wills'* decision is clearly illustrated when the discussion by that court includes no reference to any specific language in the statute regarding survival of any cause of action. Instead, the *Wills'* court looked for inferences and stretched for some rationale found not in the statute, but in Black's Law Dictionary, in order to find a definition of "legal representative," which reference book happened to include, by way of "example" – the executor or administrator of an estate. Again, the section referenced by the *Wills'* court in order to make this inference was not even from Part 1 of Article II. Instead, the Second District looked to the wrong section of the NHCA for some language to trigger an ability to infer survivability and incorrectly found this rationale in §§ 3-606 and 3-608.

Again, these sections are not in Part 1 of Article II of the Act and thus cannot even, in the first instance, provide a recovery under either the old or the new § 3-602. In addition, §§ 3-606 and 3-608 deal in situations that necessarily have to take place *in the presence* of a resident or *during* the resident's lifetime. Thus, any reference utilized by that Second District to a "resident's representative" refer to situations where a resident may have been under a disability and a power of attorney was the one making decisions for the disabled resident who was still alive.

Those references to a "resident's representative" had nothing to do with an administrator or executor of a deceased resident's estate. The analysis by the court should not have been to a reference book, but to the statute itself. The NHCA has a complete Article which includes all definitions for the specific statutory terms used. (*See,* ARTICLE I. SHORT TITLE AND DEFINITIONS; 210 ILCS 45/1-101 through 1-130) The judicial focus should have been on two terms: "resident" and "resident's representative," Sections 1-122 and 1-123 of the Act, and defined as follows:

§ 1-122. "Resident" means a person residing in and receiving personal care from a facility.

and

> § 1-123. "Resident's representative" means a person other than the owner, or an agent or employee of a facility not related to the resident, designated in writing by a resident to be his representative, or the resident's guardian, or the parent of a minor resident for whom no guardian has been appointed.

Neither definition makes any reference to a decedent's estate, executor or administrator. All logical examinations of those definitions lead to the conclusion that this Act was enacted to protect the rights of living nursing home residents, not provide an additional cause of action to surviving relatives or creditors.

Also, it must be noted that the new § 3-602 was amended, effective July 21, 1995, and at that time the Legislature had the opportunity to include any desired item or language in the new provision, and nothing was added allowing survivability. The new § 3-602 refers to a "facility resident" and does not refer to a decedent or personal representative of a deceased resident.

In further support of a strict construction analysis, one can look to the Fourth District Appellate Court reasoning in *Dardeen v. Heartland Manor Inc.*, 297 Ill. App. 3d 684, 696 N.E.2d 1279, 231 Ill. Dec. 708 (4th Dist. 1998), *aff'd* 186 Ill. 2d 291, 710 N.E.2d 827, 238 Ill. Dec. 3d (1998), which was approved and affirmed by the Illinois Supreme Court, whereas the *Wills* case has not been so tested or affirmed. In *Dardeen*, the only issue was a "certified question" and involved the retroactive effect of the new § 3-602.

Although *Dardeen* did involve a deceased resident, the issue as to whether or not any cause of action under the NHCA survived was not raised. However, *Dardeen* can be utilized in our analysis, for the limited purpose that the new, amended § 3-602 was given retroactive effect as the old section did not create a "vested right," but only created some sort of remedy. With a specific ruling from our Illinois Supreme Court that § 3-602 of the Act does not create a "vested right," there is further strength for the argument that the specific, legislative statement as to survivability must be clearly found in the statute, or this "remedy" does not survive the death of a facility resident.

Any nursing home whose conduct wrongfully causes injury to a resident or a resident's death is subject to common law liability with a properly alleged tort claim under the Illinois Survival Act and/or the Illinois Wrongful Death Act. Thus, there is no injustice, void or absence of a remedy resulting from abatement of a statutory cause of action under the NHCA.

The true purpose of the NHCA was to provide a quick procedure and remedy to facility residents to correct their complaints of inadequate care and treatment while they were still alive. In finding a rational basis for the provision in question, namely § 3-602 of the NHCA, the Supreme Court noted that the recovery of attorney's fees and treble damages was an incentive for elderly residents or residents who lacked financial resources to pursue costly litigation to correct their situation and seek redress for violations of the Act. *Harris v. Manor Healthcare Corp*., 111 Ill. 2d 350, 489 N.E.2d 1374, 1382-83, 95 Ill. Dec. 510, 518-19 (1986). In *Harris*, the Supreme Court identified no legislative intent to allow any cause to survive; rather, the purpose was to allow a quick remedy for living residents, as further evidenced by the availability of declaratory *and* injunctive relief within the NHCA. *Harris*, *supra*., 489 N.E.2d at 1378, 95 Ill. Dec. at 514.

Purely statutory causes of action demand greater judicial restraint and restrict the freedom with which a court may act to alleviate perceived injustices. *Stevens v. Lou's Lemon Tree, Ltd*., 187 Ill. App. 3d 458, 543 N.E.2d 293, 297, 135 Ill. Dec. 58, 62 (1st Dist. 1989) (Dram Shop Act case). And even when dealing with the Illinois Nursing Home Care Act, courts have specifically refused to graft remedies into or legal presumptions onto its provisions when nothing in the express language of our statute, itself, allows or even purports to impose such matters. *See, Flinn v. Four Fountains, Inc.*, 180 Ill. App. 3d 499, 536 N.E.2d 89, 90, 129 Ill. Dec. 405, 406 (5th Dist. 1989).[1]

In conclusion, there is no basis for an estate of a deceased nursing home resident to maintain a Survival Act statutory cause of action against a nursing home based on an alleged violation of the NHCA. The NHCA was enacted to protect living long-term care facility residents and provide quick, efficient and "no cost" remedies to the residents in order to correct care deficiencies while they are alive and residing in the facility, not to create an additional survival cause of action to surviving family members.

Endnote

1 An Order was entered by Judge David Slocum in Brown County, Illinois, on October 17, 2001, in the matter of the *Estate of Mary Prillmayer v. Heritage Enterprises, Inc.,* Law No. 2001-L-7, dismissing with prejudice all statutory causes of action under the NHCA brought under the Survival Act. The plaintiff has filed an appeal, which is pending in the Fourth District with Docket No. 4-01-1003.

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