



WHITE ARNOLD & DOWD

MEMORANDUM

FROM: Karen M. Hennecy

RE: Coronavirus and the Law: Elder Law Developments in a Global Pandemic

DATE: April 15, 2020

Colleagues,

Over the past few weeks, COVID-19 has impacted every area of our lives, including how we plan for our future. As we consider how we currently provide legal services for the elderly, I wanted to make sure you were aware of several recent legislative developments.

Coronavirus and the Law: Elder Law Developments in a Global Pandemic

The current COVID-19 pandemic has brought with it a growing need for Elder Law and benefit planning services. Practitioners are adapting to this new season by improving and creating new means of delivering services, as well as understanding and communicating how recently-enacted guidelines and acts can benefit our clients. Telephone and video interviews and conferences, electronic signatures, remote notarization and an increased utilization of electronic communication are now being used more frequently for our clients' convenience and safety. A number of statutory and other provisions have been put into place to assist Americans, many of which directly affect our elderly population. Substantive legal developments passed or adopted in response to the pandemic to date include:

1. **Centers of Medicare and Medicaid Services ("CMS") Q50-20-14-NH** offers guidance for infection control and prevention of coronavirus in nursing homes. This includes the restriction of visitors and non-essential health care personnel with a few exceptions. The most notable exception is "compassionate care" for visitors in end-of-life situations, regardless of whether the situation is coronavirus-related. Even then, visitors must be restricted to a specific room, disinfect hands and wear personal protective equipment, and be screened for respiratory infection before entry into the facility. This restriction on visitors is notable because it is preventing attorneys from accessing their clients in person during a time when client/patients are likely to experience depression and isolation, and there is no oversight from family members regarding the physical, mental, and emotional

condition of their loved one. <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurvey/certificationengeninfopolicy-and/qso-20-14-nh.pdf>

2. **Coronavirus Preparedness and Response Supplemental Appropriations Act 2020** provides additional funding for the Centers for Disease Control and Prevention, National Institutes of Health and Public Health, and Social Services Emergency Fund. Most notably, this Act expands the use of telehealth by waiving previously-existing Medicare restrictions. <https://www.congress.gov/bill/116th-congress/house-bill/6074>
3. **Alabama Medicaid Emergency Section 1135 Waiver** provides a wealth of work-arounds for health care providers to deal with Medicaid payments for COVID-19-related claims. It lays the groundwork for out-of-state Medicaid payments to be made for patients and waives screening requirements for health care providers to employ or re-employ other health care providers. Additionally, the Section 1135 Waiver waives prior authorization for fee-for-service cases and preadmission screenings prior to nursing home placement and transfers between facilities. It further allows evacuating facilities to provide care in alternate locations. The Section 1135 Waiver also grants immediate rights to Medicaid fair hearings and allows additional time to file fair hearing requests, waiving the previous and often cumbersome procedural requirements. https://medicaid.alabama.gov/documents/1.1_MM/1.1_2020/1.1_MM_CMS_1115_Waiver_Approval_3-25-20.pdf
4. **Section 1812(f) of the Social Security Act** historically required a 3-day hospital stay before Medicare would cover nursing home rehabilitative care. However, as of March 13, 2020, CMS has waived the 3-day rule and added an additional 100 days of coverage for rehabilitation in a nursing home setting in response to the current COVID-19 pandemic. <https://www.cms.gov/About-CMS/Agency-Information/Emergency/Downloads/Finding-Section-1812-f-SSA-FL.pdf>
5. **The Families First Coronavirus Response Act (“FFCRA”)** is the most significant piece of legislation passed in response to the coronavirus. It can be broken down into 8 major divisions:
 - a. *Supplemental Appropriations* – provides additional funding for federal programs including WIC, TEFAP, Senior Nutrition Program (includes those who are home-bound, disabled, or have multiple chronic illnesses, and caregivers for home-bound individuals).
 - b. *Nutrition Waivers* – three of the many provisions in this division of the FFCRA include the Maintaining Essential Access to Lunch for Students Act (<https://edlabor.house.gov/imo/media/doc/MEALS%20Act%20Bill%20Text.pdf>), which allows children to obtain student meals while school is out of session, the COVID-19 Child Nutrition Response Act (<https://www.govtrack.us/congress/bills/116/hr6203/text>), which allows all child and adult care centers to serve meals outside the school/center or in individual settings, and SNAP COVID-19 Response Waivers, which suspend the work and

work training requirements for SNAP during the crisis and allows states to request special waivers to provide temporary, emergency benefits to existing SNAP households.

- c. *Emergency and Family Medical Extension* – the FFCRA also includes the COVID-19 Health Care Worker Protection Act of 2020 (<https://www.congress.gov/116/bills/hr6139/BILLS-116hr6139ih.xml>) in which the Occupational Safety and Health Administration (“OSHA”) requires employers within the health care sector to develop and implement a comprehensive infectious disease exposure control plan—the Emergency Temporary Standard (“ETS”) and Social Security Act Amendments which require all facilities accepting Medicare payments to follow the ETS set by OSHA. <https://www.osha.gov/SLTC/covid-19/>
- d. *Emergency Paid Sick Leave Act of 2020* – defines “emergency leave day” as a day in which an individual is unable to work due to: 1) current diagnosis of COVID-19; 2) worker is quarantined; 3) worker is caring for another person who has COVID-19 or is quarantined; or, 4) the worker is caring for a child unable to care for themselves due to school closure or other child care facility closures. This Act additionally provides for emergency paid leave benefits.
- e. *Emergency Unemployment Stabilization and Access Act of 2020* – provides \$1 billion to states to support unemployment claims and \$5 million to states cover state staffing to keep programs going; also extends benefits 26 additional weeks. <https://www.congress.gov/116/bills/hr6199/BILLS-116hr6199ih.xml>
- f. *Health Provisions* – provides that testing for COVID-19 must be covered by private health plans, and provides for testing reimbursement for uninsured individuals and no-cost COVID-19 testing for those insured by Medicaid, CHIP, VA, and Tricare, as well as American Indians and Alaska Natives.
- g. *Paid Sick days for Public Health Emergencies and Personal and Family Care Act* – requires all employers to allow employees to gradually accrue seven days of paid sick leave and to provide an additional fourteen days available immediately -- a major exception is small businesses with fewer than fifty employees are not required to pay for leave due to school closings/child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern. <https://www.govinfo.gov/content/pkg/BILLS116s3415is/pdf/BILLS/116s3415is.pdf>
- h. *Tax credits for Paid Sick and Paid Family Medical Leave* – covered employers can qualify for dollar-for-dollar reimbursement through tax credits for wages paid under the FFCRA.

We have entered a new era in Elder Law and providing legal assistance for the elderly, and the current pandemic will only accelerate the pace of change. New emphasis is being placed on digital marketing and direct mail, online meetings, and free conference call services. States are also

expanding digital execution laws, such as Alabama's new online notarization provisions to temporarily address issues related to COVID-19 and in-person notary meetings issued in Governor Kay Ivey's Fourth Supplemental State of Emergency on March 26, 2020. New difficulties with Medicaid applications will inevitably arise regarding promptness, availability of documents and meeting deadlines, delays in fair hearings and availability of nursing home beds. That said, difficulties force us to become better.

If you or your family are in need of Elder Law services or if I can provide guidance or answer any specific questions you may have, including issues related to COVID-19, please contact me at (205) 715-2690 or khennecy@whitearnolddowd.com.

Wishing you continued good health,
Karen

About Karen Hennecy: Ms. Hennecy, a graduate of Samford University and Cumberland School of Law, concentrates her practice on the administration of decedents' estates and protected persons as well as Elder Law issues. She assists clients and their families in developing and implementing advance directives, durable powers of attorney, wills, trusts, other types of asset preservation, and Medicaid planning. Ms. Hennecy is a past president of the Alabama State Bar's Elder Law Section, and remains active in a number of professional organizations.

The following language is required by the Alabama Rules of Professional Conduct: No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by others.