

The medical records at the Department of Mental Health facilities should be retained for TEN years after death or discharge of the patient or resident.

There are two laws which should be considered in determining the length of time medical records should be retained by the department, titles 33 and 68.

T.C.A. 68-11-305 addresses the preservation of hospital records:

Unless specified otherwise by the board, a hospital shall retain and preserve records which relate directly to the care and treatment of a patient for a period of ten (10) years following the discharge of the patient or his death during his period of treatment within the hospital. However, in cases of patients under mental disability or minority, their complete hospital records shall be retained for the period of minority or known mental disability, plus one (1) year, or ten (10) years following the discharge of the patient, whichever is longer.

Although Title 68 does address patients under a mental disability, the mental health law specifically addresses the length of time the department's medical records should be retained. T.C.A. 33-3-104, Rights of Patients or Residents, states:

The superintendent shall keep records detailing all such care and treatment received by any such person and such records shall be made available, upon that person's written authorization or his guardian's, to his attorney or personal physician. Such records shall be preserved by the superintendent until such person has been discharged from the hospital or developmental center and for such additional time as the commissioner may direct, but in no event less than ten (10) years.

The law requires that medical records of the developmental centers and mental health facilities be retained until the person is discharged and, after discharge, for at least 10 years, or, if the commissioner so directs, for a longer period of time. The statute gives the Commissioner the discretion of requiring that the records be retained for a longer period of time, if necessary.

Title 33 does not, however, differentiate in the length of time a minor's and an adult's records should be retained. Because the law in Tennessee protects the right of a minor to bring a cause of action after reaching the

age of majority, it is necessary to examine other laws which could affect the length of time the department should retain medical records. T.C.A. 28-1-106 reads as follows:

If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability.

This law preserves a minor's cause of action until the minor reaches the age of majority, and, in order to obtain the benefit of the savings statute, the cause of action must accrue during the party's minority. The statute protects the right of the minor or his/her representative to bring an action for an alleged injury to the minor or someone else for whom he/she has standing to bring the action.

Although this statute protects the cause of action of a minor until after majority, it limits the time within which the cause of action may be brought to "the time limitation for the particular cause of action" or a maximum of three years from the date of the removal of the disability.

The medical malpractice statute limits the time within which a malpractice action may be brought to one year. T.C.A. 29-26-116 states that the statute of limitations in malpractice actions shall be one year as set forth in section 28-3-104. In the event the alleged injury is not discovered within the said one year period, the period of limitation shall be one year from the date of such discovery. In no event shall any such action be brought more than three years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant. In that instance, the action shall be commenced within one year after discovery that the cause of action exists.

The case law in Tennessee is split as to whether the savings statute tolls the time limitation in the medical malpractice statute. (The purpose of this "savings statute" is to toll a statutory limitation period for the duration of legal disability.) The courts in Braden v. Yoder, 592 S.W.2d. 896 (Tenn. App.1979) and Parlato v. Howe, 470 F.Supp. 996 (ED Tenn. 1979), held that the savings statute was not superceded by the later medical malpractice statute and the rights of a minor were preserved until reaching the age of majority. However, the court in Jones v. Morristown-Hamblen Hospital Assoc., 595 S.W.2d 816 (Tenn. App. 1979),

did not address the minority issue and held the medical malpractice suit of a minor barred because of the medical malpractice limitation of one year. Since the Tennessee Supreme Court has not, as yet, resolved the issue, the safest avenue for the department is to assume the savings statute does toll the time to bring a cause of action.

To compute the length of time during which a minor's records should be preserved, it is then necessary to determine what is to be considered to be the age of majority and then add three years, the longest period of time within which an action may be brought. In Tennessee, it is rather difficult to determine the age of majority. T.C.A. 1-3-113 states as follows:

Notwithstanding any laws to the contrary, any person who is eighteen (18) years of age or older shall have the same rights, duties, and responsibilities as a person who is twenty-one (21) years of age, except as provided in subsection (b) relative to the rights to purchase, possess, transport, and consume alcoholic beverages, wine, or beer, as those terms are defined in title 57.

The statute goes on to list several exceptions to the alcoholic beverage rule.

Further, other statutes are ambiguous on the majority issue. Since Tennessee's laws are conflicting on this subject, it would be safe to consider, for the purpose of retaining records, that the age of majority to be twenty-one years of age. Therefore, if the records are held for twenty-one years plus the three year maximum time within which to file suit, the records should be preserved for twenty-four years after death or discharge.

Because the savings statute preserves the right of a minor to bring a cause of action on behalf of himself or a parent, all patient records should be held for twenty-five years after death or discharge.