Elder Law eNews

A Production of the Elder Law Section Communications Committee
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RECENT COURT DECISIONS

FAMILY COURT INCREASES MMMNA BASED UPON EXCEPTIONAL CIRCUMSTANCES STANDARD

This decision explores circumstances which might give rise to extraordinary circumstances warranting an increase in the MMMNA for a community spouse. The community spouse was responsible for payment of the entire mortgage and debt service, maintenance and insurance expenses on the marital home which she and her institutionalized husband jointly purchased. Mortgage payments increased the equity she and her husband had in the residence. The community spouse also has personal medical and dental expenses and prescription medications which totaled approximately $300.00 per month. Additionally, she spent approximately $100.00 per month to purchase necessary and incidental personal items for her husband, including Depends undergarments and replacement clothing, neither of which are provided to patients by the nursing home, and delinquent monthly $329 tax payments due to the IRS and NYS. The community spouse also incurred large expenses associated with her automobile, including a monthly loan payment of $530.00 and insurance premium payments of $259.00 per month. She made daily trips to visit her husband at the nursing home. While public transportation was available, it was impractical since this particular community spouse was elderly and would need to endure a lengthy trip to visit her husband. The community spouse had monthly income of $2,799.55 when the MMMNA was $2,267. Thus the Family Court of Queens County found that there were exceptional circumstances warranting an increase in the MMMNA and an award of the institutionalized spouse's monthly income of $1,284 and affirmed the decision of the Magistrate. In the matter of Bertha — *2004 NY Slip Op 50918U, 4 Misc. 3d 1017A; 2004 N.Y. Misc. LEXIS 1248.*

MONEY "LOANED" TO MOTHER DEEMED TO BE AVAILABLE RESOURCES FOR MEDICAID ELIGIBILITY PURPOSES

While this decision involved a matter of administrative law, to wit, whether there was substantial evidence on the record as a whole to support the decision of the Erie County Department of Social Services, a review of the arguments raises other issues. Here we have children giving funds to their mother to help pay her medical bills. The application for Medicaid was denied because of excess resources-that is, the mother had received gifts from her children and therefore had available funds with which to pay her medical expenses. The daughters argued that the monies given to their mother were given as a loan and not a gift. The record, which is unavailable to review, had, according to the court, enough evidence to support the decision of the administrative agency that the funds given to the mother were gifts and, therefore, she was correctly determined to be ineligible for Medicaid due to excess resources.

Suppose the funds were in fact loans given by the children. Should the result be different? Say a person borrowed funds from a bank, and that during the period for which Medicaid was sought used those funds to pay for medical care. Does a bona fide obligation to repay a debt (assuming a bona fide debt) reduce available resources to net available resources? Some may argue for an offset to arrive at "Net Available

Resources" under 18 NYCRR 360-4.6(b), but there appears to be no such resource offset.Barbara Faber, as executor of the last will and testament of Mary A. Keefe, deceased, petitioner, v. Deborah Merrifield, Commissioner, Erie County Department of Social Services, Antonia C. Novello, Commissioner, New York State Department of Health, and Mark Lacivita, Director of Administration, Office of Administrative Hearings, New York State Office of Temporary and Disability Assistance, Respondents. Supreme Court Of New York, Appellate Division, Fourth Department, 782 N.Y.S.2d 495; 2004 N.Y. App. Div. LEXIS 11329.

REFORMATION OF TRUSTS NOT ALLOWED TO PROTECT FUNDS FOR THE BENFIT OF DISABLED BENEFICIARIES

This was a case where trustees of two independent inter vivos trusts brought an application before the New York County Surrogate's Court to reform the trusts. The trusts, created prior to the statutory authorization for supplemental needs trusts as is contained in EPTL 7-1.12, provided benefits to certain disabled family members.

One trust required income to be paid to a disabled beneficiary which then made that beneficiary ineligible for Medi-cal in California and yet the income that was available was insufficient to pay for the beneficiary's care. Reformation of that trust was sought so that the trust income could be transferred to a trust created by the disabled beneficiary's father. The father's trust was a third party SNT and the Surrogate was not unmindful of the fact that upon the death of the disabled beneficiary, the trust property would pass to others free of any claim for reimbursement by Medi-cal.

The other situation involved three trusts which were about to be terminated due to the death of the prior income interest. The termination would result in a disabled grandchild obtaining a portion of the property (amounting to $900,000) in the three trusts. Even though the trusts by their terms were to terminate, reformation was sought with respect to the funds distributable to the disabled person so that the trusts would continue as third party SNTs and upon the death of the disabled beneficiary the trust property would be distributed to others.

Based on the intent of the grantors, Surrogate Preminger would not reform a trust since reformation is intended to be employed to correct an error or mistake. There was no error or mistake here since the Grantors' intents were being adhered to. The Surrogate did say however that the court would entertain an application to create a self-settled SNT with, of course, a payback. In the Matter of the Trust u/a SYLVIA U. RUBIN, dated December 28, 1972, 4536/76, Surrogates Court of New York, New York County, 4 Misc. 3d 634; 781 N.Y.S.2d 421; 2004 N.Y. Misc. LEXIS 958, June 7, 2004.

NO EVIDENCE OF UNDUE INFLUENCE FOUND IN FATHER/DAUGHTER RELATIONSHIP

The decision deals with the all too common problem of one parent leaving assets having a greater value to one child than to the other(s). Here a father, whose wife predeceased him, requested that his daughter move in with him because he was alone. The daughter and her family did so. The daughter then provided care to the father who requested that his daughter take him to an attorney to change his will. The father not only left the family home entirely to his daughter but also conveyed a remainder interest to the daughter while the father retained a life estate.

The son suggested undue influence, duress, and constructive fraud growing out of a confidential relationship. The court, after reviewing numerous arguments made by the son, distinguished between a father-daughter relationship and a confidential relationship with an unrelated third party. The court also found that there was no evidence of undue influence, duress or fraud and issued a judgment in favor of the daughter. The decision is instructive owing to the many arguments advanced regarding what one party considers evidence of undue influence. Michael G. Connelly, Plaintiff, v. Maureen T. Connelly, Defendant, 10537/03, Supreme Court of New York, Kings County, 2004 NY Slip Op 50961U; 4 Misc. 3d

1019A; 2004 N.Y. Misc. LEXIS 1319, August 2, 2004, Decided.

ANNUAL ACCOUNTING NOT REQUIRED IN COURT-APPROVED SUPPLEMENTAL NEEDS TRUST, NOT WITHSTANDING MEDICAID REQUEST FOR SAME

An application was made before the Suffolk County Surrogate seeking the creation of a self-settled SNT. DSS requested that the court require annual accountings. Surrogate Czygier, as he has stated in the past, indicated that annual accountings are unnecessary in that the interests of the remainderman (DSS) are protected by the regulations applicable to self-settled SNTs appearing at 18 NYCRR 360-4.5 and the requirement of a trustee to post a bond-which the Surrogate required in this case. Moreover because DSS could petition the court to require an accounting at any time, there was no need for further protection in the form of mandatory annual accountings. Matter of Kevin Pete Kaidirmaoglou, NYLJ November 5, 2004, Friday, page 28.

FAMILY LAW COMMITTEE ACTIVITIES

Rita Gilbert, the chair of the Family Law Committee, attended a Kincare Conference sponsored by AARP in November. The purpose of the conference was to produce a basis for legislation to support greater grandparent involvement in the care of a grandchild.

LONG TERM CARE REFORM COMMITTEE

The Long Term Care Reform Committee (Lou Pierro, Chair; Robert Kurre, Vice-Chair) is nearing completion of its Long Term Care Reform Report.

This report will serve as a basis for discussion and represent the Section's position with respect to important policy issues once the legislative session regarding Governor Pataki's 2005-2006 budget bill commences.

COMMUNICATIONS COMMITTEE

We are happy to report that Gary Bashian of White Plains, New York has joined the Communications Committee and will be contributing to the production of the Elder Law eNews.

SAVE THE DATE!

The Elder Law Section has planned the following meetings:

Tuesday, January 25, 2005 — Annual Meeting, Marriott Marquis Hotel, NYC
Thursday, August 11 — Sunday August 14, 2005 – Summer Meeting, Boston Marriott Long Wharf
Thursday, October 20 — Saturday October 24, 2005 – Fall Meeting, Gideon Putnam Hotel, Saratoga Springs
Tuesday, January 2006 — Annual Meeting, Marriott Marquis Hotel, NYC
Thursday, August 3 — Saturday, August 5, 2006 – Summer Meeting, Sheraton Harborside Hotel, Portsmouth, N.H.

Please mark your calendars, and join us for informative, enjoyable events in fun locations.

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to Steven Rondos, raiarondos@aol.com or Dean Bress, dsbress@yahoo.com