

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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RECENT COURT DECISIONS

GUARDIANSHIP OF MENTALLY RETARDED WOMAN AND REQUEST FOR AUTHORITY TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING TREATMENT UNDER SCPA 1750-b IS GRANTED

Despite objections of Mental Hygiene Legal Service, the Surrogate found the need for a guardian and appointed the 26 year-old woman's mother as her guardian, including the power to decide whether to withhold or withdraw life-sustaining treatment. The court went on to state that a guardian does not have unlimited discretion to withhold or withdraw life-sustaining treatment. A guardian must conduct a thorough analysis of all aspects of the patient's medical state, prognosis, and expressed wishes before permitting the rejection of life-sustaining treatment.

Matter of Chantel R., NYLJ December 20, 2004 Page 18, Col. 3 (Surr. Ct. NY Co.)

AN ALLEGED INCAPACITATED PERSON IN ARTICLE 81 PROCEEDING CANNOT BE FORCED TO TESTIFY

In an Article 81 proceeding, the petitioner hospital sought to call respondent as a witness. The AIP's attorney cited the Fifth Amendment right not to testify. The court held that the right to remain silent can be invoked in a civil commitment proceeding.

Matter of United Health Services Hosp, Inc., NYLJ November 29, 2004, Page 20, Col. 3 (Supreme Ct. Broome Co.)

DEVESEE CAN SELL HIS LIFE ESTATE IN DECEDENT'S RESIDENCE TO PAY FOR ASSISTED LIVING FACILITY

Petitioner, who was elderly and resided in an assisted living facility, could sell his life estate interest in decedent's residence bequeathed to him by decedent. The court found that the life estate was not limited simply to a right to occupy, but was also a right to the use of the residence. The court stated that it was decedent's primary intention to provide petitioner with a place to live, and that the sale would allow him to pay for his assisted living expenses. *Matter of Strohe*, NYLJ December 28, 2004, Page 19, Col. 3 (Surr. Ct. Nassau Co.)

LEGISLATIVE DEVELOPMENTS

GOVERNOR'S 2005/2006 BUDGET PROPOSAL SEEKS DRASTIC MEDICAID CUTS

Governor George E. Pataki has proposed the following in his 2005-2006 budget bill:

1) Limit the use of spousal refusal in home care cases solely to situations where the spouse is **absent** and refuses to make income/resources available for the cost of care. In the case of nursing home care, spousal refusal would require hardship in addition to assignment of support,

2) extend the look-back period for all types of transfers to 60 months, provided a) the commissioner obtains approvals under federal law to implement a 60 month look-back period, b) federal financial participation would not be affected by the use of a 60 month look-back period by the state, and c) the commissioner submits waiver applications and/or state plan amendments, as necessary to obtain approval to implement a 60 month look-back,

3) transfer of homestead to a sibling with an equity interest and caretaker child exceptions would only apply to institutionalized individuals and not in community Medicaid situations,

4) apply the transfer of asset rules to "non-institutionalized" individuals, who would then become ineligible for "long term care services", defined as home health services, personal care services, assisted living program services, and such other services as designated in the regulations as long term care services, and

5) commence the penalty period on the date on which the individual begins receiving services, a) if the commissioner obtains approvals under federal law to implement such as period of ineligibility, b) federal financial participation would not be affected by the use of such a period of ineligibility, and c) the commissioner submits waiver applications and/or state plan amendments, as necessary, to obtain approval to implement such a period of ineligibility.

In addition, there is a proposal to provide the DOH with authority to request that the Attorney General commence spousal recovery actions.

Section members will be meeting with legislators on February 15, 2005 to discuss the potential impact of these proposals on New York's elderly and disabled population. Please contact Daniel G. Fish (dfish@ffglaw.com) or Steven H. Stern (ssstern@davidowlaw.com), Co-Chairs of the Lobbying Committee, if you are interested in getting involved with the Lobbying Committee.

COMMITTEE ACTIVITIES

Long Term Care Reform Committee:

At the Section's Executive Committee meeting held on January 25, 2005 during the New York State Bar Association's Annual Meeting, the Executive Committee unanimously adopted the Report of the Long Term Care Reform Committee. This 100 page report serves as an excellent guide to providing us with a clear picture of today's demographics and economic issues; New York's compliance with the *Olmstead* standards prohibiting unnecessary institutionalization in public programs; community based alternatives; long term care insurance; and short term and long term solutions. The report is expected to be available to members on the Section's web site and will be used in conjunction with the Section's lobbying efforts to oppose Governor Pataki's 2005-2006 Budget Bill.

Guardianship:

On December 7, 2004, Howard S. Krooks, Section Chair, and Joan Lensky Robert, Immediate Past Chair of the Section, testified at a meeting of the Birnbaum Commission. One of the issues discussed was how many attorneys were excluded from future appointments due to the Part 36 fee cap. A survey was drafted and circulated to members of the Section. The responses were filed by the January 15, 2005 deadline in order for this information to be considered by the Commission. The Commission's report which is

expected to be issued on February 7, 2005.

On November 30, 2004, the Guardianship Task Force of the Appellate Division for the Second Judicial Department submitted its report and recommendations to the Hon A. Gail Prudenti. The report is available to the public on the court's website: www.nycourts.gov/courts/ad2/. Comments may be submitted by February 9, 2005. The Task Force was formed to examine the practices and procedures currently employed in the guardianship Parts throughout the Second Judicial Department and to report and recommend proposals to improve, uniform and strengthen these practices. The Guardianship Committee is currently working on submitting a comment to this report. Any comments should be forwarded to Charles Devlin, Chair of the Guardianship Committee, at cdevlin@courts.state.ny.us.

Ad Hoc Committee on In-Kind Income:

The committee was formed in response to an item in the New York State Department of Health's Regulatory Agenda dated June 30, 2004, wherein DOH proposes to "count as income, [for Medicaid eligibility purposes] in-kind income received in food, clothing and shelter rather than in cash." This would be a significant change in the current State policy as set forth in 18 NYCRR 360-4.3(3) which considers in-kind income, other than from a legally responsible relative, only if earned. The committee has circulated a memorandum describing the proposed changes to different organizations. To date, NYSARC has developed a strategy to respond to DOH directly. A meeting between the two organizations is expected in the near future.

Financial Planning and Investments:

The Financial Planning and Investments Committee (Tim Casserly, Chair) is asking members of the Section to submit cases of financial abuse of the elderly in connection with the solicitation of inappropriate annuity contracts. Please forward your comments and stories to Tim Casserly at tcasserly@burkecasserly.com.

OTHER SECTION BUSINESS

Same Sex Couples Report:

On April 2, 2005, the New York State Bar Association's House of Delegates will vote on a number of proposals with respect to the Report on Same Sex Couples issued in October 2004 by the Association. Elder Law Section member Amy S. O'Connor is leading discussions within the Elder Law Section to consider a possible submission to the Association regarding the Section's position on this issue. Please contact Amy at oconnor@mltw.com or (518) 447-3335 to find out when conference calls have been scheduled to discuss these issues. The Section must file its position no later than March 1, 2005.

Save the Date

Thursday April 28, 2005
Advanced Institute, JFK Radisson Hotel

The spring meeting will feature an Advanced Institute, examining estate planning topics in greater detail than some of the Section's more broad-based programs. Medicaid and Guardianship issues will be explored along with focused discussions on the Uniform Principal and Income Act, Tax Basis Issues, Marital and Elective Share Concerns, as well as other estate planning topics.

Thursday August 11 - Sunday August 14, 2005
Summer Meeting, Boston Marriott Long Wharf

The Section will hold its summer meeting at the Boston Marriott Long Wharf Hotel August 11 through August 14, 2005 and will feature a seminar presented by Natalie Choate, an attorney with the Boston law firm of Bingham McCutchen and author of Life and Death Planning for Retirement Benefits, a leading resource for estate planning and money management professionals. Ms. Choate will be speaking about the "100 Best (and Worst) Planning Ideas for Your Client's Retirement Benefits." Recognizing that a significant portion of American wealth is held in IRAs, 401(k) plans, or other retirement plans, Ms. Choate will present a systematic approach to make sure attendees give the best advice to their clients who own these types of funds as well as evaluating marketing proposals their clients receive offering the latest money-making ideas.

On Friday evening, attendees are invited on a cruise to the renowned John F. Kennedy Library and Museum for dinner and cocktails. The Boston Marriott Long Wharf is on the Boston Harbor offering diverse historical and cultural options including the North End, which is home to Faneuil Hall and Quincy Market as well Boston's "Little Italy." Harbor tours featuring whale watches, the Freedom Trail, and the famous New England Aquarium with IMAX theaters are also in the immediate vicinity of the hotel.

Thursday October 20 - Saturday October 22, 2005
Fall Meeting, Gideon Putnam Hotel, Saratoga Springs, NY

The fall meeting will take place at the historic Gideon Putnam Hotel in Saratoga Springs, New York. The Gideon Putnam is located in the center of the historic 2200-acre Saratoga Spa State Park, which houses an 18-hole championship golf course, the newly renovated Roosevelt Mineral Bath and Spa, the new Saratoga Auto Museum, the Hall of Springs, the Little Theater, and the National Museum of Dance & Hall of Fame. Downtown Saratoga offers unique shops, high-class restaurants and a variety of nightlife, and is a short ride from the Gideon Putnam. Saratoga is also the home of Yaddo, an artist's retreat and rose gardens where Edgar Allan Poe is said to have composed part of "The Raven." Down the street from Yaddo is Saratoga National Golf Course, 2004's Course of the Year as named by the International Association of Golf Course Owners.

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