Elder Law eNews

A Production of the Elder Law Section Communications Committee
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January 2007

RECENT COURT DECISIONS

COURT DECLINES TO ORDER A NUNC PRO TUNC GIFT TO AVOID NEW MEDICAID LAWS

An Article 81 Guardian sought authorization from the Tomkins County Supreme Court to gift $60,000 to each of the ward's two sisters and, additionally, to make its order nunc pro tunc to avoid the effects of the changes to the Medicaid law on February 8, 2006. Under the new Medicaid rules, the gift would cause the Ward to incur a 60-month period of ineligibility which would not start to run until (1) a Medicaid application is submitted, (2) the ward is receiving a form of institutional care, and (3) the ward's resources do not exceed the then resource limit for a single person. According to the opinion, the court declined to issue an Order nunc pro tunc because courts only had the power to issue a nunc pro tunc order to correct ministerial errors and not to approve a gift as of an earlier date when in fact the gift was not actually made on that earlier date. Since the actual gift was given *after* February 8, 2006, the court held new Medicaid laws would apply to the gift. The ward had $352,000 of liquid assets and the cost of his nursing home was $5,000 per month, or $60,000 a year. Thus, $60,000 x 5 ($300,000) would need to be retained to pay for the ineligibility period, which was potentially 5 years. Thus the court allowed a total gift of $60,000 effective as of the date that the gift was made (leaving $8,000 short of the $300,000 needed for 5 years of nursing home costs).The court noted that in this case the application to make the gift was not made prior to the instant application, leaving the door open for future cases. Thus, if an application to make the gift was made at an earlier time, it is possible that the Rolland court would have entertained that motion and authorized gifting nunc pro tunc to the date of the prior application.

Matter of Rolland, 13 Misc.3d 230, 818 N.Y.S.2d 439 (Decided June 22, 2006).

COURT HOLDS ARTICLE 81 GUARDIANSHIPS ARE NOT INTENDED TO ASSIST NURSING HOMES SEEKING TO BE PAID

Petitioner nursing home brought an Article 81 proceeding because it had not received the resident's NAMI (net available monthly income). The resident's spouse cross-petitioned citing the fact that the resident executed a durable power of attorney appointing his spouse as the attorney-in-fact. The court held that absent any evidence that the person was incapacitated when the power of attorney was signed, it would be inappropriate to invalidate the power of attorney

and appoint a guardian for the person under Mental Hygiene Law § 81.02. The spouse was collecting the resident's Social Security income in the belief that the resident was covered by a long-term care policy. The social services director testified that the reason why the guardianship proceeding was brought was because the nursing home had not received any of the NAMI. The court denied the application and dismissed the application advising that the purpose for which the proceeding was brought (to collect the NAMI) was not the legislature's intended purpose of an Article 81 application.

Matter of the Application for the Appointment of a Guardian for S.K., 2006 NY Slip Op 26384, 2006 N.Y. Misc. LEXIS 2609 (Decided September 26, 2006).

JOINT ACCOUNT - SURVIVORSHIP OR CONVENIENCE?

In *Matter of Dudley*, the Chautauqua County Surrogate grappled with the question of whether a joint account with rights of survivorship established by an agent under a power of attorney from the decedent (the "Agent") for a person who thereafter died entitled the surviving account owner (the "Survivor") to the proceeds on the death of the decedent or whether the joint account was merely a convenience account payable on death to the decedent's estate. The Survivor and an attorney for the decedent opened an account at a local bank. The Agent had requested the bank to open the account as a convenience account but was told by a bank employee that the bank could not do so. Thus the account opened was a joint account with rights of survivorship. When the decedent died, the Survivor refused to turn the account proceeds over to the decedent's estate. The Survivor testified that the account was opened so that he could pay the bills of the decedent who did in fact die a few days after the account was opened. The Surrogate's opinion referred to the fact that the Survivor further testified that "[he] ...did not know what type of account was opened or what a convenience account was but knew that he could pay [the decedent's] bills out of the account." While a joint account established under § 675 of the Banking Law was presumptively a joint account with rights of survivorship, that presumption is not conclusive and thus may be rebutted. Since 1) the joint account was established by an attorney acting under a power of attorney, 2) the agent under the power did not have the right to make gifts, and 3) the bank was requested to establish a convenience account, the court held that the presumption in favor of rights of survivorship was overcome.

Matter of Dudley, 2006 NY Slip Op 52042U; 2006 N.Y. LEXIS 3074 (Decided October 25, 2006).

DOES AN ARTICLE 81 PERSONAL NEEDS GUARDIAN HAVE THE RIGHT TO AN ACCOUNTING FROM AN INSTITUTIONAL TRUSTEE OF A REVOCABLE TRUST?

In *Matter of Mary XX*, the Albany County Supreme Court appointed the petitioner the personal needs guardian of Mary XX. The Court refused to appoint the petitioner the property guardian of Mary XX since there was an outstanding power of attorney and revocable trust that were sufficient property management devices. As personal needs guardian, the Judgment appointing

the petitioner also directed the petitioner to examine "...all relevant circumstances... and the existing financial circumstances" in determining the best arrangements for Mary's care and treatment, including who shall provide care and assistance and what home improvements and hospital equipment may be necessary for Mary to reside in her home comfortably. The petitioner requested certain documents from the trustee which the trustee refused to give to the petitioner taking the position that the petitioner lacked standing to obtain those documents. Petitioner then requested an accounting which was denied by the Albany Supreme Court.

The issue on appeal was whether a personal needs guardian is entitled to information about the IP's property when the petitioner was not appointed the property guardian and the petitioner has no fiduciary relationship with the IP related to property matters. The Supreme Court determined that the personal needs guardian has no such right (interestingly, this is the same court that appointed the petitioner and directed the petitioner to examine all the relevant circumstances). On appeal to the Third Department, the Appellate Court said that an accounting can be ordered when there is (1) a fiduciary relationship, (2) an entrustment of money or property, (3) no other remedy is available, and (4) a demand and refusal of an accounting. In this case, the Appellate Division found that the trustee is a fiduciary, he is holding money and property of the IP, and a demand and refusal for an accounting have been made. Furthermore, the court stated that there was no other remedy for the guardian to carry out the lower court's instructions. Therefore, the institutional trustee was ordered to provide the accounting to the personal needs guardian.

Matter of Mary XX, 2006 NY Slip Op 7535, 2006 N.Y. App Div. LEXIS 12513 (Decided and entered September 19, 2006).

DOES AHLBORN REQUIRE A NEW LOOK AT OLD MEDICAID LIEN PAYMENTS?

In *Matter of Margaret Fergeson*, the issue before the Kings County Supreme Court was whether a negotiated settlement of a Medicaid lien was to be set aside following the Ahlborn decision issued by the United States Supreme Court (126 S. Ct. 1752, May 1, 2006). In *Ahlborn*, the United States Supreme Court clarified the circumstances under federal Medicaid law when a lien could be imposed on a tort recovery. Counsel argued that the anti-lien provision prohibited recovery of medicaid liens from tort proceeds that exceeded the portions allotted for medical expenses. DSS argued that if the *Ahlborn* decision applied retroactively, the compromised settlement amount of $40,000 should be set aside and that the full lien should be reinstated. The Court indicated that *Ahlborn* did not warrant vacatur of the settlement order reached prior to the issuance of the *Ahlborn* decision. Since the court had directed counsel to negotiate a lesser compromise figure with the DSS, which the court thereafter agreed to set as the medical lien portion of the arbitrated award, the reduced amount agreed upon became the designated medical costs allocated to the settlement, and was the only amount that could be recovered by the SSL § 104-b lien. All motions were denied and the settlement stood as agreed upon.

Matter of Margaret Fergeson, 2006 NY Slip Op 26376; 2006 N.Y. Misc. LEXIS 2539 (Decided

September 20, 2006).

WHEN IS A MEDICAID APPLICATION CONSIDERED TO HAVE BEEN FILED?

In *Matter of Patricia Bensman*, the applicant's 2002 Medicaid application was denied because of asset transfers and because of insufficient documentation. The applicant claimed that she did not perfect an appeal of that denial owing to the bad advice received from a DSS employee. The asset transfers were thereafter reversed and a new 2003 application containing all needed documentation was filed and approved based on the second application. The applicant argued at a fair hearing that the application should have been approved as of the date of the 2002 application. The applicant lost that argument at a fair hearing and appealed under CPLR Article 78. The Fourth Department decided that because there was a lack of documentation associated with the 2002 application, and because it was undisputed that an appeal would not be successful notwithstanding the apparent advice of the DSS employee, the 2003 application is the appropriate application on which to consider the date of Medicaid eligibility.

Matter of Patricia Bensman, 2006 NY Slip Op 6661, 821 N.Y.S.2d 341; 2006 N.Y. App Div. LEXIS 11195 (Decided September 22, 2006).

Save the Date

April 13-14, 2007 Elder Law "UnProgram", Embassy Suites,
New York City
August 2-5, 2007 Elder Law Summer Meeting, Stoweflake Resort,
Stowe, Vermont
October 17-20, 2007 Elder Law Fall Meeting, Turning Stone Casino, Verona, NY
August 13-16, 2008 Elder Law Summer Meeting, Renissance Harbor Place, Baltimore, MD
October 23-26, 2008 Elder Law Fall Meeting, Otesaga Resort,
Cooperstown, NY

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

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