Elder Law eNews

A Production of the Elder Law Section Communications Committee

Howard S. Krooks, Section Chair
Steven Rondos, Committee Chair
Dean Bress, Committee Vice-Chair

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Dear Members of the Elder Law Section:

It is our pleasure to advise you of the formation of a new committee of the Elder Law Section, the Communications Committee. Section Chair, Howard S. Krooks, formed the Communications Committee to create an e-newsletter advising Section members of recent developments in the law, proposed legislation, Elder Law Section Committee activities, and pending actions across the State that may be of importance to all members of the Section.

This is the first Elder Law eNews we are sending to our members. The newsletter will be sent out on a regular basis either in the form of an e-mail blast or in writing for those members without an e-mail address.

In order to compile the eNews, we need your help. Kindly forward your comments and contributions to us on a going-forward basis so that we may incorporate them into future eNews. A brief summary of your topic will be helpful. Please fax or email your comments and contributions to any of the following members of the Communications Committee:

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CONNECTICUT UPHOLDS SPOUSAL REFUSAL

The Federal District Court for the District of Connecticut has upheld the right of a community spouse to assert spousal refusal where the institutionalized spouse assigned his support rights to the state. A community spouse moved for summary judgment requiring the State of Connecticut to declare her institutionalized husband eligible for Medicaid notwithstanding the fact that she had resources in excess of the CSRA. Resources in excess of the CSRA are considered available to pay for the cost of care. Yet, under 42 USC 1396r-5(c)(3), eligibility may not be denied when an institutionalized spouse has assigned to the State rights of support from the community spouse. Connecticut argued that in Connecticut there is no statutory authority for assigning support rights and that the power of attorney used to effectuate the assignment did not confer sufficient power on the attorney in fact. The District Court dismissed the state's arguments and granted summary judgment for the community spouse thereby upholding the right of spousal refusal in the State of Connecticut. *Morenz v. Wilson-Coker*, (D. Conn., Civ. Act. No. 3:04 cv 216,

June 10, 2004.

NOTE—this case was litigated by Section member Rene H. Reixach of Rochester, New York.

AN AGENT DESIGNATED IN A NEW YORK HEALTH CARE PROXY IS ENTITLED TO HOSPITAL MEDICAL RECORDS UNDER HIPAA.

A daughter, who was appointed as power of attorney and health care proxy by her mother, and who was caring for her mother, sought to obtain medical records from a Long Island hospital. The hospital refused offering the following reasons: (1) the power of attorney does not relate to and cannot implicate health care decision making in New York, (2) the agent designated in a health care proxy is not a "qualified person" under the New York Public Health Law which would allow release of such records, (3) federal regulations control this legal issue unless NY law is "more stringent" and NY law is not more stringent, and (4) a request for medical records under federal regulations must come from the mother herself. The hospital indicated if records are needed, all that the daughter need do is commence a guardianship proceeding and obtain such authority from a court.

The court sided with the daughter and specifically referred to the New York Public Health Law, which states that "Notwithstanding any law to the contrary, the agent shall have the right to receive medical information and medical and clinical records necessary to make informed decisions regarding the principal's health."

Yet, because the hospital did not give appropriate consideration to an appeal by the daughter or even establish an appropriate appeal mechanism, the Court, owing to certain procedural matters, returned the matter for further consideration by the hospital. If the daughter did not obtain a satisfactory result, she could again pursue the matter in court. *Matter of Mougiannis v. North Shore-Long Island Jewish Health System, Inc.*, NYLJ May 19, 2004, p.19.

A POWER OF ATTORNEY AND HEALTH CARE PROXY DOES NOT ALLOW THE AGENT TO DETERMINE THE RESIDENCE OF THE PRINCIPAL.

Daughter was appointed as POA and HCP by her mother. Son brought an Article 81 proceeding for the appointment of a guardian. Daughter moved for summary judgment requesting that she be permitted to determine the residence of the mother and that the petition for guardianship should be dismissed since the use of the POA and HCP was the least restrictive means available. The Court determined that neither the POA nor the HCP allowed the agent to choose the place of residence. *Matter of Julia C., NYLJ*, May 15, 2004, p.20.

ARE FEWER PEOPLE SIGNING WILLS THESE DAYS?

According to a survey of Martindale-Hubbell, in 2004 only 42% of adults had a Will. This is down from 47% in 2000. Why? Well, it could be that people believe that the estate tax exemption's increase to $1.5 million is a reason not to worry. It could also be that more people are using revocable trusts as the chief testamentary disposition instrument. The reasons cited are anecdotal. See the Wall Street Journal, June 10, 2004, p.D2.

A TORTFEASOR WHO CAUSES THE DEATH OF A GRANTOR OF A QUALIFIED PERSONAL RESIDENCE TRUST BEFORE THE END OF THE TRUST TERM IS ANSWERABLE IN DAMAGES FOR THE LOST TAX BENEFITS.

In *Del Broccolo v. Torres*, defendant caused the death of the plaintiff. The issue was whether defendant is liable for the lost tax benefits associated with the premature termination of the Qualified Personal

Residence Trust some eight years before its scheduled termination. In general, tax benefits planning is speculative and could vary over time. Here, however, there was nothing that was speculative and there was nothing except premature death which would negate the tax benefits. Thus the court notably held that the lost tax benefits are an appropriate consideration for the trier of facts. See *NYLJ*, June 24, 2004, p.20, c.1.

FIRST DEPARTMENT RULES THAT ARTICLE 81 APPLIES TO INCAPACITATED INFANTS.

The lower court refused to execute an order to show cause commencing an Article 81 proceeding for an incapacitated infant. Instead, the lower court wrote a decision stating that petitioners should commence an action under Article 17 of the SCPA. The first department directed the lower court to conduct the hearing, holding that actions brought under article 81 of the Mental Hygiene Law may be brought on behalf of infants. *In re Rojas, 2004 N.Y. App. Div. LEXIS 6657*.

TAXES ON A DISABILITY TRUST MAY BE PAID BEFORE MEDICAID IS REIMBURSED.

The Supreme Court of Colorado ruled that upon termination of a (d)(4)A Disability Trust, the trustee may use the corpus of the trust to pay state and federal taxes before Medicaid is reimbursed. *Stell v. Boulder County DSS (Co., No 03sc511, June 14, 2004).*

MEDICARE'S CRITERIA FOR CONTRACTORS NOT SUBJECT TO RULE MAKING REQUIREMENTS.

The U.S. Court of Appeals for the Ninth Circuit ruled that the criteria Medicare gives to its contractors to make local coverage decisions are interpretive rules that are not subject to the formal rule making requirements of the Medicare or administrative procedures acts. *Eringer v. Thompson* (9th Cir., No 03-16408, June 10, 2004).

CREATION OF AN ELDER LAW IN NEW YORK STATE.

State Senator Martin Golden has sponsored a bill, No. S6047, which will establish Chapter 35-A of the Consolidated Law as Elder Law. While the measure does not create a new statute, it moves certain agencies and programs to the new Elder Law such as the State Office for the Aging, contracts with Greenthumb Environmental Beautification, program for elderly pharmaceutical insurance coverage (EPIC), and police services to the elderly. The intent is that by establishing an Elder Law in New York State, it would provide a new level of focus on issues affecting seniors. The bill has passed both houses of the Legislature and awaits signature by Governor Pataki.

NYSBA Executive Committee Meeting at Mohegan Sun

The NYSBA Elder Law Section Executive Committee Meeting at Mohegan Sun is open to Section members (on a space-available basis). The meeting will be held on August 5, 2004 at 10:45 a.m. in the Abenaki Meeting Room. Please contact Lisa Bataille, Section Liaison, at (518) 487-5681, if you are interested in attending.

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