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A Production of the Elder Law Section Communications Committee

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Power of Attorney Update

Amendments to the NY General Obligations Law regarding powers of attorney have passed the State Assembly (A8392-C) and Senate (S7288-A), but the bill has not been signed by the Governor as of the writing of this update. The following are some of the highlights of the proposed law:

> The bill would exclude from the law a number of powers of attorney in a new section, GOL § 5-1501C. The exclusions pertain primarily to commercial and governmental transactions that were probably never intended to come under the new law.
> The bill would redefine a "principal" as an individual who executes a power of attorney "acting for him or herself and not as a fiduciary or as an official of any legal, governmental or commercial entity" GOL §5-1501(k). Then, GOL § 5-1501B would state that nothing in law would bar the use or validity of any other or different form of power of attorney desired by a person "other than a principal" GOL § 5-1501B.4.
> Under the amendments, revocation of prior powers of attorney is no longer the default, and modification section can include a provision revoking prior powers of attorney. GOL §§ 5-1503 and 5-11513.1(d).
> The bill redefines the statutory major gift rider (SMGR) as a statutory gifts rider (SGR) and would clarify that the SGR is necessary for "gifts" and not "other transactions." GOL § 5-1514.
> The bill restores the ability to create, modify or revoke a trust to most of the construction section of the statute, unless such creation, modification or revocation of a trust is a gift transaction. GOL §§ 5-1502A, 5-1502B, 5-1502C, and 5-1502L.
> Under the amendments, the special proceeding under GOL §5-1510 is no longer the "exclusive remedy" for the production of records. GOL § 5-1505.2(a). Thus, a record production could be compelled in a guardianship proceeding or by subpoena in a criminal or civil proceeding.
> An amendment makes it clear that the notary who takes the acknowledgement on the SGR can be one of the witnesses. GOL § 5-1514.9(b).

This update was submitted by Elder Law Section member David Goldfarb, who has written on the amendments in greater detail in the Summer edition of the *Elder Law Attorney*.

NY Supreme Court Finds That the Value of Life Estate Upon the Sale of Real Property is Based on Fair Market Value, and Not Net Sales Proceeds.

In a recent Article 78 proceeding, the Nassau County Supreme Court upheld a Fair Hearing determination that, upon the sale of property upon which a Medicaid recipient has a life estate interest, the proper share attributed to the recipient is the actuarial portion of the fair market value of the property, instead of a share of the net proceeds.

In this case, Ms. Wolf transferred property to her son and his wife in 1991, and retained a life

estate. In 2003, a reverse mortgage was taken out on the property, which was apparently used to pay for her living expenses in the community. She later entered a nursing home and received Medicaid coverage. In August 2008, the property was sold and the mortgage was satisfied from the proceeds. After payment of the mortgage and closing costs, they realized net proceeds of $198,212.29. Upon being informed of the sale in February 2009, Nassau County DSS calculated a penalty period based upon the life estate portion of the full value of the house, $575,000, which resulted in a transfer of $120,750 and a penalty period of 11.44 months. Ms. Wolf's estate (she passed away in July 2009) argued that the penalty period should only have been calculated based upon the net proceeds, which would result in a transfer of $41,624.58 and a penalty period of 3.94 months.

After a Fair Hearing, the hearing officer found that there were no provisions in the regulations to allow for mortgages or costs; moreover 96 ADM-8, which provides guidance to districts on valuing life estates, provides that life estates are based upon the current fair market value of the property and the age of the person, and does not address the issue of mortgages. The hearing officer also rejected the claim that the mortgage was a superior lien to Medicaid's claim.

In reviewing the issue, the Court found that, since the ADM and the regulations did not speak to the deduction of mortgages, and the only reference is to the fair market value of the property, the agency's interpretation was not arbitrary and capricious, and was entitled to deference from the Court.

Given the significant financial impact of this ruling on the estate, practitioners are forewarned of the potential adverse consequences whenever the sale of a property subject to a life estate is being considered.

In Re Wolf v. New York State Dept. of Health, File No. 21666/09 (decided April 30, 2010), 2010 NY Slip Op 31180(U)

Income Transferred to Trust for the Sole Benefit of a Disabled Child Cannot be Excluded from Net Available Monthly Income (NAMI).

The Supreme Court of Albany County dismissed an Article 78 petition involving a Medicaid recipient whose Net Available Monthly Income (NAMI) had been deposited into her disabled adult child's sole benefit Supplemental Needs Trust since 2004. The Court upheld NYS DOH's decision to disallow Petitioner's deposits of monthly income into the adult child's SNT that were deducted from her post-eligibility monthly income contribution.

The Medicaid applicant began receiving benefits in November 2003. In April 2004, an SNT was established for the benefit of petitioner's adult disabled son. Thereafter, her monthly income, consisting of Social Security and pension benefits, was deposited into the son's trust. In January 2009, the Albany County Department of Social Services ("ACDSS") sent a notice to petitioner stating that, in February 2009, her contribution toward her care would be increased from $0 to $969.55 per month. A Fair Hearing was held at which time the Administrative Law Judge (ALJ) upheld DSS's determination.

Petitioner argued that transfers of income to a trust for the sole benefit of a disabled child are excluded from NAMI, Kaiser v. Commissioner, 824 NYS2d 755 (Sup. Ct. Nassau County 2006) and Hammond v. Commissioner, 2007 WL 6082308 (Sup. Ct. Nassau County 2007). These cases are very similar to the instant case. Petitioner also argued that Respondent was bound by precedent as well as its practice and that its ruling was arbitrary and capricious and based on an error of law.

During pendency of this case, Hammond died and Jennings, the executor was substituted for Hammond. The Second Department in Jennings v. Commissioner, N.Y.S. Dept. of Social Services, 71 AD3d 98, 2010 WL 28002 (2nd Dept. 2010), reversed the decisions held in *Hammond* and *Kaiser* and held that monthly income funding an SNT could not be excluded from NAMI. The facts in *Jennings* were not distinguished. There being no contrary case law from the Third Department, this Court found it binding authority and dismissed the petition.

Elder Law Section member D. Steven Rahmas, attorney for Albany County DSS, represented the Respondent.

Schulz v. Daines, Sup. Ct., Albany County (Index # 7679-09), April 20, 2010, Article 78, Albany County

Additional Accounting Requirements Sought by HRA for SNTs in Bronx County Denied

Court approval for the creation of a self-settled SNT was sought, and the New York City Human Resources Administration filed a request for approval of an amended SNT, which provided for additional accounting and notice requirements than would ordinarily be required. The SNT was to be funded with the Petitioner's assets, and sought the appointment of Petitioner's daughter as SNT trustee. HRA's request for additional accounting requirements would require that the trustee file annual and final accounts in accord with Mental Hygiene Law Sections 81.31, 81.32 and 81.33 of Article 81.

The Court noted that only Section 81.31 of the MHL is applicable to accountings by SNT trustees, which in turn refers the accounting party to the various provisions of the Surrogate's Court Procedure Act governing the procedures to be followed regarding annual accountings and the form of papers to be filed by the guardian of an infant's property (not the case here). The court stated that the originally filed SNT contained exactly those requirements and no other requirements are applicable to this SNT. The Court further stated that it lacks subject matter jurisdiction to hear an application for the appointment of an Article 81 guardian of the person of an adult. Therefore, the Court directed that all references in the amended trust to MHL Section 81.33 and 81.32 be removed and, in its place, SCPA Section 1719 be inserted.

The bottom line of this decision, in the opinion of Surrogate Holzman, is that the requested amendments by HRA might have been appropriate where the SNT is established for the benefit of a person who already has an Article 81 guardian of the person or property, but there is no justification for applying these provisions of Article 81 where a trust is established for the benefit of a person with severe and chronic or persistent disability who is competent to handle his/her own affairs.

In the Matter of Lula A, Petitioner (Surrogate Holzman, Bronx County Surrogate's Court, NYLJ Vol. 243, April 27, 2010, p. 34, Col. 1)

Court Voids Marriage and Denies Elective Share.

A marriage procured through overreaching and undue influence, entered when one party lacks capacity, results in a denial of the right of election by the surviving party.

In February 2001, while decedent's daughter, the primary caretaker, was away on vacation for one

week, the defendant, with knowledge of decedent's severe dementia secretly married him and subsequently re-titled decedent's bank account ($150,000) in their joint names and listed herself as sole beneficiary of his retirement account ($147,000). In August 2001 decedent expired and his children, the intended beneficiaries, brought an action declaring the marriage void.

The Supreme Court denied summary judgment. The Appellate Division found plaintiff made a prima facie showing of entitlement and remitted the matter to the Supreme Court for entry of Judgment declaring the marriage and changes of beneficiary designation null and void. The Supreme Court also stated that defendant "shall have no legal rights and can claim no legal interest as a spouse." Defendant appealed from the Order declaring the marriage void, precluding her as a beneficiary of decedent's estate and sought her elective share.

The Estates Powers and Trusts Law (EPTL) Section 5-1.1-A considers one to be a "surviving spouse" with a right of election "unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that: (1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage…was in effect when the deceased spouse died…" Because the marriage was declared a nullity six years after decedent's death, defendant had a right to her elective share under EPTL Section 5-1.2. This case illustrates an anomaly in the law and the court suggested the legislature address it to "prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm…"

The Court held that equitable principles control, and found defendant, who took unfair advantage for her own gain at the expense of decedent's intended beneficiaries, should not profit from her wrongdoing and that equity should "intervene to prevent the unjust enrichment of the wrongdoer." The Court upheld the Order declaring the marriage and changes of beneficiary designation a nullity, but modified the Order to restore the beneficiary designation that was in effect in 2001 before the change was made allowing defendant to take one quarter of the retirement account as she had originally been one of four beneficiaries listed.

Campbell v. Thomas, Appellate Division, Second Department, 2010 NY Slip Op 2082 (3/16/10)

Do These Two Cases on Article 17-A Powers Yield Different Interpretations of the Same Statute?

Here we have two cases decided in one month by the Surrogate's Court of New York County. One Surrogate said that, because the powers granted in an guardianship under Article 17-A of the Mental Hygiene Law were plenary, they could not be tailored like Article 81 powers, and therefore, no gift giving is allowed. A little over two weeks later, a different Surrogate in the same court opined that implicit in the law is the ability to act in the ward's best interest. Are these positions at odds, or can they be distinguished?

In *Matter of John J.H.*, the parents of a young man with moderate to severe mental retardation sought to donate the proceeds from the sale of his artwork to charity in the context of an Article 17-A guardianship. New York County Surrogate Glen found that, in Article 17-A proceeding, there could be no tailoring of powers as in Article 81. The Surrogate further stated "While recognizing that two prior judges in this court have assumed the power of Article 17-A guardians to make gifts, those decisions (both of which involve the same ward) are distinguishable, and, as well, rest on questionable authority. In *Matter of Schulze*, 23 Misc 3d 215 (Sur Ct, NY County 2008) (*Schulze* II), the court posed the question as "whether article 81 of the Mental Hygiene Law preempts article 17-A with respect to the authority of guardians to make gifts on behalf of their ward" (cite omitted). The court answered that question in the negative." Calling Article 17-A a "blunt instrument" and saying the statute is overbroc

for a legislative overhaul, the Surrogate found no power of substituted judgment in the history of the statute.

Contrast this with *Matter of Yvette A*, decided in the same month, where New York County Surrogate Webber stated that "[a]lthough, Article 17-A does not specifically provide for the tailoring of a guardian's powers or for reporting requirements similar to Article 81, the court's authority to impose terms and restrictions that best meet the needs of the ward is implicit in the provisions of §1758 of the SCPA, under which 'the court shall have and retain general jurisdiction over the mentally retarded...person for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian,...as may be deemed necessary or proper for the welfare of such mentally retarded... person.'

In *Yvette A.*, a father, who had been heretofore uninvolved in his daughter's life, applied for an article 17-A guardianship of the person and property of the daughter, a mentally retarded individual who had been living for many years in a group home. He had re-entered her life when he became concerned about several incidents and recent medical developments and was seeking to make decisions regarding her care and placement. His petition was opposed by Mental Hygiene Legal Services, the NYCLU, NYLPI and the Guardian Ad Litem, who all cited his previous uninvolvement with her life and were concerned that it could happen again in the future. They also argued that the matter should be moved an Article 81 Court, which, in their opinion would provide a greater level of protection.

Surrogate Webber disagreed, saying that, although Article 81 was designed to be less restrictive and more flexible than Article 17-A, it was not intended to replace it. Moreover, the powers implicit in § 1758 of the SCPA allowed the Court to take the steps necessary to provide for the needs of the mentally retarded person and, in §1755 of the SCPA, to amend or modify its orders as necessary, to an unlimited extent, based upon the needs of the ward and changing circumstances. He appointed the father as guardian, with a number of restrictions in place, including the duty to file initial and annual reports regarding her care. The guardian was also restrained from moving her, changing her case management, taking control of any of her property, and initiating litigation on her behalf without Court approval.

Are the expansive powers of the Court to impose terms and modify its orders propounded by Surrogate Webber at odds with the "blunt" plenary powers found by Surrogate Glen? More on this in future editions.

Matter of John J.H., Surrogates Court of New York, New York County, 2010 NY Slip Op 20084; 2010 N.Y. Misc. LEXIS 415 (March 8, 2010)

Matter of Yvette A., Index 1391/09, Surrogates Court of New York, New York County, decided 03/25/10, (Unreported)

Program and Events Update

Save the Date for these upcoming Section Meetings:

August 5-8, 2010, Elder Law Summer Meeting, Ritz Carlton Hotel, Philadelphia
October 28-30, 2010 Elder Law Fall Meeting, Renaissance Westchester Hotel, White Plains
January 25, 2011, Elder Law Section Annual Meeting, NY Hilton Hotel, NYC

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to either Howard S. Krooks, hkrooks@elderlawassociates.com, Antonia J. Martinez, elderlawtimes@yahoo.com or Deepankar Mukerji, dmukerji@kblaw.com