

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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Estate Recovery Regulations Imminent

As reported by the new Section Chair, T. David Stapleton, regulations regarding the expanded estate recovery rules are expected soon. A draft of the regulations, which are appended to a NYSDOH request to amend the State Medicaid Plan, but not the official release, is available on the NYSDOH website at the following link:

http://www.health.ny.gov/regulations/state_plans/status/coverage/original/docs/os_2011-06-21_spa_11-42.pdf

Provided that HHS does not object to the amendment, we would expect that regulations will be issued soon; however there may be substantive changes to the draft, so practitioners are warned not to rely on this version.

New Committee

A new Elder Law Mediation Committee has been formed by the Section. Anyone interested in joining should contact Co-Chairs Judy Grimaldi and Laurie Menzies.

Second Circuit Rules on Health Care Proxies outside of a Hospital Setting

This case has been the subject of much discussion at Section meetings. Rita Stein, on behalf of herself and as executrix of the estate of her deceased husband Milton Stein, brought an action against the County of Nassau, the Nassau County Police Department, and four emergency responders. Rita claimed that the emergency responders violated her and her husband's Fourth, Fifth, and Fourteenth Amendment rights and committed the state-law torts of assault and negligence when they refused to transport Milton — who was unresponsive at the time — to the hospital of Rita's choosing and then physically prevented Rita from interfering with their provision of emergency medical care to Milton.

Milton had appointed Rita as his health care agent in 1990, pursuant to a statutory Health Care Proxy; however, the District Court found that the applicability of health care proxies to non-hospital settings had not been "clearly established" at the time of the incident, and therefore qualified immunity barred Rita's suit against the emergency responders.

The Second Circuit found that under New York law, the creation of a health care proxy did not trigger an agent's authority to make health care decisions on behalf of her principal. Instead, that authority "commence[s] upon a determination, made pursuant to [New York Public Health Law § 2983(1)], that

determination must be made by an attending physician in writing. Since there was no indication that such a determination had been made in this case, the emergency responders had no reason to believe that Rita had authority to act on Milton's behalf and were entitled to qualified immunity. The Second Circuit granted summary judgment for the emergency responders on the constitutional claims; however it remanded the case to the District Court to examine the tort claims, since these claims did not necessarily involve the Health Care Proxy.

Stein v. Barthelson, decided April 8, 2011. 09-3682-cv (2nd Cir.).

Legislative News from the Health Care Issues Committee

NYS Assembly Member Richard Gottfried recently addressed the amendments to the Health Care Proxy laws and the Family Health Care Decisions Act which were considered in the recent legislative session.

He reported as follows: The “clean up” bill which proposed several technical amendments to the Family Health Care Decisions Act (FHCDA) did not pass as originally proposed; however, a pared-down version of the bill was passed expanding the application of surrogate decision-making beyond hospital settings, as allowed under the current law, to also include hospice settings as well. It did not expand further to include home health care services as proposed, which could be addressed in future legislative sessions.

The important issue of “medical futility”--allowing doctors to determine that continued treatment may be discontinued if such treatment is determined to be medically futile, was inadvertently dropped from the FHCDA when the DNR option was absorbed into the law and was addressed in this revision. This was an issue which drew a great deal of attention from both sides and brought support for the bill as it gave the patient or agent the right to make choices even if contrary to the doctor’s orders.

In addition, legislation was proposed, as a result of the outcome of the *Stein* case, which would allow a health care agent to make a determination of which hospital the principal should be transported to by EMS or ambulance when the principal is unresponsive without a prior determination of incapacity by a medical professional. This exception to the prior capacity determination was limited to transportation and selection of medical facility. This amendment to the health care proxy law was proposed in a separate bill by Senator De Francesco. Said legislation did not pass this session and will need to be re-introduced at the next legislative session

Assembly Member Gottfried also addressed the efforts to curb the NYS budget deficits through changes to the delivery of Medicaid home care services. The budget process focused on the extraordinary growth in home care expenditures which occurred in NYC with certain agencies while other agencies’ billing remained level. In order to address this rise in costs, specifically in the home care industry, reimbursement methods have been restructured. As a result, beginning April 2012, all home care cases expected to continue for more than 120 days must be converted to managed long term case service or long term home health care programs (known as the Lombardi program or LTHHCP) or other case management programs. This change is subject to receiving a federal waiver. In anticipation of this deadline, many certified home health agencies (CHHA’s) are transitioning cases to managed long term care agencies, causing an upheaval in client care. Fair hearings and advocacy to insure safe and appropriate care plans for the home care patient during these conversions to managed care will be the newest challenge to elder law practitioners. Most managed care agencies, due to their fiscal constraints, will be unable to provide the high-hour coverage to Medicaid recipients

services, as seen in the preliminary transition cases, is causing families to either provide supplemental care at a greater sacrifice or to accept nursing home care for the Medicaid recipient.

Attorney-in-Fact Lacks Authority to Amend Irrevocable Trust

Petitioner, Linda LiGreci, Settlor's daughter, brought an action seeking the removal of the Trustee, Settlor's brother, pursuant to a Trust Amendment she signed as Agent under a validly executed Power of Attorney.

Settlor, Nicholas LiGreci, created the Ligreci Irrevocable Trust on November 5, 1991 and appointed his brother, John T. LiGreci, as Trustee. On April 20, 2010, Settlor signed a Power of Attorney granting full authority as agent to his daughter, the Petitioner, who the following month executed an "Amendment to the LiGreci Irrevocable Trust," seeking to remove her uncle as Trustee and appoint her son in his place. Each of the three beneficiaries named in the trust executed a proper consent to said amendment and on June 3, 2010, Nicholas LiGreci expired.

The creator of a trust has a statutory right under EPTL Section 7-1.9 to amend an otherwise irrevocable trust during his lifetime by obtaining the "written consent acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust property." This is, however, a personal right that terminates at death.

A similar fact pattern arose in *In re Goetz*, 8 Misc. 3d 200, 793 N.Y.S. 2d 318 (2005), where the Settlor had reserved to himself the right to amend the trust terms during his lifetime and executed a power of attorney appointing his wife as agent. The Settlor later sought to amend the trust and signed the necessary paperwork, however, not in the presence of a notary, rendering it a nullity. Settlor's wife signed the amendment in her capacity as Settlor's agent and this too was held to be ineffective as this was a personal right of the Settlor.

In this case, the Trust stated in clear terms that it was irrevocable and "shall not be subject to any alteration or amendment." The Court held that the right to revoke an irrevocable trust is personal to the Settlor, absent specific language in the instrument stating otherwise. Here, Settlor did not have such language and personally never exercised his statutory right to do so. Although the Power of Attorney in existence specifically granted the agent the authority to create trusts and appoint trustees, it made no mention about restructuring a prior estate plan. For nineteen years Settlor's brother acted as Trustee and managed the Trust. There was no credible evidence in the court record that Settlor sought his removal. The Power of Attorney did not authorize agent to reform Settlor's prior estate planning and the Court, therefore, set aside the amendment dated May 19, 2010.

Perosi v. LiGreci, decided 2/14/11. (Supreme Court, Richmond County) 2011 NY Slip Op 21048.

Court Determines That Three Year Lookback Period Applies to October 2005 Transfer Since Pre-DRA Transfer Rules Apply

The central issue in this guardianship proceeding involved the transfer of the incapacitated person's former homestead located in Brooklyn, New York from the IP to Marcia Abrams (one of 4 children) in October 2005. The motivation for the transfer was to protect the financial interests of the

IP by Philip Abrams, the IP's son who lived with the IP. The IP took a reverse mortgage on the property while Philip was residing with her, and he subsequently applied for guardianship over her, which was objected to by his sisters. Marcia Abrams was appointed personal needs guardian. Another daughter, Dianne Roberts, was appointed property management guardian. It was then agreed amongst the parties that the IP's home would be sold. On June 16, 2008, Marcia Abrams, as owner of the property, contracted to sell the house. However, the title company requested consents from all parties to the sale, and the sale never occurred due to a disagreement between Philip Abrams and his sisters. On December 9, 2008, the court ordered that the legal owner of the property was Marcia Abrams, and that the house was to be sold with the net sales proceeds to be held for the benefit of Nellie Abrams during her lifetime.

A final accounting was required to be filed since the IP was moved to New Jersey to live in a skilled nursing facility near her two daughters who also lived in New Jersey, and a new guardianship proceeding in New Jersey was being pursued. Marcia Abrams raised the question of whether the net sales proceeds from the sale of the home needed to be included in the final accounting. She argued that these funds are not an available resource for purposes of determining Nellie Abrams' eligibility for Medicaid benefits due to the October 2005 transfer being subject to a three year lookback period, and not a five year lookback period.

Citing to numerous other cases addressing the lookback period post-DRA, the court held that the October 2005 transfer to Marcia Abrams was subject only to a three year lookback period since the transfer occurred prior to February 8, 2006, the effective date of the new transfer of asset rules under the DRA. Since the IP did not apply for Medicaid until May 1, 2010, the May 2005 transfer of her home to Marcia Abrams was clearly outside the three year lookback period. However, the court went on to say that since the court had ordered the net sales proceeds to be maintained in trust for the benefit of Nellie Abrams during her lifetime, these monies must be included as part of the final accounting to be filed with the court. Although not stated in the opinion, presumably these monies were then deemed to be available resources for purposes of determining Nellie Abrams' eligibility for Medicaid.

In the Matter of Nellie Abrams, an Incapacitated Person, decided March 15, 2011 (Supreme Court, Kings County) 2011 Slip Op. 21101.

In Burial Dispute Among Family Members, Decedent's Intentions Control

In this case, a dispute arose over the disposition of the remains of a decedent between his niece, Grace D., who had been appointed his personal needs guardian, and the decedent's sister, Vita P., who had been his property management co-guardian. Decedent's sister sought cremation of her brother's remains and subsequent transport to her residence in Vermont. Decedent's niece sought a Catholic funeral and burial customary of a Knight of the Order of the Holy Sepulchre. The funeral home in possession of his remains sought clarification by court order to determine which family member is to be given priority in decision making. The Court found that, although the law favors a surviving spouse and next of kin, the testamentary wishes of a decedent are paramount. It is only in the absence of decedent's express wishes that a relative's desire should be considered.

In this case, decedent had no surviving spouse or children; his two sisters and his niece constituted his next of kin in the second and third degree respectively. At the hearing, decedent's sister, Vita P., testified both she and her sister wished to be cremated and both wanted their brother's remains treated similarly but admitted decedent had never expressed such a desire. Grace D., decedent's niece, testified she wanted her uncle buried in the Catholic cemetery plot purchased by decedent thirty-five years ago. Grace D. stated her uncle was a religious man, actively involved in the church and the Knights of the Order of the Holy Sepulchre.

Sepulchre.

The Court noted that each of decedent's parents as well as a predeceased sibling were buried, not cremated, and concluded that decedent's purchase of the cemetery plot in 1975, which included a fee for permanent care, indicated his wishes that the plot be used and perpetually tended. The Court also noted that Vita P.'s concerns had more to do with expense than decedent's personal wishes and ordered decedent's remains to be buried at the cemetery plot owned and purchased by him in the religious burial garb normally used for the interment of a Knight of the Order of the Holy Sepulchre.

In the Matter of the Appointment of Grace D., decided 2/22/11. (Supreme Court, Nassau County, No. 29490-I-09) 2011 NY Slip Op 21069.

Petitioner with Conflict of Interest Cannot be Appointed Guardian

The Bronx County Supreme Court, J. Hunter, found that a family member petitioning to be appointed guardian of the person could not serve because of conflict of interest. In this case, A.M., the Petitioner, had come from Florida after the death of their parents to care for his sister, L.M., the AIP, a shut-in who had not been outside of her home for 40 years and had not been bathing or changing her clothes. Although he had engaged home care services for her, he could not provide for her medical needs without being appointed guardian. A.M. and a family friend, an attorney, petitioned to become the co-guardians of the person and property. The AIP opposed the appointment of both.

L.M. was the beneficiary of two testamentary trusts from her parents, which contained assets in excess of \$1,000,000. A.M. was the trustee of both trusts, which named A.M.'s children as remaindermen. Testimony was taken which indicated that A.M. felt under great pressure to preserve the funds for his children, which made it difficult to make decisions for his sister; for example, it was felt she would benefit from psychiatric treatment, which was not considered by A.M. In addition, he declined to purchase health insurance for her.

Although the petitioner amended the petition to be named a co-guardian solely of the person, the Court found that AM was not eligible for appointment because of an actual conflict of interest. A.M.'s potential for financial gain prohibited his appointment. As stated by the Court, "The fact that Mr. M. seeks only to be appointed guardian of the person does not eliminate this conflict. For example, if appointed guardian of her person, Mr. M. will have power to relocate the person and to make medical decisions on her behalf. Mr. M. testified that he plans to place his sister in a facility, something the court evaluator revealed is medically unnecessary and adverse to the desires of the person, and once the person is relocated, he intends to sell their house" (at page 5). The Court also did not appoint the proposed co-guardian, perhaps based upon the AIP's objections, and instead appointed a third party guardian of the person.

In the Matter of the Application of A.M., For the Appointment of Temporary Guardians for The Person and Property of L.M. Decided April 25, 2011. (Supreme Court, Bronx County, Index No. 917XX-10).

Program and Events Update

Save the Date for these upcoming Section Meetings:

August 18-21, 2011, Elder Law Section Summer Meeting, The Equinox Hotel, Manchester, VT

October 10-15, 2011, Elder Law Section Fall Meeting, The Equinox Hotel, Manchester, VT

January 24, 2012, Elder Law Section Annual Meeting, NY Hilton, NYC
August 9-12, 2012, Elder Law Section Summer Meeting, Marriott Long Wharf, Boston

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