Elder Law eNews

A Production of the Elder Law Section Communications Committee
Ami S. Longstreet, Section Chair
Howard S. Krooks, Committee Chair
Dean S. Bress, Committee Vice-Chair

June/July 2007

RECENT COURT DECISIONS

AN APPELLATE COURT DETERMINES THAT THE APPOINTMENT OF AN ARTICLE 81 GUARDIAN WAS UNNECESSARY

A daughter, who was appointed an agent under a springing durable power of attorney which became effective upon her mother's incapacity, appealed the decision of the Supreme Court appointing an article 81 guardian for her mother. The hospital wherein the mother was situated petitioned for the appointment and, after a hearing, the trial court, finding the mother to be incapacitated by clear and convincing evidence, appointed a guardian.

The Second Department determined, consistent with the arguments of the daughter, that no guardian was needed; and that while certain uses of the power of attorney were questionable, the appointment of a guardian was a last resort to be effected when no other resources were available. In this instance the lower court improvidently exercised its discretion by appointing an independent guardian when the existing power of attorney was a resource which could serve to protect the mother in the absence of the appointment of a guardian.

In the Matter of Nellie G, Index No. 16195/05, 2007 NY Slip Op 1877; 831 N.Y.S.2d 473; 2007 N.Y. App Div. LEXIS 2587, March 6, 2007.

WAS THE TRIAL COURT IN ERROR IN DISMISSING A GUARDIANSHIP PETITION WITHOUT PERMITTING DISCOVERY AND A HEARING?

One of two daughters appealed the summary dismissal (prior to a hearing) of her petition to appoint a guardian for her father. In March 2006, the respondent executed a durable power of attorney, a health care proxy and an irrevocable trust. It also appeared that the respondent father executed a will and a living will, none of which were before the court for reasons which are unclear. These documents were not prepared by the respondent's long time attorney but were in fact prepared by an attorney recommended by the daughter with whom the father resided.

The petition alleged, among other things, that the father executed the documents at a time when he had diminished capacity and was under the influence of the daughter with whom he was living. The respondent, represented by counsel, opposed the appointment. A court appointed evaluator indicated that the father appeared oriented and could participate in the proceedings. The court evaluator further opined that the respondent did not fully understand the estate planning documents under review. The father's long term prior attorney for a period of more than 30 years indicated that the father and his deceased wife always wanted their daughters to share assets equally. The irrevocable trust favored one daughter over the other, and it was the opinion of the long term attorney that this could only be the result

of overreaching. Furthermore, the court evaluator concluded that the respondent had been subject to overreaching and undue influence.

The court evaluator moved to inspect the respondent's medical records and retention of experts to evaluate the extent of the respondent's diminished capacity. The trial court, after hearing oral argument, and relying on the estate planning documents before the court (which were the very documents in question) dismissed the petition and concluded that a guardian was unnecessary in the circumstances.

The issue on appeal was whether it was error to dismiss the petition without discovery and a hearing. The appellate court determined that it was error.

The appeals court determined that the guardianship statute sets forth a two pronged test. One prong has to do with whether the appointment of a guardian is necessary, and the second prong has to do with whether the alleged incapacitated person is in fact incapacitated or whether that person consents to the appointment. To determine whether a guardian is necessary, the court must review the report of the court evaluator. Here a court evaluator advised the lower court that such a determination cannot be made in the absence of discovery. Furthermore, the court evaluator and the long time attorney put into question the validity of the estate planning documents. And, once the petition makes sufficient allegations about incapacity, it is imperative to allow further discovery about the respondent's capacity at the time of execution of the documents in issue. Thus, the appellate division reversed the summary dismissal and remitted the matter back to the lower court for further proceedings consistent with the court's order.

In the Matter of Daniel TT, 2007 NY Slip Op 1458; 2007 N.Y. App Div. LEXIS 1968, February 22, 2007.

DOES THE RESERVATION OF A SPECIAL OR LIMITED POWER OF APPOINTMENT IN A DEED CONSTITUTE A REVOCABLE GIFT PROPERLY INCLUDIBLE IN THE DONOR'S PROBATE ESTATE?

The issue presented to the Nassau County Surrogate was whether the reservation of a life estate in a deed coupled with a special lifetime power to appoint the property was a completed gift or whether the property subject to the power was properly part of the decedent's probate estate. The decedent deeded a remainder estate to her daughter-to the exclusion of her other children. The attorney who prepared the deed submitted an affidavit to the effect that he had met with the decedent privately (outside of the presence of the daughter receiving the remainder estate) and that it was the decedent's clear wish to give the subject real property to her daughter owing in part to family financial losses caused by the decedent's other children. The Surrogate concluded that there was no overreaching by the daughter and that "the affidavit of the attorney clearly demonstrates that the execution of the deed was not subject to the exertion of any undue influence." With respect to the question of whether the gift was revocable and thus includible in the probate estate, the Surrogate concluded that while a gift may be incomplete for tax purposes (so as to avoid a gift tax), the gift in this instance is complete and subject to being divested only upon an act of the decedent prior to the decedent's death. (Note: A limited power of appointment does not allow the holder to revoke the gift.) Thus the Surrogate concluded that the gift was complete when made and not part of the probate estate notwithstanding the retained power of appointment.

In the Matter of the Estate of the Margaret Mozer, 2007 NY Slip Op 50634U; 2007 N.Y. Misc LEXIS 1474, March 30, 2007.

PETITIONER DENIED REQUEST FOR A WRIT OF HABEAS CORPUS WHEN AN APPEAL IS THE APPROPRIATE MANNER TO CHALLENGE A LOWER COURT'S DECISION.

A son, for whose mother an independent Article 81 guardian was appointed unsuccessfully sought on numerous occasions to remove the court appointed guardians, filed for a Writ of Habeas Corpus under Article 70 of the CPLR. The issue before the court was whether an Article 70 petition is the appropriate way to challenge a determination of the Guardianship Part. The court concluded that an Article 70 proceeding is not an alternate to an appeal. The court determined that Article 70 is meant to rescue someone from a denial of a fundamental, constitutional or statutory right. The Court of Appeals has held that an Article 70 proceeding is no substitute for a conventional appeal. The petition was thus denied and the court further pointed out that the mother was on a ventilator and in a comatose state thereby rendering the Writ of Habeas Corpus of questionable value.

People v Driscoll, 2007 N. Y. Misc. LEXIS 3398; 237 NYLJ 87, April 24, 2007.

HAVE THE PERSONAL INJURY MEDICAID LIEN RIGHTS BEEN FURTHER EMASCULATED IN NEW YORK?

Since 1993, issues involving medicaid liens under Section 104-b of the Social Services Law were essentially resolved in favor of the government. First, *Cricchio* allowed the lien to be enforced before the proceeds of a personal injury action could be placed into a supplemental needs trust; then, *Calvanese* said that the full amount of the proceeds was available to satisfy the lien; then the *Gold* and *Santiago* erased the rule of *Baker v. Sterling* and applied 104-b liens to recoveries by infants. Following those decisions, the US Supreme Court in Ahlborn (implicitly overruling the prior New York decisions) decided that the Medicaid lien was to be limited to that portion of the proceeds of a personal injury action applicable to past medical expenses incurred.

Then the New York County Supreme Court (J. Schlesinger), following the Ahlborn approach, conducted a hearing in *Lugo v. Beth Israel* (13 Misc. 3d 681; 819 N.Y.S. 2d 892) to determine the “full value of the case” based on the settlements or verdicts in similar cases. After the full value of the case is determined, that amount or value is compared to the actual settlement to produce a percentage of value. The percentage of value arrived at is then multiplied by the actual past medical expenses incurred in a particular matter and the resulting amount is the amount of the lien recovery available to DSS.

More recently, the Queens County Supreme Court, citing and following *Lugo* required a hearing to determine what portion of past medical expenses incurred should be subject to a lien based on the full value of the case. After conducting a hearing, the court found that the full value of the case was $6 million. The actual settlement was $1.7 million, which was 28.3% of the full value. The undisputed past medical expenses were $141,638. Thus, the Medicaid lien was reduced to $40,083, or 28.3% of $141,638.

Chambers v. Jain, 2007 NY Slip Op 50776U; 2007 N.Y. Misc. LEXIS 2479, April 13, 2007.

Editorial Comment. In *Ahlborn (Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752 2006) the parties stipulated to the “full value of the case.” Why? While one can acknowledge that recent NY decisions have followed *Ahlborn*, it does not appear that *Ahlborn* required this approach. We do not understand the rationale behind why the amount of the Medicaid lien is adversely affected (and it can only be adverse) by the differential between the full value of the case (assuming it is determinable) and the actual settlement when one acknowledges that there may be many reasons why a case may be settled for one amount or another.

NEW JERSEY COURT HOLDS THAT ALIMONY PAID INTO A SELF-SETTLED SUPPLEMENTAL NEEDS TRUST IS NOT AVAILABLE TO THE MEDICAID RECIPIENT.

A New Jersey court was required to decide whether alimony paid into a supplemental needs trust (the "Trust") was actually available to the Medicaid recipient or was it protected by the Trust. Citing federal and state statutes, the New Jersey court decided that since "assets" are defined to include income, and since alimony is a form of income, the State of New Jersey could not treat the alimony as available to the Medicaid recipient.

J. P. v. Division of Medical Assistance and Health Services, Superior Court of New Jersey, Appellate Division, Docket No. A-5339-05T1. Decided April 19, 2007.

COURT DECIDES ON A GUARDIAN OF THE PROPERTY AND NOT A SUPPLEMENTAL NEEDS TRUST

In a SCPA 17-A proceeding before the Kings County Surrogate's Court, the Surrogate was called upon to decide whether to place segregated German reparation payments (the "Reparations") into a supplemental needs trust for the benefit of a retarded person (one Samuel Erman) or subject the Reparations to the control of a property guardian. Mr. Erman's sole heir was his mother who needed an Article 81 guardian to assist her. Reparation payments by themselves are exempt from Medicaid budgeting and recovery. The Surrogate reviewed the pros and cons of each method pointing out that if a supplemental needs trust were employed the funds therein remaining at the time of the death of the disabled beneficiary would be used to repay Medicaid and there would be nothing available for the trust beneficiary's mother. Curiously, as part of the court's analysis, reference was made to the fact that a supplemental needs trust would be subject to disbursements made only for supplemental needs-and thus suggested that a property guardian would have greater leeway in making disbursements. Perhaps. Based on the foregoing the court concluded that the use of a property guardian was superior to the use of a supplemental needs trust.

Matter of Samuel Erman, 2007 N. Y. LEXIS 3679; 237 N.Y.L.J. 92 (Kings Co. Surr. Ct. April 13, 2007).

WHAT DO YOU DO WHEN AN EXECUTOR ENGAGES IN SELF-DEALING AND FAILS TO MOVE FORWARD AS AN EXECUTOR?

An alternate executor under the will of a Dutchess County resident petitioned the Surrogate to revoke Letters Testamentary granted to the primary executor alleging self-dealing (living rent free in the property of the decedent) and not moving the sale of all estate property as is the executor's responsibility. In addition, the court pointed out that the executor had not filed the required inventory under 22 NYCRR Section 207.20(a)(2)(iii). Since the rule allows the Surrogate to revoke letters when an inventory has not been timely filed and to disallow commissions, the Surrogate revoked the letters, disallowed any commissions, and granted letters to the successor executor.

In the Matter of Edgar M. Jones, deceased., 2007 NY Slip Op 50929U; 2007 N.Y. Misc. LEXIS 3246 (Dutchess Surr. Ct. May 7, 2007).

Save the Date

August 2-5, 2007 Elder Law Summer Meeting, Stoweflake Resort,
Stowe, Vermont
October 18-20, 2007 Elder Law Fall Meeting, Turning Stone Casino, Verona, NY
October 20, 2007 Advanced Institute, Turning StoneCasino, Verona, NY
January 29, 2008, Annual Meeting, Marriott Marquis, NYC
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.

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to Howard S. Krooks, hkrooks@elderlawassociates.com or Dean Bress, dsbress@yahoo.com