

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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RECENT COURT DECISIONS

ANNUAL ACCOUNTINGS FOR SUPPLEMENTAL NEEDS TRUSTS GOVERNED BY PROVISIONS OF THE TRUST AGREEMENT

The Second Department held that annual accountings of a corporate trustee of a Supplemental Needs Trust are governed by the provisions of the trust agreement, the SCPA and the EPTL. Where the provisions of the trust allow the trustee to take its commission and pay attorney's fees, the trustee may do so without prior court approval. *Matter of Hawwa A. Anonymous*, 2004 NY Slip Op 05789 (July 6, 2004).

POWER OF ATTORNEY MUST SPECIFICALLY AUTHORIZE GIFT GIVING

Where a power of attorney does not specifically contain a gift-giving provision, a gift to the agent "carries with it a presumption of impropriety and self-dealing." To overcome this presumption, the recipient of the gift must make "the clearest showing of intent" on the part of the principal. *Marszal v. Anderson*, AD3d (3d Dept. July 15, 2004)

TRUST PROPERTY IN A 1986 TRIGGER TRUST WHERE GRANTOR RETAINED A LIMITED POWER OF APPOINTMENT AND HAD NOT EXPRESSLY ELIMINATED HERSELF AS REMAINDER BENEFICIARY WAS DETERMINED NOT TO BE AN AVAILABLE RESOURCE

The Grantor of the subject trust established a trigger trust (prospectively outlawed by statute in 1992) retaining for herself the right to change the remainder beneficiaries. The Grantor eliminated her spouse and others, but did not eliminate herself as a potential remainder beneficiary. According to the Court of Appeals, the trust property was not an available resource. The court reasoned that a remainder comes into existence only after the death of the Grantor. In this instance, the Grantor could not be a remainder beneficiary according to both the law and the intent of the Grantor as expressed in the instrument. See *Matter of Martha Ferrugio*, 2004 N.Y. Lexis 2154, September 2, 2004.

LEGISLATIVE DEVELOPMENTS

GOVERNOR PATAKI SIGNS 2004-2005 BUDGET BILL. RESTRICTIVE MEDICAID ELIGIBILITY PROPOSALS NOT ADOPTED. MANY CHANGES MADE TO LONG-TERM CARE INSURANCE.

New York's recently enacted 2004-2005 budget included many changes to long term care insurance. The following is a summary of key provisions enacted:

(1) Taxpayers purchasing qualified long term care insurance policies will be allowed a credit of 20% of

their paid premiums (10% under prior law). Also, a tax credit which exceeds the tax for the year may be carried forward;

(2) a NYS coordinator chosen by the NYS Department of Health will implement long term care insurance centers to provide education and outreach for the general public by providing information in print and audio and visual advertisements, announcements, conferences, and presentations, a telephone hotline, counseling, referral services, workshops, and generally to provide assistance in choosing and obtaining long term care insurance; annual reports must be filed with the governor, the speaker of the assembly and the temporary president of the senate;

(3) it will be possible for people to purchase a long term care Partnership insurance policy having a duration of fewer than three years but not shorter than one year (a short-term policy); purchasing a short-term policy will allow a person to be able to protect an amount of nonexempt resources equal to the policy benefits purchased and exhausted; NY is providing the Commissioner of the Department of Health with authority to enter into reciprocal arrangements with other states which offer their own brand of a partnership policy (presumably if effected with, say, California, former NY residents moving to California would be able to obtain Medi-Cal in California-thus providing portability);

(4) seniors purchasing a qualified long term care insurance policy will be able to designate a third party to receive notices of nonpayment of premiums due or notices of cancellation for nonpayment of premiums;

(5) consumer protection is achieved by providing for a notice provision where the insurer must give at least 10 days notice for the insured to change his/her mind and obtain a return of the premium (30 days if the transaction is effected by mail); and

(6) the NYS Dept of Insurance is directed to study and develop investment product options which might combine aspects of the benefits which would normally be found in a disability, long term care and/or life insurance policy and to avoid lapsing on the failure to pay premiums.

At our 2004 Summer meeting, we discussed proposals that would have drastically changed Medicaid eligibility rules. The proposed changes, none of which were adopted in the final budget bill signed by Governor Pataki, included:

(1) A proposal to extend the look back period to 60 months on all transfers of resources;

(2) A proposal to apply penalty rules to community Medicaid applicants;

(3) A proposal to eliminate spousal refusal for community medicaid; and

(4) A proposal to start the ineligibility period for institutional care at the time of the filing of a Medicaid application.

In August 2004, the State's budget passed without implementing any of the foregoing proposals to the Medicaid eligibility rules.

LEGISLATURE ENACTS A NEW ASSISTED LIVING FACILITY LAW

In October of 2001, several members of the Elder Law Section met with staff members of the New York State Department of Health (DOH) in Albany to discuss Governor Pataki's then current proposal regarding assisted living legislation and the Section's proposed revisions to it.

On August 12, 2004, the New York State legislature enacted a new Article 46-A to the Public Health Law

which does, by and large, incorporate the suggestions made by our Section to the DOH staff. The newly enacted Article 46-A provides a comprehensive and intelligent definition of assisted living, which now encompasses the so-called "assistive living facilities" or "look-alikes" in addition to the formerly covered assisted living facilities.

The legislation requires every facility that purports to offer housing with on-site monitoring and personal care services in a home-like setting to be licensed and overseen by DOH. Each resident is ensured an individualized services plan (ISP) which must include input by the resident or the resident's representative and the resident's physician, among others. The legislation also provides standards for "enhanced assisted living" care and services to residents who require a higher level of care but who can be maintained safely at the assisted living facility. It also provides standards for any residence serving individuals with special needs such as dementia or cognitive impairment. Contracts for admission must contain certain minimum information. In addition, the statute addresses the issues of dispute resolution and quality assurance, including the minimum rights and responsibilities of residents.

AMENDMENTS TO ARTICLE 81 OF THE MENTAL HYGIENE LAW

Mental Hygiene Law Article 81 has been amended by Chapter 438 of the Laws of 2004 (approved September 14, 2004; effective December 13, 2004). The amendment enacts several substantive changes in the law, while also making many technical corrections.

Here are some highlights of the substantive changes:

- definition of life sustaining treatment in a new subdivision (j) of § 81.03
- commencement of a proceeding by the filing of a petition, with the 28 day period for hearing to begin with the signing of the order to show cause, § 81.07 (a), (b)(1)
- specific prohibition in § 81.07 (b)(3) against any court requirement for the attachment of medical information to the order to show cause as supporting papers
- changes in the notice and service provisions of § 81.07
- court evaluator appointments are mandated to be made from the OCA list, § 81.09 (b)(1)
- clarification of § 81.10 (a) to ensure an AIP's right to choose and engage counsel, but also to require appointed counsel to remain of record until the court determines that the engagement of counsel was free and independent
- the only temporary relief under § 81.23 that will require the appointment of counsel is that of temporary guardian, § 81.10 (c)(5)
- MHLS may be appointed court evaluator or counsel for AIPs in the community, § 81.09 (b)(1); 81.10 (e)
- the AIP is the only party who may demand a jury trial on the issue of incapacity, § 81.11 (f)
- courts only have 7 days to render decisions after hearing, § 81.13, and a judgment must be entered and served within 10 days of signature, § 81.16 (e) [timing for the commission is still confusing, see, § 81.13]
- more detail has been included in the powers of property management guardian, § 81.21
- major medical/dental treatment consent expressly limited by the exception for life sustaining treatment in § 81.29 (e), § 81.22 (a)(8)
- the purpose of a TRO or preliminary injunction is extended to include the health and safety of an AIP, § 81.23 (b)(1), (2)
- changes in bonding requirements and provision for depositing assets into court and including trustees for bonding, § 81.25
- reference to SCPA 2309 deleted from the compensation provisions of § 81.28 (a)
- court's power to vacate POA and HCP extended to permit the exercise of that power for breach of fiduciary power in addition to invalidity ab initio, § 81.29 (d)
- upon application for modification of powers, a court may dispense with the need for a hearing for good

cause, § 81.36 (c)

ELDER LAW POTPOURRI

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES COMMENCES LAWSUITS AGAINST REFUSING SPOUSES

Nassau County DSS has commenced several actions seeking to recover excess resources from community spouses. The amount of the excess resources has been as little as \$383,000 to as much as \$700,000. DSS does not appear to be willing to negotiate. We will keep you updated as to the status of these cases. If anyone has a similar case in Nassau or any other county, please let us know so we may keep our members informed.

FAIR HEARING DECISION ALLOWS INCREASE IN CSRA

An increased CSRA was permitted where the community spouse had \$468,779.13 of resources and \$736.88 of monthly income, which left the community spouse with a monthly income shortfall of \$1,582.12. The interest generated on the \$468,779.13 principal, at the rate of 3.2% per annum, yielded \$14,898.00 per annum or \$1,241.15 monthly, short of the \$1,582.12 shortfall. Thus the CS was able to keep all of the \$468,779.13 principal without an obligation to contribute, and without a risk of being sued to turn over excess resources. *Matter of Trapanese*, FH# 4150239M, September 17, 2004.

This case was handled by Elder Law Section member Michael Amoruso, Esq.

2005 MEDICARE PREMIUMS, DEDUCTIBLES, AND CO-PAYS ANNOUNCED

CMS has announced the 2005 Medicare deductibles, premiums, and co-pay amounts:

Medicare Hospital Insurance (Part A)

Deductible — \$912 per Benefit Period (\$876 in 2004)

Coinsurance — \$228 a day for the 61st through the 90th day (\$219 in 2004), per Benefit Period; \$456 a day for each "nonrenewable, lifetime reserve day" (\$438 in 2004)

Skilled Nursing Facility Coinsurance

\$114 a day for the 21st through the 100th day per Benefit Period (\$109.50 in 2004)

Hospital Insurance Premium

\$375 (\$343 in 2004)

Reduced Hospital Insurance Premium

\$206 (\$189 in 2004)

Medicare Medical Insurance (Part B)

Deductible — \$110 per year (\$100 in 2004)

Monthly Premium — \$78.20 (\$66.60 in 2004)

Source: U. S. Department of Health and Human Services (3 Sep 2004)
www.hhs.gov/news/press/2004pres/20040903a.html

CMS ALLOWS STATES TO REQUIRE EARLY REDEMPTION OF SAVINGS BONDS

In a memorandum dated February 2, 2004, from CMS to its Region I Administrator in Boston, CMS stated that states may require Medicaid applicants who own U.S. Savings bonds to request a waiver from the Department of the Treasury allowing them to cash out the bonds early, thus making their value an available resource. However, until the time the Treasury Department allows for early redemption, the bonds are not considered as a resource.

REVENUE RULING CLARIFIES GIFT AND ESTATE TAX ISSUES RELATING TO IRREVOCABLE GRANTOR TRUSTS

The Internal Revenue Service has ruled that a grantor can pay the annual income taxes owed by the trust without the payment being treated as an additional taxable gift to the beneficiaries of the trust. The Ruling also provides suggested wording for the trust. Rev. Rul. 2004-64 (July 6, 2004).

IRS PUBLISHES FINAL REGULATIONS FOR REDUCED MAXIMUM EXCLUSION FOR HOME SALES

Where a taxpayer has not been able to meet the two out of five year holding period for a principal residence, or has sold a principal residence in the most recent two years, a reduced exclusion is available to taxpayers who do not meet the conditions if the failure is "by reason of" a change in the place of employment, health, or unforeseen circumstances. If none of these provisions apply, if the taxpayer is able to show that based on facts and circumstances the primary reason is related to a change in employment, health, or unforeseen circumstances, the taxpayer may yet be entitled to the reduced maximum exclusion. See 69 FR 50302, TD 9152, August 16, 2004.

DEVELOPMENTS IN OTHER STATES

NJ ALLOWS MEDICAID PLANNING BY A GUARDIAN

After two lower courts refused to allow a guardian to sell a mother's residence and then gift a portion of the proceeds to children, the highest court in NJ reversed following the NY Court of Appeals rationale of *Shah*. The court stated that if a person with capacity could engage in Medicaid planning, then a person without capacity, acting through a guardian, should be able to do so as well. The Court went on to say that there is a presumption that a person would want the government to pay for care instead of relatives. In order for an application to be granted, petitioner must satisfy the court of the following:

- (1) the incapacitated person will not regain competency;
- (2) the assets remaining after the gifting is completed will be sufficient to take care of the needs of the incompetent person prior to becoming eligible for the Medicaid program;
- (3) the donees of the gifts are the natural objects of the donor's bounty;
- (4) the gifts will benefit the estate of the person by making assets available to beneficiaries that might otherwise be consumed by the cost of care; and
- (5) there is no substantial evidence that if the person were competent the person would not have made the gifts.

See www.judiciary.state.nj.us/opinions/supreme/a-70-02.pdf

UPCOMING EVENTS

The Elder Law Section Fall Meeting and Advanced Institute will be held on October 21-23, 2004 at the Hyatt Regency Hotel in Rochester, NY. In addition to reviewing the new long-term care insurance provisions of the 2004-2005 budget bill, the new Assisted Living Facility legislation, and the recently enacted Amendments to Article 81 of the Mental Hygiene Law, the meeting will include an Elder Law Update, a discussion of New York's experience regarding Medicaid Reform Proposals, Pooled Trusts, Fraud and Abuse issues, Estate and Spousal Recovery issues, Article 81 issues and pain treatment. 9.5 MCLE credit hours have been approved for this program.

The Advanced Institute will feature five roundtable sessions on Estate Planning and Tax Issues, Fair Hearings, Guardianship, Medicaid, Practice Management, Real Estate, Retirement Plans, Spousal Issues and Supplemental Needs Trusts. 5.5 MCLE credit hours have been approved for this segment . To view the brochure and registration information, go to www.nysba.org/ELSFall2004Meeting

SAVE THE DATE!

The Elder Law Section's Annual Meeting Program will be held on Tuesday, January 27, 2005 at the Marriott Marquis Hotel in New York City. The program will begin with an Elder Law Update and will include information on the Medicare Prescription Drug Law, Efforts to Improve Care and Resident's Rights at Nursing Homes and Assisted Living Facilities, and Hot Topics and Practice Tips. The program will finish with a panel discussion amongst the Department of Social Services and Elder Law Attorneys. More detailed information will be sent to you shortly.

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