

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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RECENT COURT DECISIONS

REFORMATION OF A TESTAMENTARY TRUST PERMITTED TO ESTABLISH A THIRD PARTY SUPPLEMENTAL NEEDS TRUST

An application was made to the Nassau County Surrogate to reform a testamentary trust (the “Trust”) set forth in a codicil to a will of the decedent (the “Will”). The Trust was created for a disabled son. The petitioner, a co-trustee of the Trust, was concerned that the disabled son’s medical expenses would result in an exhaustion of the Trust assets prior to the son’s death. It was not clear from the opinion why the son would not have been entitled to Medicaid benefits based on what appeared to be a fully discretionary third party trust. In any event, the petitioner proposed specific supplemental needs trust language for inclusion in the Trust. In response, the Surrogate indicated that a trust should not be reformed unless the reformation will carry out the intent of the testator. Based on the language in the Will, the Surrogate found that the requested reformation did not alter the decedent’s testamentary plan and was in the best interests of the beneficiary. The application was approved.

In the Matter of the Estate of Goldie Hyman, deceased, 2007 NY Slip Op 50265U; 2007 N.Y. Misc. LEXIS 402, February 16, 2007 (Nassau County Surr. Ct.).

APPELLATE DIVISION AFFIRMS ADMINISTRATIVE DECISION THAT ASSETS WERE GIFTED FOR LESS THAN FAIR MARKET VALUE PRODUCING A PENALTY PERIOD

The petitioner-wife of the Medicaid applicant was the guardian for the applicant. In that capacity, she gifted certain of the applicant’s property to a son resulting in a three month Medicaid penalty period. The petitioner first asserted that property of the applicant was transferred for full value. The appellate court determined that there was substantial evidence in the record to support a contrary conclusion. Next, the petitioner argued that the gift was made “exclusively for a purpose other than to qualify for medical assistance.” This, too, the court rejected owing to the absence of sufficient evidence in the record. Finally, the petitioner argued that somehow spousal refusal would protect the gift. The court, for good reason, rejected that argument as well considering it to be inapposite.

In the Matter of Gabrynowicz v. New York State Dept. of Health, 2007 NY Slip Op 01116, February 6, 2007 (Appellate Division, Second Department).

WITH RESPECT TO THE DRAFTING OF A WILL, WHEN DOES THE STATUTE OF LIMITATIONS BEGIN TO RUN IN CONNECTION WITH A MALPRACTICE ACTION?

A Will was executed in 2001. Allegedly, the Will was improperly drafted resulting in the payment of avoidable taxes. In 2005, a malpractice action was commenced against the attorney/draftsperson. Defendant moved to dismiss on the grounds of the running of the statute of limitations. The court ruled that an action must be commenced within three years of the accrual of the action. Citing a Court of Appeals decision which stated that the "...actionable injury occurs...when the malpractice was committed, not when the client discovered it." The court stated that if the "continuous representation" argument could have been made, the statute might have been tolled. Since continuous representation was not alleged, the dismissal was affirmed on appeal.

Lynne Iser v. Robert M. Kerrigan, 2005-09170, 2005-09171 (Index No. 05-375), 2007 NY Slip Op 1522; 2007 N.Y. App Div. LEXIS 2029 (Appellate Division, Second Department).

COURT AUTHORIZES SNT TRUSTEE TO PURCHASE A SUITABLE RESIDENCE FOR DISABLED BENEFICIARY

A guardian for a disabled 14 year-old sister applied to the Queens County Supreme Court for approval to purchase a residence for \$428,500 plus a van. The residence was needed because the disabled 14 year-old could not access a bedroom with her wheelchair and was required to reside in a living room which was incompatible with using a hospital bed.

The New York City Department of Human Resources Human Resources (DHR) objected to the expenditure of funds held in a supplemental needs trust for the benefit of the 14 year-old for the residence arguing (1) that the purchase of the residence was not in the best interests of the disabled person, (2) that it would substantially reduce trust income, and (3) that the people really receiving the benefit were family members living with the disabled beneficiary who were making no contribution towards the purchase of the residence.

The trust in question had about \$1.3 million yielding an annual income of about \$67,000. By making the expenditure, annual trust income would be reduced by about \$25,000. Furthermore, the cost to maintain the home would drain trust income by about \$23,000 a year. After a review of the costs and benefits of the proposed expenditures, the court determined that DHR's objections were arbitrary. The court stated: "It is unfathomable that DHR could believe that such an expense is unreasonable and unnecessary, and would require a young girl to live in deplorable conditions for the mere purpose of keeping the liquid assets in the Trust." It is equally clear that the fact that third parties may benefit indirectly from the expenditure does not made the

expenditure inappropriate when such an expenditure confers a substantial benefit on or for the disabled beneficiary.

Matter of Cooper, 2007 N.Y. Misc. LEXIS 391; 237 NYLJ 27 (Index No. 05-934)(Queens Co. Sup Ct. February 2, 2007).

COURT VACATES A STIPULATION AGREED TO BY A GAL

A holdover proceeding was commenced against a blind, mentally ill 69 year-old tenant incapable of defending his rights. A GAL was appointed to represent the disabled tenant. The GAL, without having met with the tenant or having visited the residence, entered into a stipulation with the plaintiff-landlord providing for a judgment of possession. The GAL, who knew that Adult Protective Service was about to commence an MHL Article 81 proceeding, nevertheless entered into the stipulation. Appellate Term vacated the stipulation, stating: "In the absence of any concrete plan in place to relocate the elderly infirm tenant, the one-sided stipulation terminating his 30 year rent stabilized tenancy with a 30-day stay of the warrant of eviction, should not be permitted to stand, especially considering that the parties were aware that the commencement of an Article 81 proceeding was imminent." Moreover, the appellate court referred to the court's continuing obligation to supervise the GAL's determinations. The court was clearly concerned that it appeared that the GAL took no steps to protect the ward.

BML Realty Group v Jack Samuels, 2007 NY Slip Op 27073, N.Y. Misc. LEXIS 444, Index No. 570131/06 (Appellate Term, 1st Dept.).

COMPACT UPDATE

S. 116 recently was reported out of the Senate Aging Committee and referred to the Senate Finance Committee. The Compact Working Group is continuing its efforts to educate public officials in Albany and various provider groups, along with AARP, regarding the inner workings of the Compact. A lobbying day is scheduled for May 15 at which time members of the Compact Working Group will meet with legislators in an effort to continue to educate policymakers about the Compact and field questions about how the program would work in New York state.

Howard S. Krooks and Vincent J. Russo, Co-Chairs, Compact Working Group

Save the Date

April 13-14, 2007 "Unprogram" Embassy Suites Hotel, NYC
August 2-5, 2007 Elder Law Summer Meeting, Stowe, Vermont
October 17-20, 2007 Elder Law Fall Meeting, Turning Stone Casino, Verona, NY
August 13-16, 2008 Elder Law Summer Meeting, Renaissance Harbor Place, Baltimore, MD
October 23-26, 2008 Elder Law Fall Meeting, Otesaga Resort, Cooperstown, NY

January 29, 2008, Annual Meeting, Marriotte Marquis, NYC

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