Elder Law eNews

A Production of the Elder Law Section Communications Committee

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LEGISLATION

PROPOSED AMENDMENTS TO THE MENTAL HYGIENE LAW

The Surrogate's Court Committee of the Trusts and Estates Section of the New York State Bar Association (T&E Section) proposed certain amendments to the Mental Hygiene Law which involved the process for transitioning from a Guardianship to an Estate when an incapacitated person dies. At about the same time Robert Kruger and Anthony Enea acting on behalf of the Committee for the Elderly and Disabled of the T&E Section developed similar legislative proposals. Anthony J. Enea and Robert Kruger, on behalf of the Guardianship and Fiduciary Committee of the Elder Law Section and the Committee for the Elderly and Disabled of the Trusts and Estates Section, have prepared what they consider to be a modification of the Surrogate's Court Committee's proposals. None of the proposals have been approved by either Executive Committee of the T&E Section or the Executive Committee of the Elder Law Section.

The goal of the proposed amendments is to expedite the process of transitioning from the Guardianship for a deceased incapacitated person to the Estate of the decedent. Some of the specific issues addressed by the amendments proposed by Messrs. Enea and Kruger relate to (a) the role of the Public Administrator in the transition process; (b) the contents of a proposed statement of death, and statement of assets and claims to be filed by the Guardian upon the demise of an incapacitated person; (c) the time frame for delivery of the guardianship assets to the personal representative of the estate; (d) a specified period of time within which the Guardian shall file his final report; and (e) the relief available to an interested person upon the failure of the Guardian to comply with the provisions of Section 81.45.

RECENT COURT DECISIONS

THE STATUS OF TOMECK

<u>Tomeck v. Saratoga Commissioner of Social Services</u>, Appellate Division, Third Department, decided March 9, 2006. See: http://www.courts.state.ny.us/reporter/3dseries/2006/2006_01683.htm.

In this case, the issue on appeal was whether the DOH properly allocated social security of an institutionalized spouse to the community spouse.

The answer to that question depends upon whether <u>Robbins v. DeBuono</u> was overruled by Washington v. Keffeler. See http://www.supremecourtus.gov/opinions/02pdf/01-1420.pdf

Robbins stands for the proposition that an allocation of the institutionalized spouse's social security to a community spouse is an impermissible "legal process" under Section 407 of the Social Security Act. The effect of denying the allocation means that the CSRA may be enhanced so as to produce more monthly

income sufficient to bring the community spouse's income up to the MMMNA.

Keffeler involved the use of social security benefits received by children to help pay for their foster care. Keffeler, according to DSS, requires some judicial intervention or other direct legal process. The Third Department was of the view that Keffeler did not overrule Robbins and that Keffeler simply involved the use of social security to pay for the cost of care of the recipient of those benefits rather an allocation of benefits of one person to another without the consent of the person whose benefits were being allocated.

The Third Department held that *Keffeler* did <u>not</u> overrule *Robbins* and, therefore, DOH improperly allocated social security income of the institutionalized spouse to the community spouse.

The case on behalf of the petitioners is being handled by former Section Chair, Louis W. Pierro, Esq. Lou has advised us that Saratoga County has moved for leave to appeal the substantive aspects of the Third Department decision to the Court of Appeals and filed its brief on June 30th, returnable July 17th. The AG's Amicus brief was filed and served on the same dates. Lou filed opposition papers and we are awaiting the Court of Appeals decision as to whether leave to appeal will be granted.

Recently, the federal district court in *Wojchowski v. Novello*, 2006 U.S. Dist. LEXIS 46108 (W.D.N.Y. July 7, 2006), held that *Robbins* no longer is controlling in light of *Keffeler* and dismissed a complaint seeking to prohibit the Department of Health from automatically allocating Social Security benefits from an institutionalized spouse to the community spouse in Fair Hearings to increase the Community Spouse Resource Allowance. The case was handled by Rene H. Reixach, who was counsel in the *Robbins* case. He has advised us that an appeal to the Second Circuit has been filed.

We will keep the Section posted as to future developments in these two cases.

HAS CALVANESE BEEN OVERRULED?

In May, 2006, the United States Supreme Court decided *Arkansas v. Ahlborn*. See http://www.supremecourtus.gov/opinions/05pdf/04-1506.pdf#search='arkansas v. ahlborn'.

A 19-year old Ms. Ahlborn was injured in an auto accident and sued her tortfeasors for medical costs, permanent injury, future medical costs, past and future pain and suffering, mental anguish, past loss of earnings and working time, and permanent impairment of the ability to earn future income, recovering an unallocated \$550,000. Arkansas' Department of Health Services (ADHS) paid \$215,645.30 for Ms. Ahlborn's care. ADHS sought to recover its expenditures from the recovery. Ahlborn refused, claiming that the recovery should be limited to that portion of the settlement representing medical care costs which concededly amounted to \$35,581.47.

Justice Stevens, writing for the Court, determined that the Arkansas statute purporting to allow a recovery beyond the medical expense recovered of \$35,581.47 conflicted with the federal statute in that the federal statute permitted recovery up to the amount of the recovery directly attributed to medical expenses incurred.

In light of the *Ahlborn* decision, one must question whether <u>Calvanese</u> (see attached) is good law in New York in that the Court of Appeals in <u>Calvanese</u> allowed recovery by DSS to the extent needed to recover its full expenditure regardless of the portion of the recovery related to medical expenses.

BURIAL RIGHTS LEGISLATION

Section Member Mickey Haggerty informed us that the new Burial Rights Legislation Bill was signed into law by Gov. Pataki on June 7, 2006 (See Chapter 76 of Laws of 2006). This amends Public Health Law §

4201 by providing that a decedent may, in writing, appoint an agent to carry out his or her wishes regarding the disposition of his or her remains. Absent such a written designation, it creates a hierarchy of individuals who shall have the authority to control and carry out those wishes. Most importantly, a domestic partner shall now have the same order of priority as a surviving spouse. This is one of a few areas of law where New York recognizes domestic partners as a distinct class of individuals with its own set of legal rights.

Prior to the enactment of this bill, there was no law that described or gave a rank order list of people to carry out the decedent's wishes concerning the disposition of his or her remains. This resulted in disputes over who had the right to carry out those wishes. This bill attempts to reduce or eliminate those disputes. The law takes effect on August 2, 2006.

To view a "marked-up" version of the final Bill, go to http://www.assembly.state.ny.us/ and search \$5917a.

COMPACT UPDATE

The New York State Compact for Long Term Care reached a major milestone on June 23, 2006 when the New York State Senate unanimously passed S3530-B, the revised piece of legislation that would create the first alternative means of financing long term care services since the Medicaid program was adopted in 1965.

Throughout the last few months, various roundtable discussions have been held in Albany to discuss Compact details with legislative staff, the home care and nursing home industry, members of the Department of Health and members of the long term care insurance industry.

It is anticipated that the companion bill introduced in the Assembly (A. 10634-a) will receive a great deal of attention in the next legislative session scheduled to begin on January 3rd, 2007.

NURSING HOME BROCHURE

The Long Term Care Community Coalition (LTCCC) publishes a report entitled: "Attorney Fact Sheet: Using Law & Regulation to Protect Nursing Home Residents When Their Government Fails Them." An attorney fact sheet and other materials may be downloaded for no charge at http://www.nursinghome411.org

PROGRAM UPDATES

August, 3-6, 2006, Elder Law Summer Meeting, Sheraton Harborside,

Portsmouth, N.H.

October 18-22, 2006 Elder Law Fall Meeting, Renaissance Westchester,

White Plains, NY

January 23, 2007 Elder Law Annual Meeting, Marriott Marquis Hotel,

New York City

April 12- 13, 2007 Elder Law "UnProgram", Location TBA

August 2-5, 2007 Elder Law Summer Meeting, Stoweflake Resort,

Stowe, Vermont

October 17-20, 2007 Elder Law Fall Meeting, Turning Stone Casino,

Verona, 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 email to Howie Krooks, HKrooks@ElderLawAssociates.com or Dean Bress, dbwest@yahoo.com