Elder Law eNews

A Production of the Elder Law Section Communications Committee
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Medicaid "Reform" Proposals Not Enacted in Governor Pataki's 2005-2006 Budget

On January 18, 2005, Governor Pataki reintroduced the draconian Medicaid reform proposals that were defeated in 2004. This year, however, the Governor has additional power in budget negotiations due to the decision in *Silver v. Pataki*, 2004 WL 2902398 (N.Y. 2004), which confirmed that the New York State budget is controlled by the Executive branch through the appropriations process. Unlike 2004, Governor Pataki has included the damaging Medicaid reforms contained in the 2005 Budget Bill in his 2005 Appropriations Bill. In light of *Silver v. Pataki*, this presents new challenges to the budget negotiations process.

The Elder Law Section's Initiative in Fall 2004

Anticipating the reintroduction of the Medicaid reform efforts in 2005, in June of 2004, Howard S. Krooks, Esq. (Section Chair) charged the Long Term Care Reform Committee to author a report that our Section could utilize as a springboard to fight the anticipated 2005 Medicaid Reforms. Under the leadership of Louis Pierro, Esq. and Robert Kurre, Esq. (and meticulous editing by Howard Angione, Esq.), the Long Term Care Reform Committee produced a top shelf report ("LTC Report") which is available to all of our members on the Elder Law Section's web page of the NYSBA website.

In particular, Chapter 6 of the LTC Report (the brainchild of Gail Holubinka and Louis Pierro, Esq.), is the New York State Bar Association's cost savings alternative to the Governor's Medicaid eligibility reforms. The proposal, aptly named the "New York State Compact" ("Compact"), is an agreement through which individuals can pledge 50% of their available resources (up to a maximum of $300,000) to privately pay for their long term care and then qualify for Medicaid while the remaining 50% of assets are protected from any future recovery. The Compact is a viable solution to bring real dollars into the Medicaid system and fills a void in New York State public policy. The 2004 Budget made asset protection through the purchase a New York State Partnership Long Term Care Insurance Policy a viable option for those individuals that qualify for such coverage. However, the Compact offers those that either cannot medically qualify for or financially afford such policies an alternative to impoverishment to achieve similar asset protection while getting the care they need. We encourage each of you to read the LTC Report and, in particular, the Compact in Chapter 6 by visiting the Elder Law Section's web page on the NYSBA website!

The Elder Law Section's Activities to Counter the Governor's 2005 Proposals

Immediately after the Governor released the 2005 Budget and Appropriation Bills on January 18, 2005, our Section's Chair (after unanimous approval from the Section's Executive Committee) charged Daniel Fish, Esq. (Section Chair-Elect) and Steven Stern, Esq., the Co-Chairs of the Lobbying Committee, with the task of leading our Section's efforts to defeat the Governor's proposals as was accomplished in 2004. In addition, the New York State Bar Association once again approved the hiring of Harold Iselin, Esq. from Greenberg Traurig LLP, the bar association's successful lobbyist in 2004, to assist our efforts in the

Legislature and the Governor's office.

Daniel Fish and Steven Stern convened the Lobbying Committee, which consists of Howard Krooks, Esq., Louis Pierro, Esq., Ami Longstreet, Esq., Howard Angione, Esq., Brian Tully, Esq., Ronald Fatoullah, Esq., Rene Reixach, Esq., Robert Kurre, Esq., Michael Amoruso, Esq., and Ronald Kennedy from the NYSBA. The Lobbying Committee has weekly teleconferences to discuss strategy and implementation of our Section's effort to educate the Legislature and the Governor's office that (1) the proposed cuts hurt our senior and disabled citizens, (2) most of the cuts require Federal waivers which are difficult to obtain, and (3) the Compact is a better way to address the Medicaid budget concerns and insures that our clients retain their dignity in contributing towards their long term care needs while avoiding total impoverishment.

On February 15, 2005, the Lobbying Committee members traveled to Albany to attend a "Lobbying Day" organized by the association's lobbyist, Harold Iselin. While in Albany, the Lobbying Committee utilized a two-pronged approach to reach and educate as many senators, assembly persons and staff about the Section's concerns and to offer the Compact as an alternative. The first group, Howard Krooks, Louis Pierro, Brian Tully and Gail Holubinka, gave a presentation to both the Assembly and Senate and their staff regarding the proposed changes and the better alternative represented by the Compact. The remainder of the Committee members in attendance met individually with selected Assembly persons, Senators and staff to discuss our clients' experiences with Medicaid and that the future may require them to contemplate a harsh choice of bankruptcy, institutionalization or divorce. Our Committee met with the following legislators and their staff:

1. Mary Ann Donnaruma
Deputy Director of Budget Studies
Assembly Ways & Means Committee

2. Honorable Marty Golden
NYS Senate

3. Honorable Dean Skelos
NYS Senate

4. Mr. Joseph Sorbero
Policy Analyst
Office of Senator Dean Skelos

5. Honorable Alexander B. Grannis
NYS Assembly
Legislative Office Building

6. Michael Krenrich, Esq.
Office of Senator Kenneth P. LaValle

7. Mr. Don Robbins
NYS Assembly Program & Counsel's Office

8. Honorable Kemp Hannon
NYS Senate

9. Ms. Sharon L. Bergin

Office of Assemblyman Richard Gottfried

Since the February 15th Lobbying Day, members of the Committee have privately met with the offices of Senator Nicholas Spano and Senator Dean Skelos. In addition, members of a working group consisting of Michael Amoruso, Howard Angione, Daniel Fish, Howard Krooks, Louis Pierro and Vincent Russo met with Senators and staff on April 12 to discuss S.3530, the Senate bill proposed on March 21, 2005 regarding the Compact proposal. The working group is continuing to work with the legislature to develop the Compact proposal into a viable alternative to the Medicaid program.

On Tuesday, April 12th, the Legislature and Governor completed work on this year's State budget. Although the Legislature had enacted a budget on March 31st, the Governor was threatening to veto large portions of the budget unless the Legislature agreed to compromises on several key issues. Because the Legislature eventually agreed to such compromises, they avoided vetoes. The net result of the budget agreement is that the Legislature did not enact the Governor's proposed changes to Medicaid eligibility. This year, the Governor proposed such changes as part of both appropriations bills and Article VII (language) bills. Because of a recent Court of Appeals decision, it was procedurally more complicated for the Legislature to reject the Governor's proposal. However, the Legislature developed a constitutionally sound approach and rejected all of the Governor's proposed cuts. The Legislature did enact the technical changes that the Governor proposed to the Partnership program. Thus, the State will not be enacting changes to eligibility or seeking a waiver.

RECENT COURT DECISIONS

THIRD DEPARTMENT UPHOLDS DSS DETERMINATION THAT APPLICANT IS INELIGIBLE FOR MEDICAID DUE TO PENALTY PERIOD RESULTING FROM A TRANSFER OF$250,000 FOR NO CONSIDERATION BY APPLICANT AND SPOUSE; THAT SPOUSE WAS NOT ESTRANGED; AND APPLICANT IS NOT ENTITLED TO A DISCOUNT OF CONVEYANCE OF HIS 50% INTEREST IN FARM TO CHILDREN

The Columbia County DSS determined that the applicant was not eligible to receive Medicaid because the applicant and his wife had transferred assets that exceeded $250,000 for no consideration. These transfers included a gift of $10,000 by the wife to each of the parties' 12 grandchildren, the transfer of $8,300 by the wife to the daughter in the form of a "loan", and the applicant's conveyance of his 50 percent interest in his farm to a son and daughter.

The Court found there was substantial evidence to show that the $8,300 transfer was not a loan, because there was no schedule for the payment of interest and the daughter had only repaid $500. Also, there was substantial evidence to support DSS's determination that the wife was not estranged. She expressed concern for his health, visited him, and never filed for divorce at the time that the transfers were made to the grandchildren. Lastly, the court found there was no provision under New York Social Services law for a fractional interest discount with respect to the farm property. While such a discount may be available for gift and estate tax purposes, no such concept was recognized in the Social Services Law of New York. *Matter of Campbell*, 787 N.Y.S.2d 491(2005).

SURROGATE GRANTED WILL PROPONENT'S SUMMARY JUDGMENT APPLICATION ON DUE EXECUTION OF WILL; IT DENIED SUMMARY JUDGMENT DEINIED AS TO WHETHER WILL PROPONENT USED UNDUE INFLUENCE OR FRAUD TO HAVE HER MOTHER EXECUTE WILL

Surrogate's Court found that while the proponent of will met her burden of proof to substantiate the due execution of the decedent's will, the objectants have presented sufficient proof to be entitled to their day in court on the issue of undue influence. The proponent had undertaken the confidential roles of assisting the decedent, who was suffering with cancer, with her finances and health care needs; proponent

monitored the decedent's conversations and would not allow others to assist her with her health care needs; although the proponent professed to have no knowledge about the decedent's will until after the decedent's death, she did appear to know that the will had been executed; her alleged lack of involvement or knowledge about the will might be viewed as being inconsistent with her complete involvement with the decedent's other affairs and finances; and proof was adduced to the effect that the proponent was successful in having the decedent's son removed from the decedent's apartment and that the decedent was never able to gain control over her finances even though she had expressed a desire to do so.

There are also controverted issues with respect to whether the proponent made false statements about the objectants. To establish fraud, the objectants must show that the proponent made a false statement that caused the decedent to execute a will that disposed of her property different from the disposition she would have made but for the false statement (In re Estate of Coniglio, 242 A.D.2d 901, 663 N.Y.S.2d 456 [1997]). Here, the objectants allege that false statements were made about them. The decedent's daughter-in-law asserts that she and the decedent's son were falsely accused of ignoring the decedent's pleas for help when she fell. The objectant daughter avers that she was falsely accused of forging the decedent's signature on checks. She also alleges that the proponent made several other false statements about her. *Estate of Olga Conti*, NYLJ, December 9, 2004, at page 30.

TESTAMENTARY TRUST WAS REFORMED INTO A THIRD PARTY SUPPLEMENTAL NEEDS TRUST BASED ON PRESUMED INTENT OF TESTATOR

A father's will created a trust for his disabled son. The trust provided for the payment of income to the son. As a result, the day treatment program had to be paid with the income from the trust instead of Medicaid. Citing *Matter of Escher*, 52 NY 2d 1006, the Governor's budget message at the time of the enactment of EPTL § 7-1.12, In applying *Matter of Ciraola*, NYLJ 2/9/01, the substituted judgment philosophy of Article 81 of the Mental Hygiene Law, *Matter of Shah*, 95 NY 2d 148, and disagreeing with the recent decision in *Matter of Rubin*, 4 Misc. 3d 634, 781 NYS2d 421, the Broome County Surrogate decided that presumed intent is something that a Surrogate could consider since that is the very effort that is made under *Matter of Shah* and Article 81. Since a court could substitute its reasoned judgment for what a disabled individual would have decided if able, the presumed intent of the testator could similarly be supposed from surrounding circumstances. Thus a reformation was permitted. There was no opposition by Broome County DSS. *Matter of Kamp*, 2005 NY Slip Op 25080; 2005 N.Y. LEXIS 363, Decided February 22, 2005.

TRUSTEE'S USE OF A STATUTORY POWER OF ATTORNEY IS EFFECTIVE TO CONVEY AUTHORITY

The First Department reversed the lower court in holding that a trustee is able to appoint an agent to act on its behalf to sign checks by the giving of a short form statutory power to the agent. *Burton v. PNC* 12 AD3d 264, 784 NYS2d 544 (Nov 18, 2004).

ELDER LAW POTPOURRI

On February 7, 2005, the Birnbaum Commission released a report proposing additional changes regarding guardianship oversight, intestate estate administration, the public administrator and counsel to the public administrator, and a review of the Part 36 Reforms. Some of the recommendations include the creation of offices of "court examiner specialists" within the court system to monitor court examiner performance, review work product, ensure all accountings are timely filed and target cases out of compliance.

The Commission would also like to bring the court examiner function in-house.

A copy of the report can be accessed at www.courts.state.ny.us/reports/fiduciary-2005.pdf.

Terri Schiavo: A Legal Analysis

The case of Theresa Schiavo is one of the most well publicized Right to Die cases in recent times. While a proper analysis of the case is too involved to do it justice within our e-News, we would like to provide our members with highlights from three of the cases that were decided last month. These cases provide a clear history of the case and the basis of its final disposition.

1. *IN RE: GUARDIANSHIP OF THERESA MARIE SCHIAVO*, 2005 Fla. App. LEXIS 3574, (CT OF APP Fla 2nd Dist March 16, 2005)

The Circuit Court for Pinellas County, Florida, ordered a hospice facility to cease supplying nutrition and hydration to an incapacitated person. Appellants, the parents of the incapacitated person (daughter), filed a motion for relief from judgment pursuant to Fla. R. Civ. P. 1.540(b)(4). The trial court denied the motion; the parents appealed and filed a motion for a stay pending appeal. Appellee guardian was also involved in the proceedings.

The trial court found that clear and convincing evidence established that the daughter, who had suffered a heart attack, was in a persistent vegetative state and that, if able to do so, would have elected to forego the use of a feeding tube. It ordered that nutrition and hydration no longer be provided. In response to that order, the state legislature passed an act pursuant to which the governor ordered a stay of the order. The Florida Supreme Court found the act to be unconstitutional.

A guardian appointed at the request of the governor opined that the daughter's movements were merely reflexive and that she was in a persistent vegetative state. The instant court rejected the parents' claim that the judgment was void for lack of jurisdiction. The trial court was empowered under Fla. Stat. ch. 765.401(3) to determine what the daughter would have decided in light of her persistent vegetative state, and the procedures followed did not violate her right to due process or privacy. The parents were allowed to present evidence as they were guardians and were allowed, contrary to precedent, to file successive and repetitive Fla. R. Civ. P. 1.540(b) motions, none of which had merit.

The order denying the motion is affirmed and the parents' motion for a stay is denied.

The Supreme Court of Florida has determined that the express right of privacy in Fla. Const. art. I, § 23, gives both competent and incompetent persons the right to forego life-prolonging procedures. This constitutional protection applies not only to persons who have the foresight and resources to prepare a living will, but also to those whose wishes have not been reduced to writing.

The Supreme Court of Florida has concluded that the decision to terminate artificial life supports is a decision that normally should be made in the patient-doctor-family relationship. However, the courts remain open to make these decisions under the Florida Constitution when family members cannot agree or when a guardian believes that it would be more appropriate for a neutral judge to make the decision.

When families cannot agree, the law has opened the doors of the Florida circuit courts to permit trial judges to serve as surrogates or proxies to make decisions about life-prolonging procedures. It is the trial judge's duty not to make the decision that the judge would make for himself or herself or for a loved one. Instead, the trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. Fla. Stat. ch. 765.401(3).

The judgment was entered by the trial court in February 2000 following an extensive trial. The trial court determined, based on clear and convincing evidence, that Theresa Schiavo was in a persistent vegetative state and that she herself would elect to forego further use of a feeding tube. This court affirmed that judgment. See In re: Guardianship of Schiavo, 780 So. 2d 176 (Fla. 2d DCA 2001) (Schiavo I).

As a result of an earlier motion for relief from judgment, we required the trial court to reconfirm that medical science offered no meaningful treatment for her condition. In re: Guardianship of: Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001) (Schiavo III). The trial court decided not only to reconfirm that issue but also to review its earlier decision that Mrs. Schiavo was in a persistent vegetative state. Following another extensive hearing at which many highly qualified physicians testified, the trial court denied the motion for relief from judgment. This court affirmed that decision. In re: Guardianship of Schiavo, 851 So. 2d 182 (Fla. 2d DCA 2003) (Schiavo IV).

The trial court's decision does not give Mrs. Schiavo's legal guardian the option of leaving the life-prolonging procedures in place. No matter who her guardian is, the guardian is required to obey the court order because the court, and not the guardian, has determined the decision that Mrs. Schiavo herself would make.

Following the exhaustion of all appellate review of both the final judgment that was entered in February 2000 and the order denying the subsequent motion for relief from judgment, the trial court ordered that, on October 15, 2003, the hospice facility must cease supplying nutrition and hydration through Mrs. Schiavo's feeding tube. The hospice facility obeyed this order. On October 21, 2003, the legislature enacted chapter 2003-418, and the Governor signed the act into law. Pursuant to this new act, the Governor ordered a stay, which both this court and the trial court honored. Thus, the hospice facility restored the supply of nutrition and hydration through the feeding tube. Thereafter, the supreme court unanimously held that chapter 2003-418 was unconstitutional as a violation of the separation of powers under the Florida Constitution. Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

Before chapter 2003-418 was held unconstitutional, the Governor requested the Chief Judge of the Sixth Judicial Circuit to appoint a special guardian ad litem for Mrs. Schiavo. Chief Judge David Demers honored that request and appointed a guardian ad litem. The guardian, Dr. Jay Wolfson, has degrees in both law and public health. He submitted a lengthy report to both the court and the Governor. In his summary, Dr. Wolfson stated, in part:

The [guardian ad litem] concludes that the trier of fact and the evidence that served as the basis for the decisions regarding Theresa Schiavo were firmly grounded within Florida statutory and case law, which clearly and unequivocally provide for the removal of artificial nutrition in cases of persistent vegetative states, where there is no advance directive, through substituted/proxy judgment of the guardian and/or the court as guardian, and with the use of evidence regarding the medical condition and the intent of the parties that was deemed, by the trier of fact to be clear and convincing.

Subsequently, the Schindlers filed a motion in the trial court, pursuant to Florida Rule of Civil Procedure 1.540(b)(4), for relief from the judgment, claiming that the trial court's February 2000 judgment is void. This is one of the exceptional grounds on which a judgment that is more than one year old may be challenged. This ground, however, is generally limited to circumstances in which the trial court enters a judgment when it lacks jurisdiction over the subject matter of the case or jurisdiction over the parties.

In this case, it is beyond any question that the trial court obtained lawful jurisdiction over the subject matter of this guardianship and the person of Mrs. Schiavo at the inception of the guardianship in 1990. Thus, it is doubtful that the Schindlers' most recent motion for relief from judgment contains even a facially sufficient claim.

In their brief, the Schindlers first argue that the judgment is void because the trial court, and not a

guardian, made the decision as to what Mrs. Schiavo would elect to do in light of her persistent vegetative state. Despite the well-established law authorizing this process as a method to fulfill the patient's right of privacy under the Florida Constitution, the Schindlers argue that this process provides insufficient due process and violates Mrs. Schiavo's right to privacy. The right of the trial judge to make this decision for Mrs. Schiavo, relying on clear and convincing evidence of the decision that she herself would have made, is a matter that the Schindlers raised in the first appeal. This court expressly rejected these arguments several years ago. See Schiavo I, 780 So. 2d at 179. [*9] Thus, these arguments are not only issues that would not render a judgment void, but they are also issues that have long been resolved in this case.

The Schindlers also argue that the judgment is void because Mrs. Schiavo was denied a full and fair opportunity to defend her rights in this case. As we have explained in the past, this is not a case where the trial court validated the guardian's decision for the ward without a full and independent inquiry. Instead, both Mr. Schiavo and the Schindlers were allowed to present evidence to the trial court as if each were her guardian. Id. The trial court then made its decision pursuant to law and based upon a heightened standard of proof. That decision has been subject to appeals and postjudgment scrutiny of all varieties, and it remains a valid judgment pursuant to the laws and the constitution of this state. Not only has Mrs. Schiavo's case been given due process, but few, if any, similar cases have ever been afforded this heightened level of process.

We note that the [HN4] case law generally allows a party to file only one motion for relief under rule 1.540(b). See Berman, supra P 540.5(b). Indeed, courts have taken the position [*10] that they lack authority "to entertain a second motion for relief from judgment which attempts to relitigate matters settled by a prior order denying relief." Steeprow Enters., Inc. v. Lennar Homes, Inc., 590 So. 2d 21, 23 (Fla. 4th DCA 1991) (citing Atlas v. City of Pembroke Pines, 441 So. 2d 652, 652 (Fla. 4th DCA 1983), 450 So. 2d 485 (Fla. 1984)); accord Mailcoat v. LaChappelle, 390 So. 2d 481, 482 (Fla. 4th DCA 1980). Because of the nature of this case, neither the trial court nor this court has enforced these general rules. The Schindlers have filed numerous motions, but they have failed to present any lawful basis for relief from judgment.

Dr. Wolfson, the guardian who was appointed at the request of the Governor, visited Mrs. Schiavo many times in 2003. He was unable to independently [*11] observe any "consistent, repetitive, intentional, reproducible interactive and aware activities." His report does not challenge the now well-established medical diagnosis that Mrs. Schiavo's movements are merely reflexive. As he explained: "This is the confusing thing for the lay person about persistent vegetative states."

2. *In the Matter of Theresa Schiavo*, 2005 U.S. Dist. LEXIS 4265,
(M.D. Fla March 22, 2005)

The parents' motion for a temporary restraining order was denied. In response to an order of defendant state court judge directing defendant husband/plenary guardian to discontinue nutrition and hydration for his incapacitated wife, the wife's parents, sued pursuant to an Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3 (March 21, 2005).

The court based its decision on the TRO analysis rather than the Act's constitutionality. That the wife would die without temporary injunctive relief was an irreparable injury that outweighed any harm a TRO could cause as well as any harm that could be caused by feeding tube reinsertion. The TRO would not be adverse to public interest. However, the parents failed to show a substantial likelihood of success on the merits. The contention that the presiding state court judge's dual and simultaneous role as judge and health-care surrogate denied the wife a fair and impartial trial ignored the judge's statutory role as judicial fact-finder and decision-maker. The state court judge was not acting as an advocate merely because his rulings were unfavorable to the parents' claim. Applying the Mathews due process balancing test, the instant court concluded the wife's life and liberty interests were adequately protected by the extensive state court process. Appointing another guardian-ad-litem could not have offered more protection. For the

same reasons, the equal protection claim also failed. The free exercise claims failed because the parents did not show the requisite state action.

The plain language of the Act for the relief of the parents of Theresa Marie Schiavo (Act) establishes jurisdiction in the federal court to determine de novo any claim of a violation of any right of Theresa Schiavo within the scope of the Act. The Act expressly confers standing to Ms. Schiavo's parents to bring any such claims.

In resolving a plaintiff's motion for temporary restraining order, the court is limited to a consideration of the constitutional and statutory deprivations alleged by the parents in the complaint and motion.

Florida's statutory scheme, set forth in Fla. Stat. ch. 765, contemplates a process for designation of a proxy in the absence of an executed advance directive and provides for judicial resolution of disputes arising concerning decisions made by the proxy. Fla. Stat. ch. 765.401(1). Where a decision by the proxy is challenged by the patient's other family members, it is appropriate for the parties to seek "expedited judicial intervention." Fla. Stat. ch. 765.105.

In Florida, where two suitable surrogate decision-makers cannot agree on the proper decision as to the continuation of life support, the guardian may invoke the trial court's jurisdiction to allow the trial court to serve as the surrogate decision-maker.

The differences between the choice made by a competent person to refuse medical treatment, and the choice made for an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.

In order to succeed on either a 42 U.S.C.S. § 2000-cc(a) claim or a First Amendment Free Exercise claim, plaintiffs must establish that the defendants were state actors. The fact that claims have adjudicated by a state court judge does not provide the requisite state action for purposes of the statute or the Fourteenth Amendment.

3. *In re: THERESA MARIA SCHIAVO*, 2005 U.S. App. LEXIS 4702
(11th Cir March 23, 2005)

Terri Schiavo's parents moved for a temporary restraining order (TRO) in the United States District Court for the Middle District of Florida, seeking to require reestablishment of nutrition and hydration to their incapacitated daughter. The district court denied the motion, and the parents appealed. The parents also petitioned the court of appeals to grant the same injunctive relief under the All Writs Act, 28 U.S.C.S. § 1651(a).

The parents' suit challenged an order by defendant state court judge directing removal of nutrition and hydration from the daughter. Congress enacted Pub. L. No. 109-3 to enable the parents to bring the federal court suit. The court of appeals found that the district court did not abuse its discretion in finding that the parents had failed to show a substantial case on the merits and were therefore not entitled to a TRO. The parents argued that Pub. L. No. 109-3 required that injunctive relief be granted in order to allow them to have a full trial on the merits of their claims, but that Act did not change the law concerning issuance of temporary or preliminary relief. In fact, Congress specifically rejected provisions that would have mandated the grant of a pretrial stay. The court of appeals refused relief under the All Writs Act, which was not available where the relief sought was in essence a preliminary injunction. The parents could not use the All Writs Act to circumvent the requirements for preliminary injunctions.

Although a court of appeals ordinarily does not have jurisdiction over appeals from orders granting or

denying temporary restraining orders, in circumstances when a grant or denial of a temporary restraining order might have a serious, perhaps irreparable, consequence, and can be effectually challenged only by immediate appeal, the court may exercise appellate jurisdiction. In such circumstances the court treats temporary restraining orders as equivalent to preliminary injunctions or final judgments, either of which are appealable. 28 U.S.C.S. § § 1291, 1292(a)(1).

There are four factors to be considered in determining whether temporary restraining or preliminary injunctive relief is to be granted, which are whether the movant has established: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered if the relief is not granted; (3) that the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) that entry of the relief would serve the public interest.

Requests for emergency injunctive relief are not uncommon in federal court and sometimes involve decisions affecting life and death. Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion. The parents with questionable claims will not meet the likelihood of success criterion.

A court of appeals reviews a district court's denial of temporary injunctive relief only for an abuse of discretion. This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect. Short of that, an abuse of discretion standard recognizes there is a range of choice within which the court of appeals will not reverse the district court even if the court of appeals might have reached a different decision.

The United States Court of Appeals for the Eleventh Circuit does not believe that the text of Pub. L. No. 109-3 limits or eliminates a court's power to grant temporary or preliminary relief. Exactly the contrary. The Eleventh Circuit's position is that the Act, which does not mention that subject, and which was amended to remove a provision that would have changed the law, does not affect it at all.

To interpret Pub. L. No. 109-3 as requiring that temporary or preliminary relief be entered regardless of whether it is warranted under pre-existing law would go beyond reading into the Act a provision that is not there. It would require a court to read into the Act a provision that Congress deliberately removed in order to clarify that pre-existing law did govern this issue.

Upcoming Events

April 28, 2005 — Spring Advanced Institute, JFK Radisson Hotel
April 28, 2005 — Executive Committee Meeting, JFK Radisson Hotel
May 5, 2005 — Mitchell Rabbino Decision Making Day Programs
August 11-14 2005 — Summer Meeting - Boston Marriott Longwharf
October 19-22, 2005 — Fall Meeting - Gideon Putnam Hotel, Saratoga Springs
January 24, 2006 — Annual Meeting - Marriott Marquis Hotel, New York City
August 2-5, 2006 — Summer Meeting - Sheraton Harborside Hotel, Portsmouth, N.H.
October 18-22, 2006 — Fall Meeting - Westchester Renaissance Hotel
August 1-5, 2007 — Summer Meeting - Stoweflake Resort & Conf. Center, Stowe, VT.
October 17-21, 2007 — Fall Meeting - Montauk Yacht Club, Montauk, 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 Steven Rondos, raiarondos@aol.com or Dean Bress, dsbress@yahoo.com