Elder Law **eNews**

A Production of the Elder Law Section Communications Committee

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October/November 2009

Update on New Power of Attorney Statute

Commencing with the effective date of the new Power of Attorney statute in New York State, Section Chair Mike Amoruso appointed a Power of Attorney Task Force to begin identifying issues, concerns and approaches being taken with respect to the newly introduced Statutory Short Form Power of Attorney. Chairing this Task Force is immediate Past Chair, Tim Casserly. The other members of the Task Force are David Goldfarb, Amy O'Connor, Lee Hoffman, Ami Longstreet and Richard Weinblatt. The initial work of the Task Force has already provided Section Members with a 90 minute webcast broadcast across the state to over 240 practitioners which addressed the form itself and some of the issues that have arisen in its first month of implementation.

The Task Force continues to review and collect commonly asked questions from Section Members and from posting on several listservs. From time to time, answers and various approaches being taken by other attorneys shall be posted for members.

In addition to working with Section Members regarding the power of attorney, the Task Force through Mike Amoruso and Tim Casserly is also serving on a Working Group formed by NYSBA president Michael Getnick to analyze the impact of the new General Obligations Law Article 5 Title 15. It is the stated purpose of the Working Group to identify issues related to unintended consequences of the new law that detrimentally impact our practices and our clients. We are pleased to have Section input on this committee since the Working Group shall ultimately submit its report and recommendations to the Executive Committee and/or House of Delegates of the NYSBA with the hope that the legislature will ultimately remedy and/or correct such consequences."

Court Appoints a Monitor Under M. H. L. §81.16(b) Instead of a Guardian

In an Article 81 proceeding, the New York Supreme Court, Cortland County, appointed the Court Evaluator as a "monitor" to oversee the financial transactions of the Alleged Incapacitated Person (AIP), as a dispositional alternative to appointing a guardian.

In Matter of John D., the AIP suffered from a bout of hypomania, which caused him to engage in "irrational and excessive spending." At the hearing, he testified as to his recovery from the illness; however, he acknowledged that there was a 30 per cent chance he would relapse. The Court found that he was not presently incapacitated and agreed with the AIP that a guardian was not needed; however, because the AIP was in the midst of a divorce action with his wife and a relapse could have an adverse effect on the equitable distribution of property in the divorce action, the Court recommended a protective arrangement pursuant to MHL §81.16(b).

The Court appointed the Court Evaluator, an attorney, to serve as monitor with the following duties: 1) to receive and review copies of all financial statements and records of John D., and to speak with any employees of financial institutions where the AIP's assets were being held; 2) to receive and review all medical records of John D. and to speak with his physicians, psychologists and medical providers; and 3) to review and approve or disapprove any financial transaction in excess of $50,000. The protective arrangement was set for a period of one year, and the monitor was authorized to apply for extensions to

the Court.

Matter of John D., Supreme Court, Cortland County, 2009 NY SLIP OP 29368 (August 29, 2009).

Guardianship Court Denies Spousal Transfer of Medical Malpractice Proceeds; Funds to be Used for the "Continuing Care and Maintenance" of the IP

In an Article 81 proceeding, the Supreme Court, Nassau County, denied the request of co-guardians, the spouse and son of the Incapacitated Person (IP), to transfer a portion of a medical malpractice settlement to his spouse. The court instead insisted that the bulk of the funds be used for the IP's benefit, and suggested that the co-guardians consider the use of a Supplemental Needs Trust to preserve the IP's assets inasmuch as the IP was in receipt of home care Medicaid benefits.

The IP became permanently incapacitated when he suffered a stroke during a routine cardiac catheterization. The spouse and son, with great attentiveness, were able bring the IP home after several years in rehabilitative facilities. Once he was able to return to the community, he required full-time home health care. The co-guardians initially applied under MHL §81.21 to transfer the familial assets in the IP's name to the spouse for the purpose of Medicaid planning. The Court considered the care and support provided by the spouse, the IP's financial support of her during her lifetime, their long-term marriage, and approved the transfer.

Subsequently, the co-guardians successfully negotiated a $5 million settlement of a medical malpractice action. The settlement included a $1 million payment to the spouse for loss of consortium, $316,581 to pay unpaid bills to a nursing home and home health provider, with the balance, after attorney's fees and costs, of approximately $2.9 million to the co-guardians. The co-guardians sought to reimburse themselves for out of pocket expenses, including legal fees for special needs and business matters, to retain $800,000 in the guardian account, and then to transfer the balance to the spouse (which relief was denied).

The Court generally allowed the out-of-pocket reimbursements; however, it denied the legal fees without prejudice, directing that the fees be reviewed by the Court Examiner to determine which fees related to the guardianship and which related to business matters. With respect to the spousal transfer, the Court allowed for an amount to be set aside for care of their infant; but the Court declined to allow further transfers, saying that the funds should be treated differently from the marital assets, and should be reserved for the care of the IP.

In Matter of David J.Z. v. Emil Z., Supreme Court, Nassau County, Index Number 277771-I-04 (August 13, 2009).

Kings County Surrogate Holds Annual Accounts Not Necessary for Limited Asset Supplemental Needs Trust

In this case, fees were being paid annually to the SNT trustee for the preparation and filing of the annual account, as required pursuant to court order since March 30, 1998. However, the court noted the following in concluding that the SNT trustee need no longer file an annual account:

> There was little trust principal remaining and this amount would continue to be depleted on the cost of legal fees each year an account was filed,

There are safeguards in place to protect the lifetime beneficiary of the SNT:

Trustee must give notice to the Department of Social Services in advance of certain transactions (citing 18 NYCRR Section 360-4.5)

Trustee is required to post a bond

Surrogate's Court has authority to compel a trustee to account at any time and an interested party may petition for same.

Matter of Guardianship and Supplemental Needs Trust of Maria M., NYLJ, September 18, 2009, page 35, column 2.

Kings County Surrogate Denies Article 17-A Guardianship Appointment, Concluding That Such Relief Would be Excessive Given the Nature of Article 17-A Appointments

This case contains an excellent summary of the important distinctions between guardianship proceedings commenced under MHL Article 81 and those brought under SCPA Article 17-A. It considers the following question: to what extent do the shortcomings of SCPA Article 17-A require that it be narrowly construed where mental illness, as well as mental retardation or developmental disability, may be the reason a guardian is required.

Proceeding for the Appointment of a Guardian for Chaim A.K. Pursuant to SCPA Article 17-A (New York Surrogate's Court, New York County, NYLJ, Vol. 242, Monday, September 21, 2009)

4th Department Rejects Personal Care Contracts in Nursing Home Setting Due to Drafting Errors (No Refund Provision - Non-Duplicative Services in Contract)

In a matter involving personal service agreements, five petitioners brought an Article 78 proceeding challenging determinations by the Oneida County and Herkimer County Department of Social Services (DSS). Those determinations denied Medicaid benefits to applicants who had executed personal service agreements while residing in a nursing home. In each case, DSS found there had been a transfer of assets for less than fair market value upon execution of the contract.

This decision provides guidance to practitioners drafting personal service agreements. The Court looked at whether the contract included a provision providing for an estate refund upon the death of the Medicaid applicant. The absence of language providing a refund was indicia that the transfer of assets was for less than fair market value because no refund would be provided to the estate of the Medicaid applicant were he or she to die prior to his/her life expectancy.

The Court also took issue with four of the five personal service agreements that used language providing services on an "as needed" basis. These contracts lacked specificity with respect to the amount of hours provided by the caretaker. The court reasoned that because there was no language providing for services "at least X hours per week", there is no guarantee that services will be rendered. The Medicaid applicants "cannot demonstrate that the transfer of assets for prospective services was for fair market value," because the services "may or may not be rendered." This, in conjunction with the absence of language requiring the caregiver to provide a refund to the Medicaid applicant's estate in the event of death prior to his/her life expectancy period, allows the caregiver a potential windfall if the Medicaid applicant in fact predeceases his/her life expectancy.

Finally, the court noted that caregiver service logs identified non-compensable duplicative services from compensable non-duplicative services. The court cited 10 NYCRR Sections 415.1 – 415.27 to identify duplicative services being provided in a nursing home.

The matter was remanded to DSS in each case to determine Medicaid eligibility from the date of execution of the personal service agreement and a recalculation of the penalty period (specifically, to reduce the penalty period by the value of any non-duplicative services).

Matter of Barbato v. New York State, 711 TP 08-02216, (4th Dept 8 -21-2009), 2009 NY Slip Op 06283.

Save the Date

Please note the following upcoming Section meetings:
January 26, 2010, Elder Law Annual Meeting, **The New York Hilton Hotel**, New York City
August 5-8, Elder Law Summer Meeting, **Ritz Carlton Hotel**, Philadelphia
October 28-30, Elder Law Fall Meeting, **Renaissance Westchester Hotel**, White Plains

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 either Howard S. Krooks, hkrooks@elderlawassociates.com, Antonia J. Martinez, elderlawtimes@yahoo.com or Deepankar Mukerji, dmukerji@kblaw.com