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MARCH 2010

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N.Y. May Recover From Estate of 'Just Say No' Community Spouse Only Up to Spouse's Excess Resources

A New York appeals court rules that the estate of the husband of a Medicaid recipient must repay the state for her care, but only up to the amount of assets the husband possessed above the Community Spouse Protected Amount and income he received above the Minimum Monthly Needs Allowance while his wife was on Medicaid. The court also determines that the estate must pay the state's claim without first paying a $15,000 bequest to the couple's adult son with disabilities. In The Matter of Leon Schneider (N.Y. App. Div., 2 Dept., 2010, Feb. 9, 2010).

Zeena Schneider entered a nursing home in June 1996, and began receiving Medicaid benefits. At the time of Mrs. Schneider's Medicaid application, the assets of her husband, Leon, were $268,048 over the community spouse resource allowance (CSRA), and his income exceeded the minimum monthly maintenance needs allowance (MMMNA) by $157.80 a month. Mr. Schneider executed a declaration refusing to make his resources available for his wife's care, and, using a durable power of attorney, he assigned his wife's right to seek support to the state. Mr. Schneider died in 2002, and Mrs. Schneider died in 2003, at which time the Nassau County Department of Social Services (DSS) filed a claim against Mr. Schneider's estate to recoup $386,382.77 in benefits provided to Mrs. Schneider.

The Surrogate's Court upheld DSS's claim but reduced it by $15,000, which represented a bequest to the couple's son with disabilities. The estate appealed, arguing that DSS was not entitled to recover the funds from Mr. Schneider's estate and, in the alternative, that its claim should be reduced. DSS asserted that Mr. Schneider was a "responsible relative" who had sufficient resources to pay for his wife's care, and so DSS was entitled to recover from his estate.

The Supreme Court of New York, Appellate Division, modifies the Surrogate Court's decision, reducing DSS's claim from $386,382.77 to $279,883 but eliminating the bequest to the couple's child with disabilities. The court determines that the state "may recoup benefits paid only to the extent that [Mr. Schneider], as a responsible relative, had 'available resources'. Accordingly, DSS may recover only the excess resources and the 75 monthly contributions it made to cover those of [Mrs. Schneider's] medical expenses for which [Mr. Schneider] was responsible." However, the court also finds that "the limitation on recoveries from a Medicaid recipient's estate where the recipient is survived by a permanently disabled child is inapplicable here, where the DSS does not seek recovery from the estate of the institutionalized spouse . . . but rather, seeks recovery from the estate of the community spouse

Editor's Note: This may be the other shoe to drop. Under "spousal refusal," a technique made much more difficult to use since the 2005 DRA, there has always been a question as to how aggressive a State might be in seeking recovery under the spousal support assignment. This case appears to answer that question for New York—very aggressive. This technique was used in Connecticut only sparingly in the early 2000's and this case will likely not have much of an impact here.

The Top 10 Elder Law Court Rulings of 2009

Below, in chronological order, are the top 10 elder law decisions for the past year.

1. State That Has Not Expanded Definition of Estate May Still Recover Non-Probate Asset

A Missouri appeals court finds that the state may use an accounting statute to recover Medicaid benefits from a decedent's estate even though the only asset is a non-probate asset and Missouri has not expanded its definition of estate to include non-probate assets. In Re Estate of Jones (Mo. Ct. App., W.D., No. 69310, Jan. 13, 2009).

2. Annuity Purchased to Benefit Community Spouse Is Available Resource

A New Jersey appeals court holds that under the Deficit Reduction Act of 2005 (DRA) a state may consider the value of an annuity purchased for the sole benefit of the community spouse in determining whether the Medicaid applicant is eligible. N.M. v. Div. Medical Assistance and Health Servs. (N.J. Sup. Ct., App. Div., No. A-0828-07T1, Feb. 26, 2009).

3. Non-Saleable Promissory Note Is Improper Transfer

The Ohio Court of Appeals finds that a non-saleable promissory note is a prohibited asset transfer for Medicaid eligibility purposes because the interest was deferred and it wasn't clear the note barred cancellation upon the loaner's death. Brown v. Ohio Dept. of Job & Family Servs. (Ohio Ct. App., 8th Dist., No. 92008, March 12, 2009).

4. Trust Is an Available Resource Despite Discretionary Language

The Minnesota Court of Appeals finds that a trust's principal and income are both available resources for Medicaid purposes even though the trust's language requires only payments of income to the beneficiary and gives discretion to the trustee to distribute principal. In The Matter of the Stephanie L. Wilcox Trust (Minn. Ct. App., No. A08-1458, May 19, 2009).

5. Property Owned in Joint Tenancy Falls Under Estate Recovery Rules

A Minnesota appeals court rules that the state may assert an estate recovery claim against property that was owned in joint tenancy at the time of a Medicaid recipient's death and that flowed into her surviving spouse's estate. In re the Estate of Grote (Minn. Ct. App., No. A08-1691, June 2, 2009).

6. Irrevocable Trust Forbidding Distribution of Corpus Is Still Countable by Medicaid

The Massachusetts appeals court finds that although an irrevocable, income-only trust expressly prohibits distributions of principal, other provisions in the trust could conceivably permit the trustees to invade trust assets, and thus the trust is countable for Medicaid purposes. Doherty v. Director of the Office of Medicaid (Mass. App. Ct., Essex, No. 08-P-939, June 18, 2009).

7. Property of Trust That Bars Distributions That Interfere With Medicaid Eligibility Is Available Asset

An Illinois appeals court finds that a trust that prevented the trustee from making distributions if it would interfere with public assistance is an available asset for Medicaid eligibility purposes. Vincent v. Dept. of Human Services (Ill. Ct. App., 3rd Dist., No. 3-08-0096, June 18, 2009.

8. Community Spouse's Post-DRA Annuity Purchase Is Not an Improper Transfer

An Ohio appeals court holds that the purchase of a post-DRA annuity by a community spouse is not an improper transfer of assets. Vieth v. Ohio Dept. of Job & Family Services (Ohio Ct. App., 10th Dist., No. 08AP-635, July 30, 2009).

9. 10th Circuit Reiterates: States Need Not Exempt (d)(4) Trusts From Asset Calculations

Confirming an earlier decision, the 10th Circuit Court of Appeals rules that Congress left states free to count (d)(4)(A) and (d)(4)(C) trusts as available resources for Medicaid purposes. Hobbs v. Zenderman (10th Cir., No. 08-2099, Sept. 1, 2009).

10. Annuity Purchase by Community Spouse Upheld in Federal Appeals Court Decision

In a much-anticipated decision, the Third Circuit Court of Appeals affirms a U.S. district court ruling allowing a community spouse to purchase a DRA-compliant annuity to protect savings from the costs of her husband's nursing home care. Weatherbee v. Richman (3d Cir., No. 09-1399, Nov. 12, 2009).

Nursing Home Resident May Not Transfer Assets Beyond the CSRA to Spouse

A U.S. district court holds that under Medicaid law, an institutionalized spouse may not transfer assets beyond the CSRA (currently equal to $109,560) to a community spouse after the Medicaid recipient's eligibility has been determined. Burkholder v. Lumpkin (U.S. Dist. Ct., N.D. Ohio, Feb. 9, 2010).

Rex Burkholder was a Medicaid recipient who lived in a nursing home. He received an inheritance of more than $130,000 from his mother (real estate and an annuity payment) and immediately transferred the assets to his wife, Linda. Mrs. Burkholder sold the real estate and used the proceeds and the annuity payment to pay off her home and car and to remodel her home. Because of the transfer, the state suspended Medicaid payments to the nursing home pending recoupment of the transferred funds.

Mr. Burkholder filed a claim to enjoin the state from suspending payments to the nursing home. He argued that 42 U.S.C. § 1396p(c)(2)(B)(i) allows an institutionalized spouse to transfer assets to a community spouse for the community spouse's "sole benefit." The state asked for summary judgment, arguing that under 42 U.S.C. § 1396r-5(f)(1), Mr. Burkholder could only transfer up to the amount of the community spouse resource allowance (CSRA).

The U.S. District Court for the Northern District of Ohio grants summary judgment to the state, holding that an institutionalized spouse may not transfer assets beyond the CSRA to a community spouse. The court finds that "§ 1396r-5(f) supersedes § 1396p(c)(2) where, as here, the transfer of assets from the institutionalized spouse to the community spouse occurs after the initial eligibility determination."

Nursing Homes Sue State for Additional Reimbursements

Cash-strapped nursing homes are suing Gov. M. Jodi Rell in federal court in pursuit of more Medicaid dollars, a dramatic step that seeks to significantly change the way the homes are funded. The lawsuit, filed Thursday, January 28, 2010 by the Connecticut Association of Health Care Facilities, charges that the state's system of paying for nursing-home care violates federal law and underfunds the homes by more than $100 million yearly. The association represents more than 100 homes with at least 14,000 patients. Lobbyists for the nursing homes have complained at the state Capitol for a decade or more about small annual increases in Medicaid payments

from the state — and no increase in some years — as the homes struggle to care for Connecticut's frail elderly. Matthew Barrett, the association's executive director, said the lawsuit is needed to stabilize a financially unstable industry. "In the current situation, there is a fear that homes would close and residents would have to be transferred to other facilities," Barrett said. "Nursing homes will have to cut costs, but the homes have been cutting costs for years. ... The quality of care could be jeopardized." Due in part to the low Medicaid reimbursement rates, 22 nursing homes have closed since 2002, according to state statistics. In 2009, four homes closed, while seven were in bankruptcy and 10 were placed under state receivership, state and nursing-home officials said.

Editor's Note: The number of Medicaid residents in Connecticut nursing homes is about 69%, compared to a national average of about 48%. Why there are so many more Medicaid recipients in Connecticut nursing homes than in other states is a matter of conjecture. Although closing nursing homes is one way to help close the State's growing fiscal deficit by reducing its Medicaid expenditures, one would hope that this is not the State's hidden agenda.