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ESTATE PLANNING, PROBATE & ELDER LAW

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JULY 2010

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Another Annuity Victory for the Community Spouse

A Missouri appeals court holds that the income from a community spouse's annuity is not an available resource for the purpose of determining the institutionalized spouse's Medicaid eligibility. J.P. v. Missouri State Family Support Div. (Mo. Ct. App., No. WD 70994, April 20, 2010).

Several married individuals applied for Medicaid. Each applicant had a spouse with an irrevocable, actuarially sound annuity that paid out in equal payments. Missouri denied the applicants' eligibility, finding that the income from the community spouses' annuities was an available resource. The trial court agreed with the state, holding that a state law requiring an annuity to name the state as the primary beneficiary in order to be excluded from resource calculations meant the institutionalized spouse had to be the recipient of the income stream. The couples appealed.

The Missouri Court of Appeals reverses, holding that the income from a community spouse's annuity is not an available resource for the purpose of determining Medicaid eligibility. The court finds that under federal Medicaid law the community spouse's income is not deemed available to the institutionalized spouse and the requirement under state law that the state be named a primary beneficiary means only that the annuity could not pay another heir in the event of the community spouse's death.

Editor's Note: Currently in Connecticut our law firm of CzepigaDalyDillman has an identical case pending in federal court. This decision bodes well, of course, for what is a case of first impression for the Connecticut District Court. Stay tuned!

Medicaid Recipient with Newly Discovered Assets Must Repay Benefits

A North Carolina appeals court finds that a Medicaid recipient whose family discovered that she owned insurance policies after she had been receiving Medicaid benefits for several years must repay the benefits already paid on her behalf. Cloninger v. N.C. Dept. of Health (N.C. Ct. App., No. COA09-970, April 6, 2010). Ella Mae Cloninger suffered from Alzheimer's disease and her children had power of attorney over her. Mrs. Cloninger entered a nursing home in May 2000 and began receiving Medicaid benefits. In 2005, the children discovered that Mrs. Cloninger had $330,685.18 in insurance policies. The children cashed out the policies and deposited the money in Mrs. Cloninger's bank account.

After receiving notice of the insurance policies, the state terminated Mrs. Cloninger's Medicaid benefits and informed the children that the Medicaid funds already spent on Mrs. Cloninger would be treated as an overpayment in the amount of $142,366.44. The trial court agreed and held that Mrs. Cloninger was liable for the repayment of all Medicaid benefits paid on her behalf. The children appealed, arguing that because they were unaware of the insurance benefits, they were not an "available" resource.

The North Carolina Court of Appeals affirms, holding that because Mrs. Cloninger owned the insurance policies at the time she applied for Medicaid, she was ineligible for benefits. According to the court, an asset need not be "known" in order to be an available resource. The court finds that because Mrs. Cloninger received Medicaid benefits when she was ineligible, she is required to repay those benefits.

Editor's Note: Why did the children contest this? Did they expect their mother to die and they would be able to keep the $330,685.18 they deposited into their mother's account? Did they plan to make gifts or to somehow engage in asset protection planning? What would be the case if the policies had cash value of $15,000 or so and the children signed the admission agreement as responsible party? Would the State recoup from the next Medicaid check due the facility the previously paid benefits and would the facility then look to the children for the rest? All because of an unknown asset?

Transfer Penalty Imposed on Lump-Sum Care Agreement

Guiseppe and Donata wanted to protect their home from a Medicaid lien should they ever need nursing home care so they conveyed their home to their daughter, Bianca. On the same date, Bianca, her siblings and her parents entered into an agreement providing that after Guiseppe and Donata died, Bianca would sell the house and split the proceeds equally with her three siblings; the agreement provided that it could only be modified in writing by all of the parties. The parents then executed Wills leaving their remaining estate in equal shares to their four children. After Donata died, Guiseppe, Bianca and one of the daughters executed an amendment to the agreement purporting to change the agreement so that Bianca received 60% of the sale proceeds and one daughter received 40% of the proceeds. Following Guiseppe's death, the other daughters sought to enforce the original agreement. Bianca argued the original agreement was unenforceable because there was no consideration. The trial court and the court of appeals disagreed. Bianca's promise to take title and distribute the proceeds after her parents death benefitted her parents sufficiently to constitute adequate consideration. See Cascio v. D'Arcangelo, 2010 Mass App. Unpub. LEXIS 346 (March 30, 2010)

Elder Proceeds to Trial on Breach of Contract Claim Against Delinquent Caregiver

Holding that actions arising in a loving relationship may also be protected under the rules of contract, a Massachusetts appeals court allows an elder to proceed to trial in an action alleging that payments she made to her nephew were not gifts but were made in consideration for his providing her with a place to live for the remainder of her life. Bryant v. Cribbie (Mass. App. Ct., No. 09-P-1421, March 25, 2010).

Hannah Bryant made two payments totaling $217,550 to her nephew, Mark Cribbie, and his wife so that the couple could purchase a larger home. Ms. Bryant alleged that in exchange for making the payments, the Cribbies promised her that she could live with them for the rest of her life. The Cribbies used the funds to purchase their new home, but they did not let Ms. Bryant live with them. Ms. Bryant sued the Cribbies for breach of contract.

Both parties moved for summary judgment and the trial court granted the Cribbies' motion, citing two letters that Ms. Bryant wrote to the Cribbies' mortgage company stating that the funds were "a gift and it is not expected to be re-paid to me." Ms. Bryant appealed, arguing that the trial court erred in granting summary judgment because there was enough evidence for a fact finder to determine that a contract existed between her and her nephew.

The Appeals Court of Massachusetts vacates the judgment, finding that "[a]ctions arising from a loving relationship and financial considerations are not mutually exclusive. That actions may arise in a loving relationship and also be protected under the rules of contract is well-established." In regards to the letters, the court explains that "[a] fact finder could determine that both letters were executed well after the time the parties came to their understanding and could infer from the circumstances of the writings as well as the content of the letters that Bryant was not expecting repayment of the money, as the letters state, but that she nonetheless expected that the Cribbies would provide her a place to live for her lifetime."

Editor's Note: Of course Ms. Bryant made a mistake and should have gotten in writing what the actual agreement was. Reading between the lines, she made the payments to help her nephew buy a house, the bank wanted evidence that the money was a gift with no strings attached, and after Ms. Bryant provided the Bank with the letter her nephew needed, her nephew then tried to use the letter against her. Let's hope that Ms. Bryant wins the case and lives a very long time!

Attorney Did Not Breach Duty in Seeking Guardianship for Client

A Texas appeals court holds that an attorney did not breach duties he owed to his client when, reasonably believing her to be incompetent, he helped her attorney-in-fact to file a petition for guardianship over her. Franks v. Roades (Tex., App., 13th Dist., No. 13-08-00439-CV, April 15, 2010).

In 1999, Attorney John Roades prepared a durable power of attorney for Christine Franks that named Ms. Franks' daughter, Carol Thompson, as her attorney-in-fact. By 2003, Ms. Franks' mental condition had deteriorated significantly and she was diagnosed as having severe and global cognitive dysfunction. Ms. Franks' adult son, Michael, however, disagreed with the diagnosis and encouraged Ms. Franks to not take her medications and threatened Carol and her family.

Acting pursuant to the power of attorney, Carol retained Mr. Roades to file an application for guardianship of Ms. Franks. Michael opposed the application and the parties ultimately reached a settlement and the guardianship proceeding was dismissed. The settlement authorized payment from Ms. Franks' estate of attorney and other fees of more than $120,000, including $38,000 for Mr. Roades.

Ms. Franks sued Mr. Roades, asserting that by filing the guardianship application at Carol's request, he caused her financial harm, breached his fiduciary duties to her and was negligent in protecting her interests. Mr. Roades countered that, in light of the medical and other information then available to him regarding Ms. Franks' lack of competence, he had a duty under the ethical rules to seek the guardianship. The trial court granted Mr. Roades' motion for summary judgment and Ms. Franks appealed.

The Court of Appeals of Texas affirms, concluding that "as a matter of law and based on the undisputed evidence, [Mr.] Roades reasonably believed that [Ms.] Franks was incompetent and that a guardianship should be pursued to protect her interests."

Editor's Note: An attorney is always in a tight spot when making a determination as to whether to file for Conservatorship for a prior or current client. Until recently, it was unclear in Connecticut just what an attorney was ethically permitted to do when confronted with a client who has diminished capacity. As a result, however, of Ethics rule changes a few years ago, it is clear that a Connecticut attorney, similarly to the attorney in the Franks case, may file for a conservatorship for a current or former client, although it should only be undertaken as a last resort.

Powers of Attorney Come in Different Flavors

A power of attorney is a very important estate planning tool, but in fact there are several different kinds of powers of attorney that can be used for different purposes. Before executing this crucial document, it is important to understand what your options are.

A power of attorney allows a person you appoint -- your "attorney-in-fact" or agent -- to act in your place for financial or other purposes when and if you ever become incapacitated or if you can't act on your own behalf. There are four main types of powers of attorney.

- **Limited.** A limited power of attorney gives someone else the power to act in your stead for a very limited purpose. For example, a limited power of attorney could give someone the right to sign a deed to property for you on a day when you are out of town. It usually ends at a time specified in the document.
- **General.** A general power of attorney is comprehensive and gives your attorney-in-fact all the powers and rights that you have yourself. For example, a general power of attorney may give your attorney-in-fact the right to sign documents for you, pay your bills, and conduct financial transactions on your behalf. A general power of attorney is no longer valid, or usable, once you become incapacitated, even if you still needed someone to help you with financial matters.
- **Durable.** A durable power of attorney can be general or limited in scope, but it remains in effect after you become incapacitated. Without a durable power of attorney, if you become incapacitated, no one can represent you unless a court appoints a conservator or guardian. A durable power of attorney will remain in effect until your death unless you rescind it while you are not incapacitated.
- **Springing.** A springing power of attorney is a power of attorney that "springs into effect" (becomes usable) only upon an event that you specify in the power of attorney. Such an event might be, and usually is, your incapacity. If you are using a springing power of attorney, it is very important that the standard for determining incapacity, or whatever triggering event you specify, be clearly laid out in the document itself.

All powers of attorney end on your death or unless you rescind it before then. Regardless of what type of power of attorney you use, it is important to think carefully about who will be your attorney-in-fact. Your attorney-in-fact will have a lot of control over your finances, and it is crucial that you trust him or her completely. While many pre-packaged do-it-yourself power of attorney forms are available, it is a good idea to have an attorney draft the form specifically for you and to use a form that is generally familiar to your State. There are many issues to consider and one size does not fit all. Contact your elder law attorney to learn more.

Editor's Note: I suggest that in all cases, unless there is a reason to the contrary, that your agent have a durable non-springing power of attorney because this type of power of attorney is the type most likely to be accepted by third parties and is most likely to allow your agent to do what needs to be done on your behalf. Connecticut statutes provide a basic durable power of attorney form and this is a good starting point, but to the basic statutory form must be added additional provisions to make the document as all inclusive and as authoritative as possible, if this is your wish. I usually add about two pages of additional provisions to the basic statutory form, including the ability to make gifts and to create and fund trusts.

How Risky Is Buying a Limited-Duration Long-Term Care Insurance Policy?

More consumers are buying shorter-duration policies as a way to keep the cost of long-term care insurance affordable. For example, in 2009 almost one-third of individual buyers purchased a three-year benefit period policy, according to the American Association for Long-Term Care Insurance. But is that sufficient coverage or is the policyholder likely to run out of benefit dollars?

According to a new consumer guide by the industry trade association, the risk of running out of benefits on a three-year policy is small, particularly for men. The possibility of having a long-term care insurance claim that lasts longer than three years is 13.1 percent, according to the May 2010 guide. For a claim that lasts longer than four years, the figure is 7.6 percent, and longer than five years it is 4.5 percent.

Men with a three-year policy who begin a long-term care claim at age 82 (a typical age) have a 12.4 percent likelihood of exhausting their benefits, while women face almost twice the risk (23.5 percent).

The guide reports that a policy that pays benefits for three years costs between 42 percent and 54 percent less than one that will pay claims for an unlimited number of years. A two-year policy is 51 percent to 64 percent cheaper than an unlimited policy, while a five-year policy brings a 30 percent to 39 percent savings.

However, if you are one of the individuals whose claim goes past the expected number of years of your policy, you can expect to need care for anywhere from two to six more years, the guide reports. A 55-year-old man who exhausts a three-year policy can expect to need long-term care for another 3.7 years, while a woman of the same age would need an average of 5.3 years of additional care. An 82-year-old who exhausts a three-year policy can expect to need long-term care for another 1.9 years (men) to 2.9 years (women).

The new guide combines comprehensive claims-related data from various studies conducted over the past year by the trade group. In addition, the guide includes findings of a special study conducted for the association by the consulting firm Milliman, Inc.

"Before they buy, people want to know their real risk of using their insurance policy," said Jesse Slome, the association's executive director.

Editor's Note: When it comes to insurance, if you sleep better at night having insurance, it is worth it to you, whether you have five years of coverage or three. Look at your family health situation (parents and siblings) for some insight as to what might be best for you. Remember too that 48% of people who enter a nursing home are discharged within one year, usually by death or discharge after a short term rehabilitation stay.