The Valliere Decision: The Probate Court Order Survives DSS' Attack

by Attorneys Carmine Perri and E. Jennifer Reale

Earlier this year, in a unanimous decision, the Connecticut Supreme Court upheld the Probate Courts' authority to issue a spousal support order so long as the conserved spouse did not yet apply and is not receiving Title XIX benefits.[i]

Protecting married couples from impoverishment when one spouse is institutionalized, while the other spouse remains in the community, was one of the objectives of the federal legislature when enacting the Medicare Catastrophic Coverage Act of 1988.[ii] Accordingly, federal law provides for spousal allowance when one of the spouses remains in the home.[iii] While federal law provides for the calculation of the spousal allowance, the same statute also states that if there is a court order for spousal support, the spousal allowance cannot be less than what the court order provides.[iv] Connecticut General Statute § 45a-655 authorizes Probate Courts to allocate some or all of a conserved person's income for the support of his or her spouse, so long as the institutionalized spouse did not yet apply and is not receiving Title XIX benefits.[v]

In Valliere, the conservator filed a petition to divert the institutionalized wife's income for the support of her husband, pursuant to § 45a-655. The Probate Court granted the request and ordered the conservator to divert $1,170.33 per month for the husband's support. When determining the amount of support, the Probate Court used the "proper under the circumstances" standard.[vi] Later, the conservator applied for Title XIX benefits for the institutionalized spouse. The Department of Social Services (DSS) granted the application, but reduced the spousal allowance to $898.45 per month, as calculated by the Department purportedly in accordance with Medicaid standards.[vii] The Department argued that as the sole agency to determine Medicaid eligibility, the Department did not have to abide by the Probate Court's order.[viii] A lengthy appeal followed.[ix]

Relying on the plain language of the federal statute, in a unanimous decision, the Supreme Court held that the Department must follow the prior Probate Court Order.[x] The Supreme Court emphasized that DSS must receive notice of the spousal support application in the probate proceedings, and thus, has the right to be present and be heard even if there is no pending Title XIX application.[xi] Noting that the Department is able to participate via telephonic or other electronic means, the Supreme Court rejected the argument that attending all Probate hearings for spousal support would place an undue burden on the Department.[xii] DSS, however, remains the sole agency to determine spousal allowance if no Court entered an order for spousal support prior to an application for Title XIX benefits.[xiii]

Shortly after the Supreme Court issued its decision, the Department filed a Legislative Proposal to amend § 45a-655. Specifically, the suggested legislation would make the Probate Court's spousal support order "null and void" if the conservator filed for Title XIX benefits. In support of the proposed legislation, the Department argued that DSS anticipates conservators will now routinely take advantage of § 45a-655 to secure better benefits for the conserved person's family, and thus, the burden on the Department to attend Probate Court hearings would increase substantially. The Department further implied that the Probate Court orders unfairly shift the cost of long term care from the family to the State.[xiv]

While Probate Court orders may allocate an increased amount for the support of the community spouse, these orders are consistent with the objective of the Medicare Catastrophic Coverage Act, which is to prevent the impoverishment of the spouse remaining in the community. Probate Courts do not blindly award lavish allowances, but rather look at the facts and circumstances of each case. As Probate Courts use the "proper under the circumstances" test when determining the amount of allowance, our Probate Judges are able to balance the potential future burden on the State for providing long term care with the need of the community spouse to remain in the home. Unlike the Department's strict calculation, this balancing standard leads to fair results in every circumstance. ■

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[i] *Valliere v. Comm'r of Soc. Servs.*, 328 Conn. 294, SC 19701 (2018).

[ii] *O'Callaghan v. Comm's of Soc. Servs.*, 53 Conn. App. 191, 195 (1999).

[iii] 42 U.S.C.A. § 1396r-5(d)(2) (LEXIS 2016).

[iv] § 1396r-5(d)(5).

[v] Conn. Gen. Stat. § 45a-655 (2018).

[vi] § 45a-655(b).

[vii] *Valliere*, 328 Conn. 294, SC 19701.

[viii] *Id.* (relying on 42 U.S.C.A. § 1396a (a)(5) (LEXIS 2016) and Conn. Gen. Stat. § 17b-261b (2018)).

[ix] DSS made its determination for spousal support on January 21, 2014. A Fair Hearing was held on July 7, 2014. The Fair Hearing Officer agreed with the Department's position. The Department denied the Applicants' Request for Reconsideration on October 18, 2014. The family appealed to the Superior Court on December 8, 2014. Judge Noble overturned the Department's determination on November 24, 2015. The Department appealed and the Supreme Court transferred the case to itself. More than four years after the initial determination, the Supreme Court issued its decision on February 1, 2018.

[x] *Valliere*, 328 Conn. 294, SC 19701. The Court noted that there are no directly applicable decisions from other states, but found *M.E.F. v. A.B.F.*, 393 N.J. Super. 543, 925 A.2d. 12 (2007) persuasive. In that case, the New Jersey court concluded that the community spouse could not seek an increase of allowance in the family court, because the institutionalized spouse was already receiving Medicaid benefits. The New Jersey court emphasized that the past tense of 42 U.S.C. § 1396r (d)(5) means that there must be a prior court order before the application is filed. *But see, Ark. Dept. of Health & Human Servs. v. Smith*, 370 Ark. 490, 262. S.W.3d 167 (2007).

[xi] *Id.* (citing Conn. Gen. Stat. § 17b-261b(b)).

[xii] *Id.* at fn. 24. (citing Probate Court Rules § 66.1a (2018)). The Supreme Court also noted that the statistics the Probate Court Administrator's amicus brief provided show that there were only a handful of spousal support petitions filed in recent years. *Id.* Specifically, there were only sixteen petitions in 2014, three in 2015, and nine in 2016. *Id.*

[xiii] *See id.*

[xiv] DSS's Agency Legislative Proposal -2018 Session on Probate Support Orders dated March 1, 2018.