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Substituted Judgment

Looking out for an elderly person who becomes incapacitated.

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DUE TO ADVANCES in medicine and technology, people are living longer. With this increase in life expectancy comes the need for financial resources to cover the ever increasing medical costs and/or costs associated with assisted living/nursing facilities. Even though many people save during their lifetime in order to provide for their family and friends upon their death, their money is now used to provide for these later-in-life needs.

Given these concerns, and the new changes in the Medicaid laws, guardians of these golden-agers and the court system have been faced with many new issues involving allocating the resources of the elderly in a way that fulfills their wishes and yet preserves the maximum amount of assets possible to provide for these later-in-life needs. These issues are illustrated in the recent case decided by Nassau County Supreme Court Judge Joel K. Asarch on Oct. 7, 2008.¹

Mildred A.'s Daughters

The subject of this case is Mildred A., an 88-year-old woman suffering from dementia.² In 2006, Mildred A. was declared an "incapacitated person" by the Supreme Court of Nassau County and attorney Emily F. Franchina, was appointed her personal needs and property management guardian.³ Prior to being declared incapacitated, Mildred A. provided financial assistance to her two daughters, Lisa D. and Abby W., including, but not limited to, the payment of their living expenses, utility bills, etc.⁴

Shortly after the guardian was appointed, the daughters of Mildred A. submitted an application to the court requesting a



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gift of an unspecified sum of money from Mildred A.'s funds.⁵ The court issued a Decision and Order permitting the gifting of Mildred A.'s assets, stating that Mildred A. had a history of financially assisting her daughters and if she "had the capacity to

make such decisions," she would have made these gifts.⁶ However, the court limited the gifts to \$12,000 for each daughter in 2006 because the court's primary responsibility is to "ensure that the welfare and interest of the incapacitated person are never

subjugated to the needs of others.”⁷

Lisa D. and Abby W. then filed the instant petition for further financial support.⁸ Lisa D. requested \$150,000 from the funds of the incapacitated person to repay a mortgage on real property.⁹ Abby W. requested permission to withdraw the sum of \$70,000 from college trust accounts established by Mildred A. for the benefit of her minor grandchildren so that she could obtain housing for her family and medical assistance.¹⁰ Both children also requested a gift of \$12,000 to aid them in their time of financial distress.¹¹

In response to this application, the guardian testified that although Mildred A. had ample financial resources to pay for her current needs and expenses, her monthly expenses would increase significantly should she require additional care in the future, i.e., the transfer to a skilled nursing home.¹² The guardian further testified that if Medicaid planning were permitted, Mildred A.'s assets would be insufficient to provide for Mildred A. during any penalty period resulting from the terms of the Deficit Reduction Act of 2005.¹³

The Supreme Court denied Lisa D.'s request for \$150,000, as well as Abby W.'s request to withdraw \$70,000 from the trust accounts.¹⁴ In denying Lisa D.'s loan request, the court noted that since most of Mildred A.'s assets were in IRA accounts, the withdrawal of these funds would result in “significant adverse income tax consequences, depleting the assets of Mildred A. even further.”¹⁵ With respect to Abby W.'s request, the court declared that a parent is responsible for supporting his or her child until age 21, even if a trust account is established for the child's benefit.¹⁶

The court compared this situation to an infant guardianship account and avowed that withdrawals should be “carefully scrutinized” and “permitted only to the extent required for the infant's necessities and education.”¹⁷ Since Abby W. requested these funds to provide for the family as a whole, rather than for the sole benefit of her children, the court held that the withdrawal of the funds was unacceptable.¹⁸

The court did, however, direct the guardian to gift each daughter \$12,000 in both 2008 and 2009 to alleviate some of their financial distress.¹⁹ The court explained that by enacting Mental Hygiene Law Article 81, the Legislature “gave statutory recognition to the common law doctrine of ‘substituted judgment,’” permitting a guardian to transfer the assets belonging to an incapacitated person “on the grounds that the incapacitated person would have made the transfer if she or he had the capacity to act.”²⁰

The court was also mindful of the provisions of the Deficit Reduction Act of 2005, since Mildred A. may require Medicaid assistance in the future.²¹ The court stated that if it was to permit even a moderate transfer of assets, such a transfer could negatively affect Mildred A.'s future Medicaid eligibility.²²

Since Mildred A. had a history of providing for her daughters financially and each daughter was faced with a “significant financial emergency,” the court concluded that gifting was appropriate under the theory of “substituted judgment.”²³ In addition,

the court held that these facts established “substantial evidence” to support that these gifts were made “exclusively for the purpose other than to qualify for medical assistance,” and therefore, these transfers would not result in a penalty period during which Mildred A. would be ineligible for Medicaid benefits.²⁴

Transfer of Assets

Courts have consistently held that an Article 81 guardian of the property may, if given the power by the court, transfer a part of the assets of the incapacitated person under the doctrine of “substituted judgment” as in the case above.²⁵ Section 81.21(d) of the Mental Hygiene Law sets forth several factors to be considered when authorizing such a transfer.²⁶

These factors include whether the incapacitated person is capable of making the proposed distribution and if so, whether his or her consent was obtained; the duration of the incapacitated person's disability; whether the needs of the incapacitated person and his or her dependents “can be met from the remainder of the assets of the incapacitated person”; whether the recipients of the distribution are the “natural objects of the bounty” of the incapacitated person; the testamentary plan or pattern of gifts by the incapacitated person; whether the proposed distribution will result in “estate, gift, income or other tax savings”; and any other relevant factors.²⁷

The doctrine of “substituted judgment” can be used to authorize a wide range of transfers, including conveying real property, making gifts and even engaging in Medicaid planning on behalf of the incapacitated person.²⁸ However, we must bear in mind that a primary purpose of the guardianship law is to “satisfy either [the] personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person” and therefore, assets of the incapacitated person should not be transferred if they are necessary for his or her care and support.²⁹

With Medicaid in Mind

Moreover, in light of the new changes to the Medicaid laws, we must make certain that any transfer of assets belonging to an incapacitated person will not negatively impact that person's ability to obtain Medicaid benefits when needed.³⁰ The recent changes to the Medicaid laws include an extension of the “look-back” period, i.e., the period that is examined to ascertain whether a transfer of the applicant's assets was made for less than fair market value.³¹

If such a transfer is made, and the transfer does not qualify as an exempt transfer under the Medicaid laws, the applicant will incur a penalty period during which he will be ineligible to receive Medicaid benefits.³² The law also sets forth a specific formula by which to calculate the duration of the penalty period and the date on which the penalty period begins to run.³³ One transfer that will not incur a penalty period is a transfer that is made “other than to qualify for Medicaid,”³⁴

as was in the case in *In re Mildred A.*, 028041-I-05.35 A non-exempt transfer of assets belonging to an incapacitated person can have devastating effects on the incapacitated person's well-being, especially if there are insufficient assets to provide for his or her care and support during the resulting Medicaid period of ineligibility.³⁶

As you can see, in the 21st century, Article 81 guardians and the court system are faced with even more unique issues involving the wishes and financial assets of incapacitated persons. The above clearly demonstrates that guardians and the courts must thoroughly evaluate all facts and adequately balance the assumed wishes of the incapacitated person with his or her financial needs to ensure that any transfer and/or gift of assets belonging to the incapacitated person will not negatively impact his or her well-being.

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1. *In re Mildred A.*, No. 028041-I-05, 2008 N.Y. Misc. LEXIS 6349 (Sup. Ct. Oct. 7, 2008).

2. 2008 N.Y. Misc. LEXIS 6349, at *1.

3. *Id.*

4. 2008 N.Y. Misc. LEXIS 6349, at *12.

5. 2008 N.Y. Misc. LEXIS 6349, at *2.

6. *Id.*

7. 2008 N.Y. Misc. LEXIS 6349, at *2.

8. 2008 N.Y. Misc. LEXIS 6349, at *3-4.

9. 2008 N.Y. Misc. LEXIS 6349, at *3.

10. 2008 N.Y. Misc. LEXIS 6349, at *3-4.

11. 2008 N.Y. Misc. LEXIS 6349, at *4.

12. *Id.*

13. 2008 N.Y. Misc. LEXIS 6349, at *4.

14. 2008 N.Y. Misc. LEXIS 6349, at *5-9.

15. 2008 N.Y. Misc. LEXIS 6349, at *6.

16. 2008 N.Y. Misc. LEXIS 6349, at *7-8.

17. 2008 N.Y. Misc. LEXIS 6349, at *8.

18. 2008 N.Y. Misc. LEXIS 6349, at *9.

19. 2008 N.Y. Misc. LEXIS 6349, at *14.

20. 2008 N.Y. Misc. LEXIS 6349, at *10.

21. 2008 N.Y. Misc. LEXIS 6349, at *10-12.

22. 2008 N.Y. Misc. LEXIS 6349, at *11.

23. 2008 N.Y. Misc. LEXIS 6349, at *12.

24. 2008 N.Y. Misc. LEXIS 6349, at *11-12.

25. See N.Y. MEN. HYG. LAW §81.21(b) (Consol. 2008); see also *In re Mildred A.*, 2008 N.Y. Misc. LEXIS 6349, at *10; *In re Sandra*, 13 Misc.3d 230, 231, 818 NYS2d 439 (Sup. Ct. 2006); *In re Burns*, 287 AD2d 862, 864, 731 NYS2d 537 (3d Dept. 2001); *In re John XX*, 226 AD2d 79, 83-84, 652 NYS2d 329 (3d Dept. 1996).

26. See §81.21(d); see also *In re Sandra*, 13 Misc.3d at 231.

27. §81.21(d).

28. See *In re John XX*, 226 A.D.2d at 83.

29. §81.01(a); see also *Helen Hayes Hosp. v. DeBuono (In re Shah)*, 95 NY2d 148, 160, 711 NYS2d 824 (2000) (quoting §81.01; citing NY Law Rev. Commn Comments, McKinney's Cons. Laws of N.Y., Book 34A, Mental Hygiene Law §81.21 at 376).

30. See, e.g., *In re Mildred A.*, 2008 N.Y. Misc. LEXIS 6349, at *11-12; *In re Sandra*, 13 Misc.3d at 232-33.

31. 42 USC §1396p (c)(1)(B)(i) (2008).

32. §1396p (c)(1)(A); N.Y. SOC. SERV. LAW §366 (5) (Consol. 2008); N.Y. Comp. Codes R. & Regs. tit. 18 §360-4.4 (c)(2)(iv)(a) (Consol. 2008); see also *In re Sandra*, 13 Misc.3d at 232-33.

33. §1396p (c)(1)(D)-(E); §366 (5); §360-4.4 (c)(2)(iv).

34. §1396p (c)(2)(C)(ii); §366 (5)(e)(4)(iii)(B); §360-4.4 (c)(2)(D)(i)(iii).

35. §1396p (c)(2)(C)(ii); §366 (5)(e)(4)(iii)(B); §360-4.4 (c)(2)(D)(i)(iii); see also *In re Mildred A.*, 2008 N.Y. Misc. LEXIS 6349, at *11-12.

36. See *In re Mildred A.*, 2008 N.Y. Misc. LEXIS 6349, at *11-12; *In re Sandra*, 13 Misc.3d 230, 232-33; *In re Gabrynowicz*, 37 AD3d 464, 465-66, 829 NYS2d 606 (2d Dept. 2007).