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The Impact of Financial Exploitation on Medicaid Eligibility

By Donald D. Vanarelli

It is not uncommon for an elderly or disabled person to entrust finances to a third party. For example, an elder may execute a power of attorney as a simple estate planning tool in order to ensure that her affairs are properly handled in the event that she is unable to act due to illness, injury, incapacity or other cause. In other cases, an elder who is becoming overwhelmed by day-to-day financial tasks may simply "hand over the checkbook" to a relative or a trusted friend.

As the elder population in the United States continues to increase dramatically, the financial exploitation of the elderly is an ever-rising problem. Whether elder financial exploitation involves common theft by an outsider or the improper use of a power of attorney by a family member, that financial abuse presents a myriad of issues.

Adding to the dilemma of financial exploitation is the impact of the exploitation on the victim's eligibility for necessary public benefits. In particular, when a third party makes improper transfers of the elder's property without the elder's knowledge or consent, will those improper transfers negatively affect the elder's eligibility for Medicaid?

With the enactment of the Deficit Reduction Act of 2005, Medicaid legislation now imposes a 60-month "look-back period," in which Medicaid officials "look back" from the application date to analyze asset transfers by the applicant. If a Medicaid applicant disposed of assets for less than fair market value within the look-back period, the applicant may be subject to a period of Medicaid ineligibility based on the value of the uncompensated transfer. 42 U.S.C. §1396(p).

In the context of a public benefits program that penalizes transfers of the applicant's resources for less than fair market value, what is the result when the applicant's resources are transferred by a wrongdoer without the applicant's knowledge or consent?

Resource Transfer Rules

The Medicaid resource transfer rules provide a logical starting point for the analysis of this question. 42 C.F.R. §410.1201 defines a "resource" as "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) *owns and could convert to cash to be used for his or her support and maintenance.* (1) If the individual has the *right, authority or power to liquidate* the property or his or her share of the property, it is considered a resource."

20 C.F.R. §416.1201(a)-(c) (1993) (emphasis supplied).

In addition, 20 C.F.R. §416.1246(e) provides that, "Transfer of a resource for less than fair market value is presumed to have been made for the purpose of establishing ... Medicaid eligibility *unless the individual ... provides convincing evidence that the resource was transferred exclusively for some other reason.*" (emphasis supplied).

Pursuant to 42 U.S.C. §1396a(a)(17)(B), a state's Medicaid plan must include "reasonable standards ... for determining eligibility ... which provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant."

State Medicaid regulations, in turn, provide further guidance for the analysis of unauthorized transfers. Although regulations vary by state, by way of example New Jersey regulations provide that, "in order to be considered in the determination of eligibility, a resource must be 'available.'"

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N.J.A.C. 10:71-4.1. Mirroring 20 C.F.R. §416.1201, the New Jersey regulations provide that a resource is considered "available" if the applicant has "the right, authority, or power to liquidate" the resource.

According to these regulations, certain categories of resources are "excludable" and are not considered in the Medicaid eligibility determination. Among the categories of "excludable resources" are "[t]he value of resources which are *not accessible to an individual through no fault of his or her own.*" N.J.A.C. 10:71-4.4(b)(6) (emphasis supplied).

The New Jersey regulation provides examples of such inaccessible resources, including real property that cannot be sold "because of the refusal of a co-owner to liquidate."

In states with regulations similar to the aforecited New Jersey regulations, a strong argument can be made that funds or assets that have been improperly transferred by a third party would be a classic example of a resource that is "not accessible ... through no fault of [the applicant's] own." In fact, such a scenario is arguably more compelling than the example provided in the aforecited New Jersey regulation itself, in which a co-owner refuses to liquidate a property.

An alternate argument could be that, as to the stolen resources, the applicant can rebut the presumption that the resources were transferred to establish Medicaid eligibility. *See* 20 C.F.R. §416.1246(e); N.J.A.C. 10:71-4.7.

Medicaid Communication No. 88-15 states that, when determining whether an "individual" has transferred resources, the "individual" shall be defined to include the eligible individual, his/her spouse, or "any person acting for and *legally authorized* to execute a contract for the eligible individual." (emphasis supplied). Of course, an agent's theft of an individual's resources falls well outside the scope of a power of attorney's "legal authority."

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The Hardship Exception

In the event of a Medicaid denial as a result of an unauthorized transfer, another avenue of redress may be available to the applicant. The U.S. Code provides for states to make determinations that the denial of Medicaid eligibility "would work an undue hardship...." 42 U.S.C. §1396p(c)(2)(D). *See* 20 C.F.R. §416.1246; *see also* HCFA Transmittal No. 64, §3258.10(C)(4), 5.

Again, by way of example, under the New Jersey hardship exception regulation, in order to prevail in a hardship exception request, the applicant must demonstrate that, "the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she has made good faith efforts, *including exhaustion of remedies available at law or in equity, to recover the assets transferred.*" N.J.A.C. 10:71-4.10(q) (emphasis supplied).

The hardship exception thus places the burden on the applicant, similar to the burden placed on the applicant in two cases discussed below, *Marcus* and *Linser*,to pursue litigation if necessary to recover the transferred assets.

The limited reported New Jersey law on the hardship waiver demonstrates that the requirements for entitlement to the exception are stringently applied. It is, however, an alternative strategy that should not be overlooked.

Obstacles to Enforcing Elders' Rights

As noted above, cases involving the financial exploitation of the elderly present various unique issues. Liability may be clouded by issues such as family relationships and trust between the victim and the abuser, whether the abuser was "authorized" to transfer the elder's assets, and varying levels of competency of the victim.

The competency of the victim may affect the evaluation of issues such as the promptness of the discovery

New Jersey Annuity Opinion Sinks in Medicaid's Bog: An Analysis of *N.M.*

By Matthew J. Parker and Jeffrey A. Marshall

More than a decade ago, Connecticut's high court described Medicaid laws as equivalent to the "Serbonian bog" referenced in John Milton's *Paradise Lost.* See *Ross v. Giardi*, 680 A.2nd 113 (Conn. 1996). It appears that the bog has claimed another victim. A New Jersey state appellate court has concluded that payments from a DRA-compliant annuity owned by a community spouse are a countable resource.

In the case, *N.M. v. Division of Medical Assistance and Health Services, et al.* (N.J. Sup. Ct., App. Div., Feb. 26, 2009), the community spouse purchased a DRA-compliant annuity that reduced the couple's resources to the eligibility level. Nevertheless, the state Medicaid agency denied N.M.'s application on the ground that the income stream produced by the annuity was an available resource. The New Jersey Superior Court upheld the denial. (See *The ElderLaw Report*, April 2009, page 5.) Previously, the New Jersey court had held that payments from an immediate annuity were not a resource because there was no evidence of a secondary market for this type of investment. See, *F.K. v. Div. of Med. Assistance & Health Servs.*, 374 N.J. Super. 126 (App.Div.); see *The ElderLaw Report*, March 2005, page 5). However, the marketability issue was irrelevant to the decision in *N.M.* because of a somewhat baffling stipulation by the applicant that the monthly payment stream could be sold.

To reach its conclusion, the *N.M.* court had to circumvent the recent precedential decision by the U.S. 3rd Circuit Court of Appeals in *James v. Richman*, 547 F.3d 214 (3rd Cir. 2008); see *The ElderLaw Report*, January 2009, page 7). The *James* court held that Pennsylvania could not treat the payments from a non-assignable immediate annuity as a resource. It noted that there was no statutory authority for such treatment and that allowing it would undermine the Medicare Catastrophic Coverage Act (MCCA) rule that "no income of the community spouse shall be deemed available to the institutionalized spouse." *See* 42 U.S.C. § 1396r-5(b)(1).

James dealt with an annuity purchased prior to the effective date of the DRA. The *N.M.* opinion argues that *James* no longer applies because Congress changed the law with the enactment of DRA section 42 U.S.C. § 1396 (e)(4). Subsection (e)(4) states: "Nothing in this subsection [the subsection of the DRA requiring disclosure of annuity interests] shall be construed as preventing a state from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1)."

Even after noting that (e)(4) "is not a model of clarity" the *N.M.* court nonetheless concludes that it authorizes the disregard of the community spouse income protections established by MCCA. The court fails to acknowledge the clear and explicit Congressional mandate that the community spouse income protections are to be given priority over other provisions of Medicaid law, such as (e)(4). *See* 42 U.S.C. § 1396r-5(a)(1). On the other hand, (e)(4) has the clearly limited purpose of restricting the effect of the rules on disclosure of annuities.

The *N.M.* court fails to consider the context of (e)(4). And it conspicuously disregards a recent federal court decision with virtually identical issues and facts but opposite result, *Weatherbee v. Richman*, ____ F.Supp.2d___ (W.D.Pa.2009); see *The ElderLaw Report*, March 2009, page 5). In contrast to the cogent statutory analysis in *Weatherbee*, the *N.M.* court bases its conclusions on a few general comments from Congressional representatives that don't even refer to the annuity provisions. *N.M.* also seeks support in a July 27, 2006, CMS directive on annuities. (See *The ElderLaw Report*, September 2006, page 2.) But the CMS guidance doesn't address the payment stream issue and basically just reiterates the terms of (e)(4).

In the authors' opinion, a more reasonable reading of subsection (e)(4) is that it simply means that the DRA disclosure requirements are not to be interpreted as modifying the treatment of annuities. Disclosure is required regardless of whether the annuity involves a penalized transfer, is irrevocable, or is treated as income or an asset.

It seems that the *N.M.* court has allowed its view of desirable public policy to influence its decision. It would have been better served to follow the wise guidance offered by Judge Roth in *James*: Courts should not "create rules based on our own sense of the ultimate purpose of the law being interpreted, but rather seek to implement the purpose of Congress as expressed in the text of the statutes it passed."

N.M. does serve to remind us of the antipathy of many courts to Medicaid planning. As to the issue of whether annuity payments are a resource, a more reasoned analysis can be found in *Weatherbee*. Since *Weatherbee* is on appeal to the 3rd Circuit Court of Appeals, it may ultimately decide the annuity issue for New Jersey. In the meantime, at least in New Jersey, attorneys should anticipate further resistance to the use of annuities to reduce community spouse resources.

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of wrongdoing, or the victim's "right, authority or power" over the assets in question. *See* 20 C.F.R. §416.1201. For example, in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002), the Florida Supreme Court refused to apply the doctrine of delayed discovery in order to permit an elderly woman suffering from dementia to file suit against family members based on their alleged misappropriation of assets, despite the elder's claimed recent discovery of the misappropriations.

In *Chalmers v. Shalala*, 23 F.3d 752 (3d Cir. 1994), a lower court had affirmed the termination of SSI benefits. The SSI recipient was schizophrenic and "unable to care for herself." After the recipient and her siblings inherited real properties, they formed a partnership to manage the properties and signed an agreement conveying their respective equitable interests in the properties to the partnership. The siblings' agreement also provided that the partnership "may be dissolved at any time by any of the partners." The Third Circuit rejected the SSI recipient's claim that, despite her "right" to liquidate her partnership interest, her disability rendered her without the "power" to do so. Notably, the court stated, "although we are sympathetic to [the recipient's] disability, *the record does not establish unequivocally that she cannot effectuate her legal rights.* An affidavit filed by her psychiatrist states that it would be 'impossible for [the recipient] to retain one attorney and participate in and discuss legal matters,' ... but *it is also a matter of record that [she] had been represented by an attorney at each stage of these proceedings and that she signed the partnership agreement [in issue].*" (emphasis supplied).

Following the *Chalmers* decision, a state court in the same circuit relied on New Jersey Medicaid regulations to find that when an individual is incapacitated and does not have a guardian in place, the individual's assets may be "unavailable" because they are not accessible to the individual "through no fault of his or her own." *See I.L. v. Division of Medical Assistance and Health Services*, 2004 WL 4744441 (N.J. Admin. 2004), rev'd, 2005 WL 4684709 (Jan. 27, 2005), rev'd, 389 N.J. Super. 354 (App. Div. 2006) (citing N.J.A.C. 10:71-4.4(b)(6)).

In a Florida case the state was ultimately unsuccessful in prosecuting a son for financially exploiting his elderly parents by endorsing an $847,000 check to himself. *Bernau v. State*, 891 So. 2d 1229 (Fla. App. 2d Dist. 2005). In "reluctantly revers[ing]" the conviction, the court noted that the State's case had been complicated by the parents' mental status, finding that, although their mental status had apparently diminished rapidly during the course of events, the State had offered no evidence that they were incompetent. (*See The ElderLaw Report*, April 2005, p. 6.)

What the Stimulus Bill Does for the Elderly

The American Recovery and Reinvestment Act of 2009, the $787 billion stimulus package that President Barack Obama signed into law February 17, 2009, includes a number of provisions that help the elderly in need as well as the economy. Here are the highlights:

- A one-time payment of $250 in the form of a tax rebate to Social Security recipients, Supplemental Security Income recipients, and veterans receiving disability and pensions. Checks were scheduled to be mailed in May;
- $87 billion to temporarily increase the federal Medicaid match to states (FMAP), which could help many adults who receive long-term care services through Medicaid;
- An increase in the reverse mortgage loan limit to $625,500, from the former limit of $417,000, for the rest of 2009;
- An additional $120 million for the Senior Community Service Employment Program (SCSEP);
- An extension until December 2010 for the Qualified Individual (QI) program that pays Medicare Part B premiums for certain low-income Medicare beneficiaries;
- $100 million for grants to states for elderly nutrition services, including Meals on Wheels and Congregate Meals;

Litigation Costs

In addition to the above issues, the practical issue of the cost of litigation may be magnified in this area of practice. Litigation of an elder abuse case may be time-consuming and costly. For example, if the victim had limited assets prior to the exploitation, or has been pauperized by the exploitation, the victim may be left without funds necessary to pursue her rights to relief against the perpetrator or her entitlement to Medicaid benefits.

The issue of litigation costs was highlighted in the California Court of Appeals case of *Levitt v. Hankin*, 93 Cal. App. 4th 544 (Cal. App. 2d Dist. 2001). The case involved the appeal of attorney fee awards by attorney Marc B. Hankin, Esq., whom the court identified as "a recognized leader in the field of elder law" who had represented a professional conservator in two actions involving the financial exploitation of elders. The appellate court affirmed the attorney fee awards, finding that the trial court's consideration of the modest size of

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the estates was proper, and that the attorney's dispute was an argument properly addressed to the legislature. (See *The ElderLaw Report*, Jan. 2002, p. 5.)

Cases Deciding Medicaid Issues

Although the administrative decisions or cases on point are limited, there is support for the position that a Medicaid applicant should not be penalized for the unauthorized transfer of the applicant's assets. The most recent reported case involving this issue was decided in Connecticut, where a nursing home sued an elder's son (and attorney-in-fact) and the attorney who had been appointed as the elder's conservator, alleging that the son's acts/omissions resulted in the loss of Medicaid benefits totaling $115,639.00. *Glastonbury Healthcare Center, Inc. v. Esposito*, 2008 WL 2797003, No. CV-01-0811032 (Conn. Super. June 23, 2008), opinion corrected, 2008 WL 4307883 (Conn. Super. Aug. 27, 2008). The elder's Medicaid application was later approved when the conservator/attorney transferred the assets as requested by Medicaid. The nursing facility's case against the son went to trial and the court concluded that the facility lost the Medicaid payments that it would have received absent the son's actions/inactions, and found the son liable for that loss. (See *The ElderLaw Report*, Sept. 2008, p. 7.)

In New Jersey, the issue of third-party transfers and Medicaid eligibility was most recently addressed in the unpublished decision in *A.H. v. Division of Medical Assistance and Health Services*, 2008 WL 648922 (N.J. App. Div. Mar. 12, 2008), certif. denied, 951 A.2d 1039 (N.J. June 12, 2008). *A.H.* involved transfers by a son of his parents' assets under a power of attorney, and the effect of those transfers on his parents' Medicaid eligibility.

The court upheld a ten-month period of Medicaid ineligibility and ordered that the son would be personally liable for the repayment of Medicaid benefits. Although the decision does not directly address whether the parents had knowledge of the transfers, it is clear that the court held the son responsible for the transfers. (See *The ElderLaw Report*, May 2008, p. 5.)

In *Probate of Marcus*, 199 Conn. 524, 509 A.2d 1 (Conn. 1986), the Supreme Court of Connecticut addressed a case in which the ward's conservatrices (her daughters) made unauthorized gifts to themselves and their family, totally depleting the ward's estate. The conservatrices then applied for Medicaid on the ward's behalf. Medicaid notified the probate court (which handled the conservatorship) that the gifts had been made, a hearing was held, and the court disallowed the gifts as unauthorized. Thereafter, Medicaid denied the ward's pending Medicaid application. On appeal, the hearing officer held that the probate court's disallowance of the gifts rendered those funds "available" to the ward.

The Supreme Court of Connecticut impliedly held that, because the Medicaid applicant had an enforceable right against her daughters for the improper transfers, the funds would not be considered "available" to the applicant if she could demonstrate that those funds could not be recovered from the daughters (because, for example, the daughters were judgment-proof).

The North Dakota Supreme Court in *Linser v. Office of Attorney General*, 2003 N.D. 195, 672 N.W. 2d 643 (N.D. 2003), considered a Medicaid termination based on a guardian's improper placement of funds into a special needs trust. The court cited *Marcus* and reasoned that "an asset to which an applicant has a legal entitlement is not unavailable simply because the applicant must initiate legal proceedings to access the asset." Therefore, it concluded that, "[I]t is appropriate for an agency to find that assets which the applicant has a legal entitlement to are actually available to him where the record fails to demonstrate the applicant would be unsuccessful in exercising a legal right to obtain them." (See *The ElderLaw Report*, Feb. 2004, p. 6.)

In a case in which a mother failed to pursue a cause of action against her daughter/power of attorney for "gifts" made under the power of attorney, the transfers resulted in the mother's Medicaid ineligibility. In the March 20, 2008, North Dakota Supreme Court case of *Makedonsky v. North Dakota Dept. of Human Services*, 2008 N.D. 49, 746 N.W. 2d 185, 187 (N.D. 2008), an incompetent applicant was found Medicaid ineligible based on transfers made by her daughter. In affirming that the assets were available, the North Dakota Supreme Court cited *Linser* for the proposition that "an asset need not be in hand to be 'actually available,' and an applicant may be required to initiate appropriate legal action to make the asset available.... If an applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available and the burden is on the applicant to show a legal action would be unsuccessful." (See *The ElderLaw Report*, May 2008, p. 5.)

The author was informed of an unreported Minnesota case in which an elderly victim of financial exploitation was spared his Medicaid benefits thanks to the efforts of the University of St. Thomas law students' Elder Law Practice Group. According to a May 8, 2008, *Minneapolis-St. Paul Star Tribune* article, in that case the elder, Donald Mayne, appointed his daughter as agent under a power of attorney. She allegedly then stole approximately $60,000 from his bank accounts. Moreover, despite the fact that the daughter faced criminal charges of "theft by swindle," Medicaid authorities attempted to strip the father of his Medicaid benefits, with an administrative law judge having found "no convincing evidence" that the transfer was not simply an attempt to hide Mr. Mayne's assets and reportedly concluding that "[i]t does not matter that his daughter, who was his

attorney-in-fact, made the transfers against his will and outside his control."

However, after that decision was appealed and the Minnesota attorney general's office became involved in the case, Mr. Mayne's benefits were restored.

Conclusion

Medicaid eligibility determinations involving financial exploitation of an applicant/victim will likely involve establishing the following elements during the application or appeal process: (1) the applicant's knowledge of, or consent to, the transfer(s); (2) the applicant's relationship to the wrongdoer; (3) the applicant's competency at the time of the transfer(s); and, (4) the steps taken by or on behalf of the applicant to recoup the transferred funds. Although eligibility determinations will be fact-sensitive, the foregoing legal authority may be used to advocate in favor of eligibility (or in favor of granting a hardship exception, in the event of a Medicaid denial) on behalf of an elderly victim of financial wrongdoing.

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KEEPING CURRENT

Attorney Disbarred for Shielding Estate Funds From Nursing Home

In Re Bach (D.C. App., No. 07-BG-1389, Feb. 26, 2009). The District of Columbia's highest court affirms disbarment of an attorney who wrote himself a check from his elderly ward's modest estate before he had secured court approval in order to shield the funds from a nursing home's competing claim.

Attorney William S. Bach served as the conservator of the estate of Fannie B. Thomas, a nursing home resident. In 2003, the nursing home filed a claim against Ms. Thomas' estate for $50,680 in services it had provided her. Subsequently, Mr. Bach filed an accounting showing that Ms. Thomas' account had less than $12,000 and made a claim for his attorney's fees of just over $3,000.

Before the court had ruled on Mr. Bach's fee claim, he wrote himself a check for $2,500 payable from Ms. Thomas' conservatorship account. After the court later granted Mr. Bach's request for attorney's fees, he paid himself the remainder of his fees from the account.

The Board of Professional Responsibility determined that Mr. Bach had acted intentionally in misappropriating the funds in order to secure payment of his fees in light of the competing claim of the nursing home and recommended that he be disbarred. Mr. Bach admitted that he misappropriated the funds, but argued that a lesser punishment was more appropriate because his conduct was merely negligent.

The District of Columbia Court of Appeals, the district's highest court, affirms the disbarment. The court finds that although Mr. Bach committed only one error, because the intentional misappropriation of entrusted funds is so reprehensible a presumption of disbarment attaches and disbarment was required.

For the full text of this decision, go to: *www.dcappeals.gov/dccourts/appeals/pdf/07-BG-1389.PDF*

Non-Saleable Promissory Note Is Improper Transfer

Brown v. Ohio Dept. of Job & Family Servs. (Ohio Ct. App., 8th Dist., No. 92008, March 12, 2009). 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.

Glenn Brown loaned about $44,000 to his daughter, secured by a promissory note. The note provided that repayment would be made in 60 monthly installments, that no interest was due for the first 60 months of payments and that the note could not be sold. Mr. Brown then entered a nursing home and applied for Medicaid benefits.

Ohio denied benefits, determining the promissory note was a prohibited asset transfer. According to the hearing officer, the assets given for the promissory note were an improper transfer because interest was deferred and it wasn't clear the promissory note prohibited the cancellation upon Mr. Brown's death. Mr. Brown appealed, and the trial court affirmed the state's decision. Mr. Brown appealed, arguing that because the note cannot be sold, it is not an available resource.

The Ohio Court of Appeals affirms, holding that while the promissory note may not be an available resource, the funds used to purchase the note are an improper transfer. According to the court, "[d]etermining that the note is or is not an available resource does not foreclose inquiry as to the funds used to obtain a non-sellable note."

For the full text of this decision, go to: *www.supremecourt.ohio.gov/rod/docs/pdf/8/2009/2009-ohio-1096.pdf*

Elder Law Attorneys Storm Capitol Hill

Sixty-two elder law attorneys met with some 40 senators, representatives or their staffs the day before the start of the National Academy of Elder Law Attorneys' 2009 annual meeting in Washington, D.C. Chicago NAELA member Kerry Peck, chair of NAELA's Senior Rights Political Action Committee, called the visits "stunningly successful."

Perhaps the highest-profile meeting was a sit-down with Sen. Richard Durbin (D-IL), who, as the Senate Majority Whip, is the second-most powerful person in the Senate. As Brian Lindberg, NAELA's Public Policy Director, reported at a Senior PAC reception the following day, an initially skeptical Durbin asked what elder law attorneys had to gain from such matters as passage of the Elder Justice Act (S.795) or the preservation of pooled trusts for disabled clients. His visitors, Lindberg said, were able to answer, "Nothing. None of our public policy issues are for us. They're all for our clients." Durbin was reportedly impressed and shared the experiences of his mother-in-law, who lived into her 90s.

Drafter Owed No Duty to Beneficiary Who Claims Testator Intended More

Chang v. Lederman (Cal. App., 2nd Dist., Div. 7, No. B100813, March 16, 2009). A California appeals court dismisses a malpractice action brought by a decedent's wife who claimed that the attorney who drafted her husband's estate plan refused the husband's request to revise the plan and instead suggested the husband seek psychological help.

Raphael Schumert and Myung Chang lived together for several years before their marriage. About six months prior to the marriage, Mr. Schumert, who had been diagnosed with terminal cancer, retained attorney Gregory Lederman to draft estate planning documents, including a trust. Pursuant to the terms of the trust, upon Mr. Schumert's death Ms. Chang was to receive a bequest of $30,000 from his sizable estate. Mr. Schumert subsequently executed a will that did not provide for Ms. Chang in any way and a trust amendment that reduced her bequest to $15,000.

After Mr. Schumert's death, Ms. Chang sued Attorney Lederman, alleging that Mr. Schumert had asked Attorney Lederman to amend his estate plan to leave her a larger share of his estate, but the attorney had refused and instead had recommended that Mr. Schumert seek psychological help. Ms. Chang contended that Attorney Lederman had thereby breached his duties to her as an intended third-party beneficiary.

The trial court dismissed Ms. Chang's complaint on the grounds that Ms. Chang had failed to establish that she was the intended beneficiary of Mr. Schumert's estate plan or that Attorney Lederman owed her a duty of care. Ms. Chang appealed.

The California Court of Appeals affirms, ruling that Attorney Lederman does not owe a duty to Ms. Chang because her claim is not based on an allegation that the actual bequest to her is defective but rather that Mr. Schumert would have revised his estate plan but for his attorney's negligence. The court finds that "[e]xpanding the attorney's duty of care to include actual beneficiaries who could have been, but were not, named in a revised estate plan . . . would expose attorneys to impossible duties and limitless liability because the interests of such potential beneficiaries are always in conflict."

For the full text of this decision, go to: *www.courtinfo.ca.gov/opinions/documents/B199813.PDF*

Did Son Voluntarily Consent to Guarantee Mom's Care Bill?

Pioneer Ridge Nursing Facility Operations, L.L.C. v. Ermey (Kan. Ct. App., No. 100,095, March 6, 2009). A Kansas court of appeals holds that a nursing home's claim against a son who signed a promissory note, agreeing to pay for his mother's unpaid nursing home bill, cannot be dismissed until the court determines if the son voluntarily consented to the third-party guarantee.

Randy Ermey admitted his mother, Neva, to a nursing home. Mrs. Ermey applied for Medicaid, but while her eligibility was pending, she incurred a bill. The nursing home issued a discharge notice against Mrs. Ermey, but rescinded the discharge once she became Medicaid eligible. Mr. Ermey signed a promissory note, agreeing to pay the outstanding bill.

After Mrs. Ermey died, the nursing home sued Mr. Ermey to collect on the promissory note. Mr. Ermey claimed he signed the promissory note as a condition of his mother continuing to stay at the nursing home in violation of the Nursing Home Reform Act. The trial court granted Mr. Ermey's motion to dismiss, holding that the promissory note violated federal law and lacked consideration. The nursing home appealed, arguing the note was signed after the nursing home had rescinded the discharge.

The Kansas Court of Appeals reverses, holding that there is a question of fact as to whether Mr. Ermey voluntarily signed the promissory note, so a motion to dismiss was inappropriate. According to the court, although Kansas has not addressed the issue yet, a third-party guarantee of payment may be acceptable if it is voluntarily given.

For the full text of this decision, go to: *www.kscourts.org/Cases-and-Opinions/opinions/ctapp/2009/20090306/100095.htm*

Associates in the Elder Law Practice: Results of a Survey

Recently the Web site ElderLawAnswers asked elder law firms to respond to a brief survey on their use of associates. Firms were asked how they find associates, how much they pay them to start out, and how much work they require of them, among other questions. Here are results from the 53 firms that responded:

The respondents were almost evenly split on how much experience their starting associates generally have. Forty-three percent hire right out of law school while 51 percent take on attorneys with between one and five years of experience. Seventeen percent generally hire individuals with more than five years of experience.

Word of mouth is the main way firms find associates (75 percent). Another 35 percent of firms advertise, 25 percent use law school or alumni offices, and 12 percent log onto Craigslist. (Respondents could check more than one option.) Interestingly, no one used a headhunter. Two respondents hired individuals who clerked at the firm while in law school, and one of these firms requires this kind of preparation.

In terms of how associates are paid, respondents were evenly divided between straight salary and salary-plus-bonus (each 43 percent). Another 13 percent use salary-plus-incentive, and no one pays a percentage of income produced.

The majority of firms (53 percent) pay their starting associates between $40,000 to $55,000. Another 38 percent pay between $55,001 to $70,000, six percent pay between $70,001 to $85,000, and lucky associates at one firm get more than $85,000. For this remuneration, 29 percent of firms expect 1,200 billable hours a year, 23 percent require between 1,400 and 1500 hours, another 23 percent ask for 1,600 hours, and 13 percent expect about 1,800 hours. Several firms couldn't answer the question because they charge flat fees instead.

Starting associates at most firms (74 percent) get two weeks of vacation, with 21 percent given three weeks. No firms start associates out at four weeks.

Not surprisingly, firms with more associates tend to pay more and require more billable hours, although more than half of the responding firms with two or more associates still pay less than $55,000 as a starting salary.

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