

# DISABILITY LAW

## NEWS

New Jersey®

Legal News for Those With Special Needs And Their Families

January 2008

### Significant Cases From New Jersey and Other States Concerning Special Needs Planning and Special Needs Trusts

#### **RECENT DECISIONS:**

#### **ALIMONY DIRECTED TO SPECIAL NEEDS TRUST IS NOT INCOME FOR MEDICAID PURPOSES: J.P. v. DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, N.J. APPELLATE COURT 2007**

A New Jersey appeals court has ruled that alimony paid directly to a special needs trust (SNT) pursuant to a spousal agreement will not be counted as "income" for Medicaid purposes.

J.P. an adult woman, suffered from a severe physical disability and had been living in a nursing home since November 2000 and receiving Medicaid benefits since 2001. In May 2003, her husband filed for divorce. During the proceedings, J.P. was granted her request that an SNT be created for her benefit. Pursuant to the spousal agreement, her husband was to pay the trust monthly alimony equal to \$1,550. The Middlesex County Board of Social Services notified J.P. that the alimony was considered income, and as a result, must be paid to the nursing home.

Reversing the Board's decision, the Appellate Division of the New Jersey Superior Court ruled that alimony paid to the SNT is non-countable income for Medicaid purposes. The court relied on *Reames v. Oklahoma*, (411 F. 3d 1164), which held that assets placed in an SNT are protected so long as they go directly into the trust and do not pass through the hands of the disabled person first. The Court also relied on a letter dated August 4, 1995 from Roy R. Trudel, a Senior Analyst at the Centers for Medicare & Medicaid Services, that explained, "where a trust meets the requirements of one of the exceptions [including a SNT], income placed in that trust is not counted as income to the individual for Medicaid eligibility purposes." The court also rejected the state's argument that the SNT was really a "Miller Trust" (i.e., a trust to which a Medicaid ap-

plicant's income may be diverted which has been prohibited in NJ) on the grounds that this is a misreading of the State Medicaid Manual, which expects the application of Miller Trust analysis when "the right to income placed in the trust actually belongs to the trust and not the individual."

#### **MEDICAID RECIPIENT'S INCOME DIVERTED TO CHILD'S SNT IS NOT COUNTABLE: IN THE MATTER OF VIRGINIA KAISER, NEW YORK TRIAL COURT, 2006.**

A New York court has held that income transferred to a special needs trust solely for the benefit of a Medicaid recipient's disabled adult child is not countable when calculating the money available to pay for the recipient's cost of medical care.

After determining Virginia Kaiser to be an incapacitated person, a New York court appointed a guardian to administer her personal needs and property. The court further ruled that Ms. Kaiser's income was to be diverted to a special needs trust (SNT) for the benefit of her adult disabled daughter, Stephanie. However, when Ms. Kaiser's guardian applied for Medicaid services with the Nassau County Department of Social Services, the Department responded that all of Ms. Kaiser's income would be considered to be Net Available Monthly Income (NAMI) to pay for Ms. Kaiser's extended medical care. After a fair hearing, the New York State Department of Health (DOH) upheld the decision, ruling that only income deposited into an SNT for a recipient's benefit is not countable, and that the exemption did not include diversions to an SNT for the benefit of Ms. Kaiser's daughter.

The New York Supreme Court, Nassau County, set aside the DOH ruling. The court found that income diverted to an SNT solely for the benefit of Ms. Kaiser's daughter is consistent with the language of

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both the federal Medicaid statute and state law. The court rejected the DOH's contention that state law allows income to be exempted only for the purposes of Medicaid eligibility and not for the actual funding of the trust. The court found such a reading would "choke[] off" the income that would form the trust's corpus, requiring that it go to the beneficiary's cost of care and thus rendering the SNT a "meaningless shell."

**UNSUPPORTIVE FATHER ENTITLED TO HALF OF DISABLED DAUGHTER'S ESTATE: IN THE MATTER OF ROGIER, N.J. APPELLATE COURT 2007.**

Jennifer Rogiers was born severely handicapped as a result of a cervical cord injury at her birth in 1983. Her mother, Rosa Rogiers, recovered \$2.6 million from a medical malpractice claim, which was placed in trust for Jennifer's benefit. During her life, Jennifer lived with her mother. Jennifer died at age 22, without a will. At the time of her death, there was approximately \$1.1 million remaining in her trust.

Jennifer's father, Ruben Martinez, requested half of the money in the trust under New Jersey's intestacy laws, which determine heirs when there is no will. Ms. Rogiers challenged his request, arguing that because he did not support Jennifer during her lifetime, Mr. Martinez does not qualify as her parent. A New Jersey lower court awarded Mr. Martinez the money and Ms. Rogiers appealed.

The Superior Court of New Jersey, Appellate Division, ruled that Mr. Martinez qualified as a parent even though he did not support Jennifer during her lifetime, and thus he was entitled to half of her estate. The court held that it is not necessary that a parent support a child in order to inherit from the child under the state's intestacy laws.

**N.J. SUPREME COURT RULES STATE EMPLOYEE ENTITLED TO PAYMENT FOR AUTISTIC CHILD'S THERAPY: IN THE MATTER OF JACOB MICHELETTI, N.J. SUPREME COURT 2007.**

The New Jersey Supreme Court has ordered a state employee health program to pay all fees incurred by an autistic child for his occupational and speech therapies.

Jacob Micheletti was three years old when he was diagnosed with autism. His father, who was employed by the State of New Jersey and is a member

of the State Health Benefits Commission (SHBC) benefit program, sought pre-authorization from Horizon Blue Cross Blue Shield for the medically necessary speech and occupational therapies that were prescribed for his son. Authorization for speech therapy was given, but not for occupational therapy.

Horizon reaffirmed the denial of coverage for occupational therapy and then denied the coverage for speech therapy that it had already granted. The SHBC agreed with Horizon and denied both therapies on the grounds that they were "sought to develop skills or improve skills that were not fully developed and were therefore excluded from coverage." Mr. Micheletti appealed.

The Appellate Division reversed, ruling that the exclusion relied on was void. Mr. Micheletti moved for enforcement of the Appellate Division's decision. His motion was denied, and an appeal followed. The Supreme Court of New Jersey ordered, without elaboration, the State Health Benefits Commission to pay "all invoices relating to in-network speech therapy, in-network occupational therapy, out-of-network speech therapy, and Applied Behavior Analysis/Verbal Behavior Therapy."

**N.J. SUPREME COURT HOLDS THAT STATE AGENCY MISAPPLIED STATUTORY STANDARDS IN DENYING SERVICES TO DISABLED APPLICANT: T.H. v. DIVISION OF DEVELOPMENTAL DISABILITIES, N.J. SUPREME COURT 2007.**

T.H. was a fifty-five year old man suffering from Asperger's Syndrome, a developmental disability. Like many developmentally disabled persons, T.H. was cared for by his parents for his entire lifetime. They provided for his every need and sought no outside assistance. In 2000, T.H.'s last parent died. One day later, he attempted suicide. Thereafter, his family sought services on his behalf from the Division of Developmental Disabilities (DDD). His application was rejected because he failed to satisfy N.J.A.C. 10:46-1.3(2), which requires that an applicant suffer "substantial functional limitations" in three or more areas of major life activity "before the age of 22." Although DDD's own expert recognized that T.H. has suffered from Asperger's since childhood, DDD rejected the evidence proffered by T.H.'s family regarding his childhood limitations because it was "anecdotal" and not "documentary." T.H. appealed and the Appellate Division affirmed.

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The Supreme Court held that, because there is no statutory requirement that an applicant for services develop substantial functional limitations in three major life areas before age 22, the regulatory imposition of that requirement exceeded the power of DDD. The court also held that DDD's rejection of the evidence proffered by T.H.'s family, not on credibility grounds, but because it was anecdotal and not documentary, was arbitrary. Because T.H. was an adult long before Asperger's was a recognized disorder, medical, educational and psychological documentation of his symptoms and treatment before age twenty-two was simply not available. The observations of his family should have been considered an adequate substitute.

***THE PRINCIPAL OF A TRUST IS AN AVAILABLE ASSET UNDER MEDICAID LAW EVEN THOUGH THE TRUSTEE REFUSED TO PAY FOR NURSING HOME CARE FOR THE DISABLED BENEFICIARY: ROME V. WILSON-COKER, CONN. TRIAL COURT 2007.***

Marjorie Rome was bipolar and had been in and out of institutions her whole life. Her father set up a trust for her in his will. The trust gave the trustee discretion to pay out the principal of the trust as necessary for Ms. Rome's "interest and general welfare, even to the extent of exhausting the entire Trust Estate." Ms. Rome entered a nursing home and applied for Medicaid. The state determined she was not eligible because the principal of the trust pushed her over the asset limit.

Ms. Rome appealed, arguing that because the trustee refused to expend trust funds to pay for her nursing home care, the trust principal was not an available asset. The hearing officer determined Ms. Rome was not eligible for Medicaid. She appealed.

The Connecticut Superior Court affirmed, holding that the trust is a general support trust, and because the beneficiary of a general support trust can compel the distribution of funds, the trust principal is an available asset.

***BEFORE THE STATE MAY BE REIMBURSED FOR ITS MEDICAID PAYMENTS TO AN SNT BENEFICIARY, THE BENEFICIARY'S PARENTS MUST BE PAID FOR THE UN-COMPENSATED CARE THEY RENDERED: STATE V. HAMMANS, IND. APPELLATE COURT 2007.***

In 1994, Roland and Sue Hammans's son Nicholas sustained traumatic brain injury as the result of a

car crash, leaving him completely disabled and requiring 24-hour care. The Hammanses later received a lawsuit settlement of \$200,000 on Nicholas's behalf, which was placed in a court-established special needs trust (SNT) under 42 U.S.C. § 1396p(d)(4)(A). The Hammanses subsequently provided Nicholas round-the-clock care at their home, with Medicaid contributing nursing services 40 hours a week.

Nicholas died unexpectedly in 2005. At the time of his death, the SNT had a balance of \$143,860. The Hammanses petitioned for fees associated with the administration of the trust and for compensation for the care they had rendered to Nicholas. The trial court ordered payment of \$140,000 to the Hammanses, finding that the Hammanses' caregiving services were consistent with the trust's terms and had been performed with the expectation that compensation would eventually be authorized prior to Nicholas's death. The State of Indiana appealed.

The Court of Appeals of Indiana affirmed, finding that the services provided by the Hammanses fulfilled the essential function of the trust and were expenditures authorized under its terms. Therefore, the Hammanses are legitimate creditors who require payment before the state may be reimbursed.

***A LOOK BACK: A NEW JERSEY CASE OF HISTORICAL SIGNIFICANCE:***

***NEW JERSEY APPEALS COURT RULES THAT THE STATE MUST BE REIMBURSED FOR MEDICAID PAYMENTS BEFORE SETTLEMENT PROCEEDS CAN BE USED TO FUND A SPECIAL NEEDS TRUST: WALDMAN V. CANDIA, N.J. APPELLATE COURT 1999.***

Lisa Ann Candia and Ayana Morris received Medicaid benefits since the 1980s. Both were awarded tort settlements, and in both cases the New Jersey Department of Human Services moved to intervene in the final orders, arguing that it was entitled to full reimbursement of medical payments before the settlement proceeds could be used to fund a special needs trust (SNT).

In the Candia case, the trial court declined to apply the state's Medicaid lien to the settlement proceeds, ruling that federal law prohibited recovery of the funds prior to the recipient's death. The court directed that an amount equal to the Department's lien be distributed to Lisa Ann's parents rather than to the state. In the Morris case, by contrast, the

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court ruled that the Department was entitled to immediate satisfaction of its Medicaid lien in an amount to be determined by the court. However, following a plenary hearing, the judge awarded the state two-thirds of its lien and directed the remainder to be added to the SNT. The judge found that the Department's lien was attached only to that part of the settlement attributable to medical expense recovery, and that the portion related to "the child's future needs" was reserved for Ayana, subject to reimbursement to the Department upon her death.

The Department appealed from both orders, contending that federal law barring recovery applies only to property already belonging to Medicaid recipients, not to liens imposed on the property of third-party tortfeasors. The Department also argued that the federal statute permitting the sheltering of SNT funds has no bearing on a state's right to recover payments from settlement proceeds.

The court agreed with the Department, ruling that: (1) the state's claim against the settlement proceeds must be satisfied before funds may be transferred to an SNT; (2) to make the adjudication of liability a prerequisite of the state's lien rights is to "elevate form over substance"; and (3) the third-party recovery and SNT provisions of federal law must be considered separately. The court also found that the Candia lower court had erred in awarding certain funds to Lisa Ann's parents and that the Morris lower court's hearing and its subsequent decision regarding categories of damages had no basis in law. ❖



## **Publisher of the Disability Law News Again Recognized as "NJ Super Lawyer" in 2008**

Donald D. Vanarelli, Esq., with offices at 242 St. Paul Street, Westfield, NJ, has been selected as a "NJ Super Lawyer" in the areas of Elder Law and Estate Planning in 2008. Mr. Vanarelli was previously selected as a "NJ Super Lawyer" in 2007.

The selection of outstanding lawyers identifies the top 5% of all lawyers in New Jersey who have attained a high degree of peer recognition and professional achievement. The rigorous multi-step selection process includes peer evaluation, a review of credentials and current bar status, and review and approval from a blue ribbon panel of leading attorneys.

Mr. Vanarelli, a Certified Elder Law Attorney, represents older and disabled persons and their representatives in financing long-term medical care, nursing home issues, qualifying for Medicare, Medicaid and other public benefits, estate planning, probate, guardianship proceedings and special needs planning.

In addition to being board-certified as an Elder Law Attorney by the National Elder Law Foundation, accredited by the American Bar Association, Mr. Vanarelli was designated as an Accredited Professional Mediator by the NJ Association of Professional Mediators. Mr. Vanarelli is a co-founder of the Elder Mediation Center of New Jersey, and he mediates cases involving elder law, guardianship, probate, and family law.

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