ELDERLAW NEWS
New Jersey ®
Legal News for the Aging and Disabled
February 2003

ESTATE PLANNING BY GUARDIANS FOR WARDS IN NURSING HOMES QUESTIONED IN IN RE KERI

Behind the Medical Curtain
By Beth Durney, Guest Contributor

The concept of "Medicaid planning," involving the strategic transfer of assets aimed at accelerating an individual's eligibility for Medicaid, is generally viewed as a prudent estate planning technique by which an individual may preserve assets for his or her loved ones. However, the continued rights of an incapacitated person to engage in Medicaid planning through his or her guardian was called into question by the recent Appellate Division decision in In re Keri, 356 N.J. Super. 170 (App. Div. 2002).

Prior to the Keri decision, the leading New Jersey case involving Medicaid planning on behalf of an incapacitated person was In re Labis, 314 N.J. Super 140 (App. Div. 1998), where the Appellate Division approved a Medicaid planning application brought by a guardian/spouse.

In Labis, the guardian-wife of an incapacitated person appealed from an order denying her the right to transfer her husband's interest in the marital home to her for purposes of Medicaid planning. After concluding that "[a]n effort should be made, in the public interest, to preserve some of [the ward's] assets, in some way to make it possible to repay a portion of the public expense in supporting the incompetent," the lower court had denied the application. 314 N.J. Super. at 143. The Appellate Division reversed.

The Appellate Division found that the lower court had denied the guardian's application "on an erroneous view that the proposed interspousal transfer was contrary to public policy, and thereby failed to consider that the interspousal transfer would benefit [the ward] in carrying forth his probable actions if he were competent to address the situation." Id. at 144.

The Labis court relied upon the substituted judgment doctrine, which grants a court the inherent power to manage an incapacitated person's estate as the incapacitated person would if he possessed that capacity. Id. at 146. The court concluded that such a transfer should be authorized "provided that [it] complies with the best interest of the ward inclusive of his desire to benefit the natural objects of his bounty." Id. at 147. As the Labis court aptly reasoned, "[c]oncepts of equal protection and inherent fairness dictate that an incompetent should be given the same opportunity to use techniques of Medicaid planning and estate planning as others more fortunate." Id.

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In the past decade during this tumultuous time of changes in healthcare, medicare, and senior life style options, the long term care industry has experienced rapid development. As in any industry, as business becomes more competitive, each company must strive, and SUCCEED, at being better than the rest. In healthcare in the United States, the long term care industry is regulated more tightly than ever, and all healthcare organizations must meet these standards in order to stay licensed to care for people. These regulations are enforced on the state level by the Board of Health, and monitored by an annual, unannounced survey.

State surveys are public information, and should be displayed and available in any long term care facility that you visit. The results may help you determine if the facility that you are visiting meets your standards when it comes to cleanliness, building safety, dietary regulation, and most importantly, the quality of resident care. Just as important as what you find reading the state survey, what you observe about your immediate surroundings is key to making a decision about the environment that you are choosing. The following is some information on what to look for, and what you can expect from a licensed assisted living community

Estate Planning By Guardians

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Estate Planning By Guardians *(Continued from Page 1)*

In finding that the interspousal transfer in issue was a reasonable means by which to effectuate Medicaid and estate planning, the Labis court provided the following insight:

> We can safely assume by his will that if [the incapacitated person] were competent, he would take every lawful and reasonable action to minimize obligations to the State of a nursing home in order to secure the maximum amount available to support his wife of twenty-seven years through the remainder of her life and benefit his children thereafter. Id. at 148.

In sharp contrast to the reasoning of Labis, in December 2002 the Appellate Division in Keri took a dim view of the notion of Medicaid planning in general. Whereas the Labis court had deemed "erroneous" the view that Medicaid planning was contrary to public policy, the Keri court referred to the technique as "troubling" and "nothing other than self-imposed impoverishment to obtain, at taxpayers' expense, benefits intended for the truly needy." Citing an increased possibility of conflict of interest where the guardian is the child of the ward, the Keri court was even more critical of the technique when sought by a guardian/child on behalf of an incapacitated parent.

In Keri, in conjunction with an application to the trial court by Richard Keri for appointment as guardian of his mother, Mildred Keri, Richard Keri sought permission to sell his mother's home and to transfer a portion of the proceeds of sale to her heirs (her two adult sons, Richard and Charles Keri), as a part of a Medicaid spend-down plan to accelerate her eligibility for Medicaid while preserving a portion of her estate for her heirs. In her will, Mrs. Keri had named her two sons as the beneficiaries of her estate.

The Medicaid planning proposal by Richard Keri was unopposed; in fact, it was recommended by the court-appointed counsel for Mrs. Keri.

> Under the Keri holding, Medicaid planning (i.e., the strategic transfer of assets aimed at accelerating a nursing home resident's eligibility for Medicaid) should be denied unless there is evidence that the ward, while competent, expressly indicated a preference to engage in Medicaid planning.

Nevertheless, after granting Richard Keri's application to be appointed guardian of his mother, the trial court denied Mr. Keri's application to conduct Medicaid planning, announcing that,

> I do not [pauperize] human beings and citizens of the United States solely to make them [wards] of the taxpayers. I don't know when probate judges got in to this business of doing estate planning post-incompetency, but I don't do it.

On appeal, the Appellate Division distinguished the Keri case from those involving Medicaid planning applications filed by a guardian/spouse of the ward. It articulated a more stringent standard for analyzing Medicaid planning applications filed by a guardian/child, and affirmed the denial of the guardian's Medicaid planning application.

It has been in reliance on the Labis decision that practitioners have advocated the concept of Medicaid planning by guardians on behalf of their incapacitated wards. Until the Keri decision, Appellate Division decisions have generally permitted Medicaid planning by guardians under the same analysis as other estate planning applications by guardians: such planning has been permitted unless there is evidence of contrary intent by the ward, formed during competency.

Under the Keri holding, this presumption in favor of permitting Medicaid planning is reversed where a guardian/child applies to the court for permission to conduct Medicaid planning on behalf of the ward/parent: such planning is denied unless there is evidence that the ward, while competent, expressly indicated a preference to engage in Medicaid planning. Unless there is express evidence of a preference to engage in Medicaid planning, the court will presume that Medicaid planning had been considered and rejected by the now-incapacitated person, and will deny the application.

Although Mrs. Keri had executed a will leaving her estate to her two sons (who would have been the recipients of the proposed Medicaid transfers); executed a general power of attorney naming Richard Keri

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as her agent; and authorized the agent to "deal on my behalf with respect to ... Medicaid," the Appellate Division concluded that Richard Keri failed to satisfy that new standard, and denied the Medicaid planning application.

As a result of the December 19, 2002 Keri decision, the future of Medicaid planning in the context of guardianship actions has been thrown into doubt. The matter in issue herein has far-reaching policy implications. Not only is the decision troubling in terms of an incapacitated person's equal protection rights to self-determination; it is also troubling on a more practical level. With an aging population and escalating costs of care for that population, this precise issue will arise again and again in the future. The Keri decision requires that an elderly, now-incapacitated person had possessed the foresight and the legal understanding to have reflected upon and expressly indicated a preference to conduct Medicaid planning in order to have a substituted decision-maker carry out such a plan. Requiring a guardian to make such a showing effectively forecloses the guardian from engaging in Medicaid planning in the vast majority of cases.

The Keri decision is now on petition for Certification to the NJ Supreme Court.

The Law Offices of Donald D. Vanarelli has developed a significant expertise in the field of Elder Law, a legal specialty focusing on the special needs and legal problems of the elderly, the disabled and their families.

or skilled nursing center.

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Most skilled nursing centers and assisted livings these days are quite elegant. Most resemble luxury hotels and resorts with grand décor and plenty of tasteful touches throughout. The key is to look BEYOND the wallpaper and really observe how much thought has gone into the design and the programming of the community itself. SKILLED NURSING CENTERS AND ASSISTED LIVINGS SHOULD BE DESIGNED TO PROMOTE SAFETY, INDEPENDENCE, AND SOCIALIZATION, IN A HOME-LIKE ENVIRONMENT FOR EACH RESIDENT, WHATEVER THEIR NEEDS.

For example, are there safety features, such as handrails, in the hallways so that residents with mobility impairment can navigate the building more independently? Secondly, are these safety features tactfully worked into the décor of the building in order to avoid an institutional look and feel?

Are there plenty of easily accessible common areas for residents to enjoy independently and together in between scheduled events and activities? Buildings should be designed to allow socialization between residents easily and conveniently. You should never have to travel too far to reach a common area or a place where one can gather with friends or family. Is there an effective means to call staff for assistance or in an emergency, such as call buttons, inter community phone systems, or emergency pendants that can be worn or carried on your person? Is it convenient and easy for all residents, especially those in wheelchairs, to enter and exit areas of the building, especially the rest rooms? Do the apartments offer the essentials so that residents can make their apartment their home in the truest sense possible?

Beyond the physical design of the building, the most important and key safety feature is the STAFF. Is the staff available and on-site 24 hours a day, 7 days a week? If the nurse- or certified nursing assistant-to-patient ratio is HIGHER than the state regulation, which may vary in each state, it is a good indication that the organization has gone **above and beyond** what is expected by the Board of Health in the name of safety and security for their residents. Personal care assistants should also be accessible throughout the day and night.

These are just a few examples of how each company strives to create a better, safer, and more appealing environment for those who choose long term care in a skilled nursing center or assisted living as a lifestyle option. As one can imagine, these types of efforts on the part of care providers can only mean better care and a happier, healthier existence for anyone who lives there, as well as more peace of mind for their families. While trends in the long term care industry continue to develop, we can all remain more positive that our future will include more options than ever before, and, hopefully, a plethora of providers whose goals and objectives are meant to provide the best care possible.

Beth Durney is the Corporate Marketing Manager for CareOne, a family owned senior care company with 11 senior care centers in New Jersey. For more information about long term care in your area,call CareOne at the Highlands, located in Edison, New Jersey at 908-754-7100.

Donald D. Vanarelli, Esq., **certified as an Elder Law Attorney** by the National Elder Law Foundation, an ABA-approved certifying organization, **certified as a Guardian and Court Evaluator in the State of New York**, and **approved as a Mediator in the State of New Jersey in civil, equity and probate litigation**, conducts seminars on various estate and elder law topics. A partial list of Mr. Vanarelli's recent and upcoming seminars follows.

Winter – Spring 2003 Speaking Engagements

January 30	Manville Library	1:00 & 6:00 PM
February 11	Tuesday Senior Club, Linden	1:00 PM- 1:45 PM
February 26	Springfield Library	1:00 & 7:00 PM
March 13	Muhlenberg Adult Care Center	7:00 PM -8:30 PM
March 25	Edison Library	1:00 & 7:00 PM
March 29	Plan/NJ (Union Library)	10:00 AM- Noon
April 10	Woodbridge Library	1:00 & 7:00 PM
April 22	Summit Old Guard	10:15 AM
April 25	Alzheimer's Association Education Conference For Healthcare Professionals	7:30 AM-4:00 PM
April 27, 28, 29	NJ Chapter of the National Association of Social Workers Annual Conference	8:00 AM-5:00 PM
May 14	NJ Chapter of Geriatric Care Managers Conference	11:00 AM-1:00 PM

UPDATE OF SELECTED PUBLIC BENEFIT FIGURES FOR YEAR 2003

MEDICAID

New Jersey's Institutional Income Cap	$1,656 per month
Community Spouse Resource Allowance	Minimum $18,132 Maximum $90,660
Minimum Monthly Maintenance Needs Allowance	$1,493 per month

MEDICARE

Part A Nursing Home Co-Insurance	$105.00 per day for days 21 through 100
Part A Inpatient Hospital Deductible	$840 per spell of illness plus $210 per day for days 61-90 $420 per day for days 91-150 (lifetime reserve days)
Part B Deductible	$100 per year
Part B Premium	$58.70 per year

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