ELDERLAW NEWS
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ESTATE PLANNING BY THE GUARDIAN OF AN INCOMPETENT PERSON IN ANTICIPATION OF NURSING HOME ADMISSION

A. THE COURT'S AUTHORITY TO APPOINT A GUARDIAN.

The authority of a court to appoint a guardian for an incapacitated person is founded upon its *parens patriae* jurisdiction, by which a court "may intervene in the management and administration of an incompetent's estate in a given case for the benefit of the incompetent or of his estate." In re Trott, 118 N.J. Super. 436, 440 (Ch. Div. 1972). In New Jersey, the appointment of a guardian for an incapacitated person is governed by statute.

Pursuant to N.J.S.A. 3B:12-25 (formerly N.J.S.A. 3A:6-36, repealed),

> The Superior Court may … appoint a guardian for [an incompetent's] person, guardian for his estate or a guardian for his person and estate. Letters of guardianship shall be granted to the spouse, … or to his heirs, or if none of them will accept the letters or it is proven to the court that no appointment from among them will be to the best interest of the incompetent or his estate, then to any other proper person as will accept the same.

See also R. 4:86-6 (c) (letters of appointment shall be granted "to the spouse or next of kin" unless "it is proven … that no appointment from among them will be in the best interests of the incompetent"). The statute has been interpreted by our courts as "creat[ing] an initial presumption of entitlement to guardianship in the next of kin," In re Quinlan, 70 N.J. 10, 22 (1976), or a "preference [in favor of] family members." In re J.M., 292 N.J. Super. 225, 239 (Ch. Div. 1996).

The New Jersey courts "routinely and repeatedly" follow the legislative preference in favor of family members. In re J.M., supra, 292 N.J. Super. at 239. The preference for family members prescribed by the statute "**must** be recognized unless it is shown to the court's satisfaction that the appointment of next-of-kin would be affirmatively contrary to the best interests of the incompetent or his estate in the sense of being deleterious thereto in some significant way". In re Roll, 117 N.J. Super. 122, 124 (App. Div. 1971). The courts accord a "strong bias" in favor of familial ties but may appoint a stranger where to do so would be for the best interests of the incompetent in view of such factors as the adverse interests of the family members and the incompetent, lack of business ability of the family members, and various other matters.

Thus, in New Jersey, "[t]he next-of-kin of the incompetent, determined in accordance with the traditional table of consanguinity, is **absolutely entitled** to the guardianship appointment unless such appointment is clearly contrary to the best interests of the incompetent….") Pressler, Current N.J. Court Rules, Comment on R. 4:86-6 at 1814 (2002).

B. DECISIONMAKING BY GUARDIANS ON BEHALF OF WARDS.

It is axiomatic that incapacitated persons possess a "common-law right of self-determination, the same as that of competent persons, except that the right of self-determination of [adjudicated incapacitated persons] must be balanced by the court with concern for their best interests." In re Roche, 296 N.J. Super. 583, 588 (Ch. Div. 1996).

The judicial standards by which a guardian's actions are measured differ from state to state.

> States generally utilize one of two prevalent standards for decisionmaking by guardians on behalf of their wards. One of these is the "best interests" standard, which mirrors the view that the guardian's duties are akin to those imposed on a parent. Under this standard, the charge of the guardian is to make an independent decision on behalf of the

(Continued on Page 2)

Medical Deductions For the Elderly: Expenses And Premiums Relating to Long-Term Care

Medical Care Defined.

Unless specifically provided otherwise in the Internal Revenue Code (IRC), personal, living or family expenses are not tax deductible. However, IRC Section 213 permits the deduction of expenses for medical and dental care. Medical care means the diagnosis, cure, mitigation, treatment, or prevention of disease; treatments affecting any part or function of the body; transportation costs of a trip primarily for and essential to medical care; and qualified long-term care services. Also deductible are expenses for medical insurance, including premiums paid for Part B of Medicare, for supplementary medigap insurance and for qualified long-term care insurance, with certain limits.

How Much is Deductible, and When?

The amount of the medical and dental expenses that exceeds 7.5 percent of the taxpayer's adjusted gross income (line 34, Form 1040) is deductible as an itemized deduction. Medical and dental expenses are deductible in the tax year they are paid, regardless of when the services were provided, except in the case of decedents. A decedent's medical expenses paid from his estate are treated as paid at the time the medical expenses were provided if they were paid within the one-year period beginning with the day after the date of death. The taxpayer may deduct medical expenses for himself and his or her spouse, dependent, and children. The taxpayer must be able to substantiate his medical deduction with a statement or itemized invoice from the medical supplier paid showing the nature of the expense, for whom it was incurred, the amount paid and the date of payment. Medical expenses that were paid by an insurance company or other source are not deductible.

Nursing Home Expenses.

(Continued on Page 4)

(Estate Planning By Guardians – Continued from page 1)

> ward.... The other standard, "substituted judgment," requires surrogate decisionmakers to act as they feel the wards themselves would act. This standard places the guardian in the shoes of the ward when making decisions. In other words, the court substitutes its judgment for that of a disabled person and does what the disabled person could have done for himself or herself if able.

Rainey v. Mackey, 773 So. 2d 118, 121 (Fla. Dist. Ct. App. 2000).

The New Jersey Supreme Court case of In re Conroy, 98 N.J. 321 (1985), illustrates New Jersey's endorsement of the concept of a continuum that utilizes the substituted judgment standard as a starting point and resorts to the best interests standard as a fallback position.

For persons whose personal preferences have been clearly articulated, the "pure substituted judgment" ("pure subjective") approach is appropriate, in which the person's clear wishes are applied. Where some, though inconclusive, indication of a person's wishes have been identified, a "limited best interests" ("limited-objective") approach is appropriate, in which the person's best interests are determined consistent with the prior indicia of personal preference. Where no indication of personal preference is expressed, the "pure best interests" ("purely objective") approach is appropriate, based upon an analysis of relevant facts other than the person's preferences. Cantor, N., Discarding Substituted Judgment and Best Interests: Toward a Constructive Preference Standard for Dying, Previously Competent Patients Without Advance Directives, 48 Rutgers L. Rev. 1193, 1223-1224 (1996) (citation ommitted); Pollack, S., Life and Death Decisions: Who Makes Them and by What Standards?, 41 Rutgers L. Rev. 505, 505-506, 518 (1989). These tests "represent points on a continuum of subjective and objective information leading to a reliable decision that gives as much weight as possible to the right of self-determination." Roche, supra, 296 N.J. Super. at 589 (quoting M.R., 135 N.J. 155, 167-168 (1994).

The substituted judgment standard is considered to be "the solution of first resort," primarily because it gives effect to the "wishes, views, values and life style" that the incapacitated person manifested during competency. A. Handler, Individual Worth, 17 Hofstra L. Rev. 493, 508 (1989). Stated otherwise,

> [t]he incompetence of a [person] should not deprive the [person] of exercising his or her autonomy if the [person], while competent, has clearly expressed his or her preference.

S. Pollack, Life and Death Decisions: Who Makes Them and by What Standards?, supra, 41 Rutgers L. Rev. at 519.

In utilizing the foregoing standards, however, it is critical to recognize that there need not be a showing that the alleged incapacitated person actually considered and chose to plan his estate to avail himself of Medicaid planning techniques. In an analogous case in which it analyzed estate planning by guardians, the Trott court examined a guardian's application to reform a will in order to take advantage of certain tax saving provisions. Although recognizing that the incapacitated person had given no indication in her will that she wished to save taxes, the court approved the application nevertheless, finding that

> the guardian should be authorized to act as a reasonable and prudent man would act (in the management of his own estate) under the same circumstances, **unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary.**

In re Trott, supra, 118 N.J. Super. at 441 (citations omitted) (emphasis supplied). Accord In re Labis, 314 N.J. Super. 140, 148 (App. Div. 1998) ("We can safely assume … that if [the incapacitated person] were competent, he would take every … action to minimize obligations to the State [and] secure the maximum amount available [to benefit his loved ones]").

C. GUARDIANS MAY TRANSFER THEIR WARDS' ESTATE ASSETS IN ANTICIPATION OF NURSING HOME ADMISSION, WITH COURT APPROVAL.

As mentioned above, it is beyond question that incapacitated persons possess "a common-law right of self-determination, the same as that of competent persons…." In re Roche, supra, 296 N.J. Super. 583, 588 (Ch. Div. 1996) (citation omitted). This proposition also applies in the context of an application to engage in Medicaid planning on behalf of an incapacitated person.

> The complexities of the Medicaid eligibility rules … should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else for any reason or for no reason. In other words, it is, or should be, clear that [an incapacitated person], who had the unrestricted right to give assets to [his family or others]… did not…lose that fundamental right merely because he is now incapacitated and financial decisions on his behalf must necessarily be made by a surrogate.

In re Kashmira Shah, 694 N.Y.S. 2d 82, 86-87 (Sup. Ct. 1999), aff'd, 95 N.Y.2d 148 (App. Div. 2000).

Upon the appointment of a guardian for the property of an incapacitated person, the court "shall have a full authority over the ward's estate, and all matters relating thereto." N.J.S.A. 3B:12-36. "The court has, for the benefit of the ward, … all the powers over his estate and affairs which he could exercise, if present and not under a disability, except the power to make a will, and may confer those powers upon a guardian…." N.J.S.A. 3B:12-49. These powers include the express power to enter into contracts, id., and to make gifts. N.J.S.A. 3B:12-50, 3B:12-58. A guardian is also expressly authorized to expend funds for the support of his dependents. N.J.S.A. 3B:12-46.

In the exercise of those powers, "the guardian or the court should take into account any known estate plan of the ward, including his will." N.J.S.A. 3B:12-62.

Pursuant to the foregoing statutory authority, a court may permit a guardian to exercise over the ward's estate all powers that the ward could or would exercise if not under a disability, including the power to transfer assets as gifts. The court's ability to authorize a guardian to take whatever actions an incapacitated person would have taken if of sound mind has been the doctrine of New Jersey case law for more than half a century. See Marsh v. Scott, 2 N.J. Super. 240 (Ch. Div. 1949).

In furtherance of this proposition, in 1972, the court in In re Trott authorized the guardian of an incapacitated person to make inter vivos transfers of assets to her heirs to minimize estate taxes, citing the proposition that an incapacitated person should not be denied the privilege of effective estate planning. Trott, 118 N.J. Super. at 436. As the court reasoned,

> Under the doctrine of *parens patriae*

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(Estate Planning By Guardians – Continued from page 2)

> the court… may intervene in the management and administration of an incompetent's estate in a given case for the benefit of the incompetent **or of his estate**. Id. at 440 (emphasis supplied).

Notably, the Trott court did not require an affirmative showing that the incapacitated person would have taken these particular steps with regard to her estate; instead, the court found that "the guardian should be authorized to act as a reasonable and prudent man would act (in the management of his own estate) under the same circumstances, **unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary.''** Id. at 441-442 (quoting In re Christiansen, 248 Cal App. 2d 398 (Dist. Ct. App. 1967) (emphasis supplied)). The Trott court went on to identify the following criteria with which to consider a guardian's proposal to make gifts:

> (1) the mental and physical condition of the incompetent are such that the possibility of her restoration to competency is virtually nonexistent; (2) the assets of the estate … are more than adequate to meet all of her needs…; (3) the donees constitute the natural objects of the bounty of the incompetent…; (4) the transfer will benefit and advantage the estate of the incompetent…; (5) there is no substantial evidence that the incompetent, as a reasonably prudent person, would, if competent, not make the gifts proposed…. Id. at 442-443.

These criteria articulated in Trott remain the standard by which courts in New Jersey analyze applications of a guardian to make gifts. See In re Cohen, 335 N.J Super. 13 (App. Div. 2000) (reversing the lower court's authorization of a settlement agreement revising the incapacitated person's testamentary plan, and remanding the case for consideration of an alternate plan consistent with the Trott criteria).

Nevertheless, despite the foregoing case law authorizing the implementation of a guardian's plan for the benefit of an incapacitated person's estate, until 1998 there were no written opinions either expressly authorizing or denying the use of the ward's assets for the specific purpose of Medicaid planning.

However, in the recent case of In re Labis, 314 N.J. Super. 140 (App. Div. 1998), the New Jersey Appellate Division, for the first time, directly authorized estate planning by a guardian in anticipation of the ward's admission to a nursing home.

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 the court the inherent power to manage an incompetent's estate as the incompetent 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 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. (emphasis supplied).

Thus, after applying the above-referenced criteria set forth in Trott, supra, and finding that the interspousal transfer in issue was a reasonable means by which to effectuate Medicaid and estate planning, the Appellate Division held that it was authorized, pursuant to N.J.S.A. 3B:12-49 and 3B:12-50, to permit the Labis guardian's request for the transfer of the marital home. Id. at 148. In so doing, 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.

Labis is the first reported New Jersey case to specifically address a guardian's application to preserve an incapacitated person's estate by making asset transfers to accelerate Medicaid eligibility. Nevertheless, prior case law, including Trott, supra, as well as case law from the New Jersey Supreme Court, lends additional support for a guardian's right to engage in Medicaid planning.

For example, in 1992 the New Jersey Supreme Court considered a similar issue when it addressed whether a minor's personal injury award, deposited into a court-supervised trust account, could be considered in determining eligibility of the minor's family for a program which, like Medicaid, is financed by a combination of federal and state funds. Essex County Div. of Welfare v. O.J., 128 N.J. 632, 637-638 (1992). The Court relied upon both the Trott decision and N.J.S.A. 3B:12-49 to support its authority to exercise all powers over a minor's estate that the minor could exercise. Id. at 644-645. The O.J. Court found no federal policy, either by regulation or judicial decree, which would require the minor's funds to be considered "available" for purposes of calculating AFDC eligibility. The Supreme Court concluded that there was "no principled basis on which to conclude that the Legislature intended to allow minor's personal injury trust funds to reduce eligibility for future benefits," even though the statute was silent on that issue. Id. at 640-643.

Courts of other jurisdictions have expressly permitted guardians to transfer the assets of their wards for the purpose of attaining eligibility for Medicaid. See In re Kashmira Shah, supra, 694 N.Y.S. 2d 82; In re John XX, 652 N.Y.S. 2d 329 (Sup. Ct. 1996), appeal den., 659 N.Y.S.2d 854 (1997); In re Daniels, 618 N.Y.S. 2d 499 (Sup. Ct. 1994); In re Guardianship of F.E. H., 453 N.W. 2d 882 (Wis. 1990); see also Rainey v. Guardianship of Mackey, supra, 773 So. 2d at 119.

In fact, in one reported decision of the Supreme Court of Ohio, the failure of an attorney/guardian to facilitate the ward's Medicaid eligibility was found sufficient to warrant the attorney's public reprimand. Office of Disciplinary Counsel v. Papalardo, 643 N.E.2d 1134 (Ohio 1994). See also Jewish Home for the Elderly of Fairfield

(Continued on page 4)

(Estate Planning By Guardians – Continued from page 3)

County, Inc. v. Cantore, 58 Conn. App. 1 (App. Ct. 2000) (action by nursing home against conservator for breach of fiduciary duty to incapacitated person based upon failure to promptly apply for Medicaid on behalf of the incapacitated person); In re Guardianship of Connor, 170 Ill. App. 3d 759 (App. Ct. 1988) (guardian breached fiduciary duty by failing to properly pursue public aid on behalf of ward).

"The simple fact is that current law rewards prudent Medicaid planning. In re John XX, supra, 652 N.Y.S. 2d at 331.

D. CONCLUSION.

Based upon the case law in New Jersey and the other states cited above, guardians may, in appropriate circumstances, engage in Medicaid planning in order to preserve a portion of an incompetent person's assets for the ultimate beneficiaries of the incompetent person's estate.

Medical Deductions For the Elderly: Expenses And Premiums Relating to Long-Term Care

(*Continued from Page 1)*

The cost of medical care in a nursing home (or home for the aged) for the taxpayer, his or her spouse or dependent, is deductible under IRC Section 213. Those costs are considered to be "qualified long-term care services" as defined in IRC Section 770B. The deductible amount includes the cost of meals and lodging.

Nursing Services.

Wages and other payments for nursing services are deductible. An actual nurse need not perform the services as long as they are of a kind generally performed by a nurse. This includes services connected with caring for the patient's condition, such as giving medication or changing dressings, as well as bathing and grooming the patient. These services can be provided in the home or at a care facility. Amounts paid to the nurse or caregiver for Social Security taxes, FICA, Medicare and state unemployment tax are deductible. The costs of the caregiver's meals, extra rent and utilities attributable to the caregiver is deductible.

Qualified Long-Term Care Services and Insurance Premiums.

Unreimbursed expenses for qualified long-term care services are deductible medical expenses. Qualified long-term care services are all necessary diagnostic, preventive, therapeutic, rehabilitative, and personal care services that are required by a chronically ill individual and provided pursuant to a plan of care prescribed by a licensed health care provider.

Qualified long-term care insurance premiums that do not exceed the following amounts per person are deductible medical expenses:

Age 40 or under		$230
Age 41 to 50		$430
Age 51 to 60		$860
Age 61 to 70		$2,290
Age 71 or over		$2,860

A "qualified long-term care insurance contract" is an insurance contract that provides only coverage for qualified long-term care services. The contract must: 1) be guaranteed renewable; 2) not provide for a cash surrender value or other money that can be paid, assigned, pledged, or borrowed; 3) provide that refunds (other than refunds on the death of the insured or complete surrender or cancellation of the contract) and dividends must be used only to reduce future premiums or increase future benefits; and, 4) generally not pay or reimburse expenses incurred for services or items that would be reimbursed under Medicare.

Benefits received under a qualified long-term care insurance contract are usually excluded from gross income if they do not exceed $200 per day.

Insurance Premiums.

Premiums paid for insurance policies that cover medical care are deductible, unless the premiums are paid with pretax dollars. Insurance premiums paid by an employer-sponsored health insurance plan are not deductible unless the premiums are included in the individual's income.

Payroll tax paid for Medicare Part A is not a medical expense. Part B is supplemental insurance and its premiums are considered a medical expense.

Premiums paid for the following are not deductible: life insurance; policies covering loss of earnings; policies for loss of life, limb, sight, etc; policies that pay a guaranteed amount for a stated number of weeks if hospitalized for sickness or injury; and, the part of an automobile insurance premium that provides medical insurance coverage for all persons injured in or by the taxpayer's car.

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