ELDERLAW NEWS
New Jersey ®
Legal News for the Aging and Disabled *September 2004*

IN RE KERI: NJ SUPREME COURT UNANIMOUSLY ENDORSES MEDICAID PLANNING BY GUARDIAN/CHILDREN

In a unanimous decision delivered by Chief Justice Poritz on August 5, 2004, the New Jersey Supreme Court, for the first time, directly addressed and authorized the use of Medicaid planning by a guardian/child for an incapacitated parent. In re Keri, No. A-70 (N.J. Aug. 5, 2004). The opinion rejected the Appellate Division's characterization of such planning as "self-imposed impoverishment to obtain, at taxpayers' expense, benefits intended for the truly needy." (Slip op. at 26). Instead, the high court recognized Medicaid planning as a legally permissible estate planning tool for which Congress has established the public policy, and found that, "so long as the law allows competent persons to engage in Medicaid planning, incompetent persons, through their guardians, should have the same right…." (Slip op. at 27).

Background

The concept of "Medicaid planning," involving the strategic transfer of assets aimed at hastening an individual's eligibility for Medicaid, has been viewed as a prudent estate planning technique by which an individual may preserve assets for his or her loved ones. As a result of the Appellate Division decision in Keri, however, the right of an incapacitated person to engage in Medicaid planning through his or her guardian was called into question. 356 N.J. Super. 170 (App. Div. 2002). In reversing the Keri appellate court last week, our Supreme Court eliminated any question as to the continued viability of Medicaid planning as an estate planning tool for guardians.

The Supreme Court Reversal

Whereas the Appellate Division had refused to presume that a reasonable competent person would engage in Medicaid planning (and instead directed that subjective proof of a ward's preference to engage in Medicaid planning be demonstrated), the Supreme Court agreed with New York's presumption in favor of Medicaid planning, finding that "'a competent, reasonable individual … would prefer that his property pass to his child rather than serve as a source of payment for Medicaid and nursing home care bills.'" (Slip op. at 17 (quoting In re Daniels, 618 N.Y.S.2d 499, 504 (Sup. Ct. 1994)).

Our Supreme Court found that the lower court decision in In re Trott, 118 N.J. Super. 436 (Ch. Div. 1972), "impliedly established" the presumption in favor of Medicaid planning by recognizing that maximizing funds available to a ward's beneficiaries (by reducing amounts owing to the state) is in the best interests of the ward's estate. (Slip op. at 17). As Chief Justice Poritz recognized,

> when a Medicaid spend-down plan does not interrupt or diminish a ward's care, involves transfers to the natural objects of a ward's bounty, and does not contravene an expressed prior intent or interest, the plan, *a fortiori*, provides for the best interests of the ward and satisfies the law's goal to effectuate decisions an incompetent would make if he or she were able to act. (Slip op. 15).

(Continued on Page 2)

(Continued from page 1)

Thus, instead of barring Medicaid planning by a guardian unless there is evidence that the ward, while competent, expressly indicated a preference to engage in Medicaid planning, our Supreme Court adopted the framework established in the Trott decision, whereby it is presumed that Medicaid planning is in the ward's best interests unless there is "substantial evidence that the incompetent, as a reasonably prudent person, would, if competent, not make the gifts proposed…." (Slip op. at 11, 17 (quoting Trott, 118 N. J. Super. at 442-43)).

The Trott criteria, which was established by a chancery court in 1972 and often relied upon by courts in the years that followed, allows gifting by a guardian if the following five criteria are met:

> (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 of the incompetent remaining after the consummation of the proposed gifts are such that, in the light of her life expectancy and her present condition of health, they are more than adequate to meet all of her needs in the style and comfort in which she now is (and since the onset of her incompetency has been) maintained, giving due consideration to all normal contingencies; (3) the donees constitute the natural objects of the bounty of the incompetent by any standard…; (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…."

(Slip op. at 10-11 (quoting Trott, 118 N.J. Super. at 442-443)).

The Keri Court characterized this last criterion as "a subjective test with a high evidentiary burden to rebut substituted judgment: that 'there is no substantial evidence' the ward, 'if competent,' would not approve a Medicaid spend-down plan." (Slip op. at 12).

In addition to adopting the clearly articulated standards set forth in Trott, Chief Justice Poritz provided a careful analysis of those criteria as they applied to Keri.

After concluding that Mrs. Keri's mental status satisfied the first criterion, the Court found that the second criterion was met, given the proposed spend-down plan, coupled with the fact that nursing home placement was necessary and that federal and state law prohibits discrimination of nursing home residents on the basis of Medicaid pay status. (Slip op. at 18-19). The Court found that the proposed donees of the spend-down plan were the objects of the ward's bounty, thus satisfying criterion three. Because the proposed plan would benefit the ward's estate, criterion four was met.

The Court also found that the guardian had satisfied the fifth criterion. Although it recognized Mrs. Keri's preference to remain in her home, rather than a nursing home, the fact that the only source to pay for in-home care was the house itself resulted in "a veritable 'Catch-22'." (Slip op. at 20). Moreover, because her dementia had resulted in *in*-

(Continued from Page 2)

creasingly difficult behavior, the Court noted that in-home care might not have been feasible. The Supreme Court concluded that there is "simply nothing in the record to suggest" that Mrs. Keri would have disapproved of the Medicaid planning proposal. (Slip op. at 21).

Finally, the Court rejected the notion that Medicaid planning by a guardian/child is a conflict of interest, reasoning that "the natural objects of a ward's bounty often are the same persons likely to be chosen by the courts as guardians," and citing the statutory preference for appointing a spouse or heirs as guardians. (Slip op. at 22 (citing N.J.S.A. 3B:12-25)):

> Disqualifying those individuals from receipt

(Continued on page 3)

of asset transfers on conflict of interest grounds prevents the use of substituted judgment in the majority of cases because, if not disabled, incompetent persons most likely would transfer their assets to their guardians. (Slip op. at 22-23).

With the future of Medicaid planning by guardians on firm legal footing, elder law practitioners may proceed with confidence in utilizing this valuable estate planning tool on behalf of their clients.

Donald D. Vanarelli, a Certified Elder Law Attorney and publisher of the Elder-law News, represented the petitioner, Richard Keri, in In re Keri, No. A-70 (N.J. Aug. 5, 2004).

What would you do if you found yourself in the following situation? You are in your late 60s and have been married for 35 years to a loving spouse who then becomes terminally ill. You both thought you would be married "till death to you part" and had saved enough money for a comfortable retirement. Your spouse is then diagnosed with Alzheimer's and he will most likely have to be institutionalized when the illness progresses. You are told that the average nursing home cost is $8,000 per month (and may be as high as $15,000 in some areas of the country). Upon consulting an elder law attorney, you find that there are only two choices available to you:

1. spend all your money on nursing home care for your ill spouse, leaving no money for you (or your dependent children) to live on

   OR

2. get a divorce and remain financially viable while your spouse's care is paid for by Medicaid.

Divorces Among the Elderly on the Rise

(From Eye on Elder Issues, 7/04 Ed.)

This very case confronts members of our society every day. **Many elder law attorneys have expressed concern over increasing divorce rates among our nation's seniors.**

Many of these divorce actions involve elderly citizens who either have no or inadequate health care insurance or are facing long term care costs which far exceed their financial resources. **In many circumstances, both spouses are still competent and it is the ill spouse who is requiring very expensive medical or nursing home care and is insisting upon the divorce to protect their well spouse.** Most of these circumstances involve more common ailments such as strokes or other illnesses that are physically debilitating and can create problems for the long-term. Other cases involve individuals in their 50s and 60s with Lou Gehrig's disease, Multiple Sclerosis or Alzheimer's. Attorneys desperately look for alternative solutions, but often see couples who never intended to get divorced. The clients are emotionally devastated by the necessity to make the decision to do so at a time when they are most vulnerable. For a society that professes to adamantly support the institution of marriage, this is indeed a sad and desperate situation.

In most states, the average nursing home stay is three years. Using that statistic, **most well spouses will be impoverished in less than two years if they are using their own resources for nursing home care.** These situations often involve middle or lower income families where the financial benefit of divorce may seem modest. However, the typical family in this income bracket has a house worth less than $100,000, savings (including pensions) of $80,000 or less, and a very modest income. These assets are further stretched if the family includes an incapacitated child or sibling relying on the family for support as well. **Losing $60,000 to $140,000 of lifetime savings each year and facing the possibility of a lien against their home leaves their elderly citizens with very few choices.** In most of these circumstances, the family cannot purchase long term care insurance, either because of insufficient income or poor health which renders them ineligible for the insurance coverage.

This creates concern among aging professionals who work with this segment of our population on a daily basis. They strongly believe **it is contrary to the intentions set forth by Congress and President Reagan in the Medicare Catastrophic Coverage act that was intended to "end spousal impoverishment."** While divorce is certainly one avenue to provide for the family, attorneys are often searching for other solutions…all to no avail. In the end, it is the client's decision to make. ✪

A PUBLICATION OF THE LAW OFFICES OF DONALD D. VANARELLI

Fall – Winter 2004 Speaking Engagements – To Date

		September	
15	GAMBRO	Asset Protection Planning	10:00 AM
		October	
19	Westfield Municipal Building	Asset Protection Planning	10:00 A.M.
23	NJ Ass'n of Professional Mediators	Mediation of Probate and Estate Lawsuits	10:00 A.M.
		November	
3	AARP, Woodbridge	Estate Planning	1:00 P.M.
9	Edison Library	Asset Protection	1:00 & 7:00 P.M.
10	Participant in Conference – Society on Aging in New Jersey		
11	Morris Area Chapter of AARP	Estate Planning Update	10:45 A.M.
17	Union County AARP, Union, NJ	Estate Planning Update	1:00 P.M.
		December	
8	NJ Institute for Cont. Legal Ed.	Estate / Medicaid Planning by Guardians	9:00 A.M.

DONALD D. VANARELLI, ESQ. OFFERS SEMINARS ON DIVORCE MEDIATION

Divorce Mediation allows the divorcing couple, not attorneys, to control the divorce process. It is less costly, much quicker, private, voluntary and highly successful. Mediators manage the negotiations between the parties. NJ Courts encourage divorcing couples to attempt the mediation of their divorces instead of litigation. ***Donald D. Vanarelli, Esq. is pleased to announce that he will present two seminars on Divorce Mediation. The free seminars will be held at on October 13th at 10:00 am and on October 21st at 7:00 pm at Mr. Vanarelli's office in Westfield. Reservations are required. Call (908) 232-7400.*** Mr. Vanarelli has been approved under the New Jersey Court Rules as a Mediator in family and divorce matters. Also, Mr. Vanarelli is a graduate of the NJ Bar Association's Family Law Mediation Training Program. He has also received advanced divorce mediation training at the Institute for Dispute Resolution of New Jersey.

ELDERLAW NEWS

LAW OFFICES OF
DONALD D. VANARELLI
242 St. Paul Street
Westfield, NJ 07090
Tel: (908) 232-7400
Fax: (908) 232-7214
Email: dvanarelli@dvanarelli.com
Websites: dvanarelli.lawoffice.com
-and- elderlawanswers.com/attorney/vanarelli.html

Estate Planning: NJ Sup. Ct. Approves Medicaid Planning
Elderlaw Issues: Divorces Among the Elderly on the Rise