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Medicaid Planning Through the Courts

With respect to the education process, the attorney should be prepared to identify the Family Independence Agency Program Eligibility Manual (PEM) items at issue, and explain the manner in which the proposed transfers work within the context of the PEM's. Depending on the Court's prior experience with Medicaid long term care issues, the attorney may also need to explain the context in which Medicaid benefits are available, the involvement of State and Federal agencies, and the current status of efforts to criminalize certain aspects of Medicaid planning.

With respect to Revised Probate Code, the attorney should be prepared to discuss the following sections:

- MCLA 700.468 and 700.486 authorize the Probate Court, on its own or through a Conservator, to engage in any act which the ward could engage in, if the ward were competent, except make a Will. MCLA 700.468 (1)(c) expressly authorizes a Conservator to "make gifts."
- MCLA 700.485 allows a Conservator to expend or distribute funds from the ward's estateto provide support for the ward's dependents and others who are members of the ward's household.
- MCLA 700.477 and 700.544 require a Conservator to manage a ward's property in a prudent manner, and subject the Conservator to personal liability for failing to do so.
- MCLA 700.487 requires the Court to consider a ward's testamentary desires in making decisions regarding the manner in which the ward's assets are managed. Therefore, an attorney will want to be aware of ward's testamentary desires, and be prepared to provide evidence to the Court that the proposed plan for achieving Medicaid eligibility is consistent with the known testamentary desires of the ward.
- Finally, the attorney should be familiar with MCLA 700.482, which provides that where the Conservator personally benefits from the transaction, the transaction remains voidable until such time as there has been notice to interested parties and Court approval.

Putting it all together, the attorney needs to have the Court understand the Revised Probate Code not only authorizes transactions to qualify for Medicaid benefits, but that it is probably a breach of a Conservator's fiduciary duty not to engage in such transactions. This was precisely the issue in a recent (and very helpful) New York case, where the Court reviewed a substantial divestment conducted by a court-appointed fiduciary and declared that:

"[G]uardians have the authority to effect transfers of assets for the purpose of rendering incapacitated persons Medicaid eligible. . . . a contrary conclusion would have the effect of depriving incapacitated persons of the range of options available to competent individuals." Matter of John XX, 652 NYS2d 329 (A.D.3 Dept., 1996); at 332. The John XX Court also noted: "the simple fact is that current law rewards prudent "Medicaid planning."

Medicaid long term care planning is an appropriate Estate Planning technique that is necessary to protect the assets of incompetent persons, to provide for the needs of their dependents and others in their household, and to facilitate their testamentary desires. The Probate Court has the authority to authorize asset transfers necessary to accomplish Medicaid eligibility. An attorney who finds himself/herself in a situation where the implementation of a Medicaid planning strategy must be conducted under the supervision of a Probate Court should be prepared to articulate the legal issues involved.

Counseling Your Florida Clients

Florida continues to welcome a vast influx of seniors, both as new residents and extended visitors. Many of these people are your clients. Can you properly counsel your client as to the differences between the laws of Michigan and the laws of Florida? The Elder Law Section of The Florida Bar invites you to a conference entitled Counseling Your Florida Client. The conference will be held March 11-13, 1999 at the Tradewinds Resort on St. Petersburg Beach. The purpose of this program is to give you a familiarity with the laws of Florida that affect your senior clients.

Proposed Mandatory Continuing Education

by Paul S. Davis

The Michigan State Bar has sent to the Supreme Court a proposal for mandatory continuing legal education (MCLE) applicable to substantially all Michigan lawyers in active practice. See October Michigan Bar Journal, pages 1027-28, and President Lenga's supporting statement at page 1026. It is anticipated that the Supreme Court will publish a notice in the December Bar Journal inviting comments, probably within 60 days after that publication.

The proposal would require 30 hours of approved continuing legal instruction every three years. Courses might be on any legal subject, and might be given by ICLE or similar sponsors or by local or special purpose bar associations. Administrative expenses have been estimated at $9.00 per active member, and could be collected as additional membership dues (Par. 10, P. 1028).

There may be some question as to whether a general program for mandatory continuing legal education is authorized under the Revised Judicature Act, Chapter 9, governing Attorneys and Counselors (MCL 600.901-949; MSA 27A.901-949; set forth in the Michigan Bar Journal Directory, pp. 72-74). Section 904 of that Act authorizes the Supreme Court to provide for the organization, government and membership of the State Bar, and to adopt rules concerning the conduct and activities of the State Bar and its members, including examinations for admission and discipline, suspension and disbarment for misconduct. These subjects are also covered in other provisions of the Act. However, nothing in the Revised Judicature Act deals with a broad program for MCLE applicable to substantially all lawyers.

In 1987 the State Bar submitted to the Supreme Court a proposal for mandatory continuing legal education substantially similar to the present one. The Supreme Court did not approve that plan. Instead it approved a limited program for additional training for newly admitted members of the Bar (Rule 17 of Rules Concerning State Bar, effective in 1990). The Rule required training on subjects related to the transition from law school to private practice; ethics and profession responsibility. This education was provided by the State Bar without cost to the students. In March 1994 the Supreme Court rescinded Rule 17.

Although the 1987 MCLE program was approved by the State Bar Representative Assembly, the current proposal was not submitted to them. The Representative Assembly is the final policy-making body of the State Bar, and it must approve any dues increase (Rule 6, Section 1 of the Supreme Court Rules Concerning the State Bar).

Members of the Elder Law and Advocacy Section, many of whom practice individually or in small firms, represent clients of limited means. If continuing legal education becomes mandatory, as proposed, there will be a need to provide legal education to this section's membership in a manner that is both time and cost effective. Suggestions for how that can be done should be directed to any section council member.

Discretionary Trust Vulnerable to Creditors

By Norman Harrison

The Michigan Supreme Court recently decided that a Discretionary Trust established for a developmentally disabled individual could be reached by creditors where the Beneficiary is also the Settlor of the Trust. In re Hertsberg Intervivos Trust, ____Mich____; 578 NW2d 289 (1998). In Hertsberg, a Trust was established by Consent Judgment in 1986 to fund a Discretionary Trust for the benefit of a developmentally disabled individual. The Court stated that a Discretionary Trust cannot normally be reached by creditors because the Beneficiary has no ascertainable interest in the asset. However, relying on In re Johannes Trust, 191 Mich App. 514, 479 NW 2d 25 (1991), a creditor can reach the assets of the Trust where the Beneficiary is also the Settlor of the Trust. In Hertsberg, the Department of Mental Health was collecting $90,000 in services provided to the Beneficiary. The decision failed to address the ramifications of OBRA 1993 Legislation which specifically authorized the establishment of Discretionary Trusts for a disabled individual under the age of 65 where the State is paid back the amount it has contributed for Medicaid benefits, 42 USC 1396p(d)(4)(A). The Hertsberg decision creates doubt whether a Discretionary Trust that is funded through a personal injury settlement or other asset obtained by the disabled individual and complies with OBRA 1993 will be beyond the reach of creditors such as the Department of Mental Health.