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COURT APPROVAL OF MEDICAID SPEND-DOWN PLANNING BY GUARDIANS

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In the 2004 case of In re Keri,[1] *the New Jersey Supreme Court unanimously decided that making gifts of assets as part of a Medicaid eligibility spend-down plan is presumptively an appropriate estate planning strategy for an incapacitated person who has a court-appointed guardian, even in situations where the guardian is the child of the incapacitated person and would be transferring ownership of some of the assets to himself. The court articulated the standards for courts to apply when asked to approve such plans, so as to protect the interests of the incapacitated person and effectuate the decisions that an incapacitated person would make if she were able to act. This article discusses the court's decision, the legal background, and its implications for elder law practice.*

INTRODUCTION

Richard Keri applied to the court to be appointed as guardian of his eighty-eight-year-old mother, Mildred Keri. Mrs. Keri's physicians concluded that she had become incapacitated and required nursing home care. At the time of this conclusion, she had been living alone in her home in New Brunswick, where Richard and his brother had been caring for her for seven years through a coordinated network of individuals that assisted them. Before she became incapacitated, she had signed a durable power of attorney. This document authorized her attorney-in-fact to file a Medicaid application for government payment of her nursing home expenses, but was silent on the

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1. 853 A.2d 909 (N.J. 2004).

subject of making gifts.

Richard and his brother were aware that federal and state Medicaid laws would permit their mother to become eligible for Medicaid benefits even if she had transferred some of her assets to her children before applying for benefits.[2] However, they were not authorized by the power of attorney to make such transfers, and Mrs. Keri no longer had legal capacity to sign a new power of attorney or to manage her financial or personal affairs. A guardianship was viewed as necessary due to this deficiency in the power of attorney because the courts have authority to permit guardians to make gifts of the incapacitated person's assets under certain circumstances.

In the guardianship petition, Richard Keri sought permission to sell the house and transfer a portion of the proceeds to himself and his brother as a gift. He would use the balance of the proceeds to pay for his mother's nursing home care, after which she would be eligible to apply for Medicaid. The court-appointed counsel for Mrs. Keri concurred in her son's request.

Richard Keri was duly appointed guardian. The house sale was authorized, but the petition to make gifts for Medicaid planning was denied. On appeal by Richard Keri, the appellate division affirmed, finding that there was no specific evidence that Mrs. Keri would have wanted to transfer some assets to her "self-sufficient, adult children" rather than use all of the assets to pay for nursing home care.[3] The court declined to presume that a person would ordinarily want to become eligible for the state Medicaid program if there were a need for nursing home care.[4] Among other things, the court held that such gifting should not be authorized unless there was subjective evidence that the ward had previously expressed a preference for Medicaid eligibility and Medicaid planning.[5]

The guardian in *In re Keri* appealed to the Supreme Court of New Jersey, and the court unanimously reversed the lower

2. The process of achieving eligibility is sometimes referred to as "Medicaid planning."

3. *In re* Keri, 811 A.2d 942, 947-48 (N.J. Super. Ct. App. Div. 2002), *rev'd*, 853 A.2d 909 (N.J. 2004).

4. *Id.* at 947.

5. *Id.*

court's decision.[6]

WHAT IS "MEDICAID PLANNING?"

Nursing home care costs over $7,000 a month now in many locales. Such care is not included in the Medicare program and is generally not paid for by private health insurance plans. If a person has no long-term care insurance, the patient must pay for nursing home care unless he or she is eligible for Medicaid, a federal program that pays for nursing home care for those who are financially needy. As a result of the high cost of affordable insurance coverage, people implement strategies to become eligible for Medicaid.

Elder law attorneys are regularly consulted by clients who are distraught at the idea that they may need to spend all of their savings on long-term care and leave no legacy for their children. In fact, clients in their seventies who are in relatively good health sometimes begin divesting themselves of their assets for this very reason. More often, people don't address this issue unless and until it becomes necessary. At that point of necessity, when the individual is presented with the opportunity to become eligible for a government program that will pay for their nursing home care, and armed with the knowledge that their care will be the same whether paid for by Medicaid or paid for by them, clients frequently choose Medicaid. This choice is often made because they feel that they have contributed to this program through their tax dollars, and they see it as another form of health care that should be partially paid for by the government.

Medicaid spend-down planning typically involves a combination of gifts and expenditures. If the client had previously signed a durable power of attorney, it will be the agent who implements a plan to achieve Medicaid eligibility. In the absence of a satisfactory power of attorney, there is a need for a guardian to be appointed. When a guardian is appointed to the case, the eligibility planning will be subject to court review.

The Medicaid program is actually a collection of needs-based health care programs established by Congress and

6. *See In re Keri*, 853 A.2d 909, 920 (N.J. 2004).

administered by the states through the counties. The program pertinent to the *Keri* case was the "institutional Medicaid program," which pays for all of the costs of nursing home care as well as other medical, dental, pharmaceutical, and vision care.[7] Each state that participates is required to adopt statutes and regulations that comply with specific federal requirements. Eligibility is established after the individual's available resources have been reduced below $2,000.[8] If the applicant is married, the resources of the spouse, in New Jersey, must be reduced to a specified level (no more than $95,100 in 2005).[9]

An application can be filed once the assets have been sufficiently reduced. If the individual or her legal guardian, even with court authorization, gave away any of her assets to others for less than fair market value during the three years immediately preceding the filing of the Medicaid application (five years for transfers to trusts), a transfer penalty period will be imposed, and the applicant will not be deemed eligible for benefits until the penalty period has expired.[10]

A formula is applied by each state to calculate the length of the penalty period. The individual must pay for her care privately until the penalty period expires. Stated another way, under federal law, asset transfers are perfectly legal and are permitted in advance of a Medicaid application, *but there are consequences,* referred to as a "transfer penalty," that the donor must take into account when transferring assets.

Some types of asset transfers are exempt from transfer penalties. Congress has legislated that the following transfers cause no disqualification whatsoever, *regardless of the dollar amount* of the transfer:

1. transfers of assets to a spouse;

2. transfer of the home to a sibling with an equity interest in the home, who has had that interest and has been living there for at least one year prior to date of transfer;

3. transfer of the home to a care-giver child. To qualify as a

7. 42 U.S.C.A. § 1396r(4)(a)(2005).
8. N.J.A.C. 10:71-4.4(b)(3).
9. N.J.A.C. 10:71-4.8(a)(1).
10. 42 U.S.C.A. § 1396p(c)(1) (2005).

care-giver child, the person must have resided in the home for at least two years prior to the date the individual required nursing home care and must have provided the substantial care and supervision needed to enable the individual to remain in the home;

4. transfers to a disabled child;

5. transfers of assets into a trust for benefit of a disabled child or a disabled person under age sixty-five, provided the trust meets specific requirements including reimbursement to Medicaid following death of the beneficiary, for amounts that were expended on the Medicaid recipient's care after age fifty-five;

6. transfers of the Medicaid applicant/recipient's income or resources into a Supplemental Needs Trust for his or her sole benefit, provided the trust meets specific requirements including reimbursement to Medicaid following the death of the beneficiary, for amounts that were expended on the Medicaid recipient's care after age fifty-five.[11]

Aside from those cases in which exempt transfers can be made, a person cannot transfer substantial sums of assets and expect the Medicaid program to immediately pay for care. However, it is clear that federal law allows a person to make such transfers with proper planning.

A Medicaid spend-down plan typically involves a combination of gifts to preserve assets for the benefit of the spouse or heirs, and expenditures to pay for care during the transfer penalty period that results from those gifts. Once the penalty period has run its course, the individual can apply for Medicaid if all of the other criteria for eligibility are met. At that point, all that will change for a person residing in a nursing home is the source of payment, as federal[12] and state law forbid discrimination against Medicaid recipients.[13]

11. 42 U.S.C. § 1396p(c)(2)(B)iv (2000); N.J. ADMIN. CODE tit. 10, § 4.10(d), (e) (1983).

12. *See, e.g.*, 42 U.S.C.A. 2000d; 45 C.F.R. § 80.3 (2005); 42 C.F.R. § 483.10 (2004).

13. New Jersey, for example, has 358 nursing homes, of which 320 participate in the

Whether gift transfers of assets are being carried out by a guardian, the individual herself, or her agent under power of attorney, the same rules apply in determining the Medicaid transfer penalties. However, the guardian cannot transfer gifts without court approval.

COURTS APPROVE GIFT TRANSFERS BY GUARDIANS IF THEY ARE IN THE BEST INTEREST OF THE INCAPACITATED PERSON

As a fiduciary, the guardian is charged with prudent management of the guardianship estate for the benefit of the ward and is prohibited from self-dealing. Guardians, therefore, must obtain court approval prior to making gifts of a ward's assets. This is the case whether the guardian seeks to make gifts

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Medicaid program. *See, e.g., In re Keri* 853 A.2d at 917 (citing amicus curiae in footnote 5). One hundred percent of the nursing home beds in these 358 New Jersey facilities are certified to receive payment through the Medicaid program, although the actual percentage that is being paid for by Medicaid varies from month to month. *See generally* New Jersey Dep't of Health and Senior Services, *Search for Long-Term Care Facilities, at* http://www.state.nj.us/health/ltc/cgi/facilitysearch.htm (providing a searchable database of New Jersey long-term care facilities accepting Medicaid payment) (last visited Apr. 4, 2005). The rights of residents in Medicaid and Medicare-participating facilities, sometimes referred to as the "nursing home bill of rights," are set forth in 42 U.S.C. § 1395i-3(c) (2000) and 42 C.F.R. § 483.10 (2004). All residents of nursing homes are equally protected, regardless of the source of payment. Among these rights are:

> the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right to expect and receive appropriate assessment, management and treatment of pain as an integral component of that person's care consistent with sound nursing and medical practices.

N.J. STAT. ANN. § 30:13-5(j) (West 2004). All residents are equally protected against non-emergency discharges by nursing homes. *See* 42 U.S.C. § 1395i-3(c)(2) (2000).

Nursing facilities are also required to meet the medical and nursing needs of the individual regardless of source of payment, so as to allow each resident to attain his or her "highest practicable" level of well-being. 42 U.S.C. § 1395i-3(b) (2000). A comprehensive individualized assessment must be done when developing the individualized plan of care, and must be periodically reviewed and revised by the physician and registered nurse who are responsible for that resident's care. 42 U.S.C. § 1395i-3(b) (2000); 42 U.S.C. § 1396r(b) (2000); 42 C.F.R. § 483.20(b), (d) (2004). For example, if the individual requires a specialized mattress or other equipment the facility is expected to provide it and to build the expenditure into the overall cost of care that it submits to Medicaid for reimbursement.

The staffing levels must be the same for Medicaid resident as for private pay residents, as facilities must provide the individualized care and treatment plan mandated by state and federal law as described above. There is also substantial oversight of the care of all patients by both state and federal governments through a myriad of departments. In New Jersey, the Office of the Ombudsman for the Institutionalized Elderly investigates complaints regarding the care of any resident, regardless of the source of payment for nursing home care.

to a third party or to the guardian himself. The guardian must show that the request is in the best interests of the ward and not just in the best interests of the potential donees. This means that the guardian must show that the proposed gifts will not adversely affect the living conditions of the ward and are consistent with past preferences or presumed preferences.

Long before there were statutes on the issue, courts relied on the doctrine of *parens patriae*[14] to find the inherent authority to permit the transfer of a ward's assets to her next of kin. Then, addressing the "best interests" issue, the court would look for evidence of the ward's wishes. In the absence of explicit or subjective evidence, the court would evaluate the request by resorting to the "substituted judgment" standard, which is applied to decision-making by guardians who have no explicit evidence of the ward's preferences. The doctrine appears to have its origins in a decision by Lord Chancellor Eldon in *Ex parte Whitbread*.[15] As discussed in *In re Estate of Groff*, "[t]he doctrine rests on the theory that the incompetent being a ward of the court, the court should exercise its discretion and assert its judgment to do that which it is reasonable to believe the incompetent would do himself if he had the capacity to act."[16] Earlier cases dealt with such issues as transfers of a ward's assets to provide support for those who had depended on the now-incapacitated person.

The doctrine has been described in different ways by the courts. The court acts with reference to the ward and for his benefit as though he probably would have acted if he were capable.[17] Stated another way, what would the ward have done if faced with the decision?[18] Another court characterized the court's duty "as final arbiter and guardian of the incompetent, to independently determine whether it would have been . . . [the incompetent's] probable intent to effectuate such a plan."[19]

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14. "[Latin 'parent of his or her country'] . . . [this doctrine refers to] the state in its capacity as provider of protection to those unable to care for themselves . . . [and gives the] government . . . standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

15. 2 Merivale § 99 (1816) (35 Eng. Reports 878 (Ch. 1904)).

16. *In re* Estate of Groff, 38 Pa. D. & C.2d 556, 565 (Pa. Orphans Ct. 1965).

17. *See* Estate of Hart v. Keresey, 279 Cal. Rptr. 249, 253 (Ct. App. 1991).

18. *See In re* Guardianship of Christiansen, 56 Cal. Rptr. 505, 522-23 (Ct. App. 1967).

19. *In re* Cohen, 760 A.2d 1128, 1137 (Super. Ct. App. Div. 2000).

Decisions from around the country dealt with gifts designed to reduce the size of a taxable estate. The Supreme Judicial Court of Massachusetts approved a guardian's petition for gifting in *Strange v. Powers*, saying that:

> There is no reason why an individual, simply because he happens to be a ward, should be deprived of the privilege of making an intelligent commonsense decision in the area of estate planning, and in that way forced into favoring the taxing authorities over the best interests of his estate.[20]

A guardian's petition for gifting was approved by a California appellate court, which concluded 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."[21] In *Groff*, the court authorized gifts to the son, daughter-in-law, and grandchild, finding that the incompetent would do so herself if she knew of the estate tax savings and that her circumstances would not be adversely affected.[22]

In 1972, before the New Jersey legislature enacted specific authorization for guardians to make gifts to third parties, the chancery court was asked in *In re Trott*[23] to authorize the guardian to make gifts of the ward's assets to heirs of the estate so as to reduce its exposure to estate taxes. The court concluded that despite lack of express authority for gifting in New Jersey's statutes of the time, it had inherent authority to do so.[24] The court stated:

> [T]he power to grant such authorization in a proper case inheres in a court of chancery by virtue of its position as protector and general guardian of all persons under disability. Under the doctrine of *parens patriae* the court, as representative of the sovereign, may intervene in the management and administration

20. Strange v. Powers, 260 N.E.2d 704, 709 (Mass. 1970).
21. *Christiansen*, 56 Cal. Rptr. at 521.
22. *Groff*, 38 Pa. D. & C.2d at 570-571.
23. 288 A.2d 303, 303 (Ch. Div. 1972).
24. *Id.* at 305 (citations omitted).

> of an incompetent's estate in a given case for the benefit of the incompetent or of his estate.[25]

Relying on the court's inherent authority, and looking to decisions in sister states for guidance, the *Trott* court held that gifting would be permissible because the following "qualifying criteria" were satisfied:

> (1) the mental and physical conditions 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 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 [incapacitated person's] bounty . . . ;
>
> (4) the transfer will benefit and advantage the estate of the incompetent by a reduction of death taxes;
>
> (5) there is no substantial evidence that the incompetent, as a reasonably prudent person, would, if competent, not make the gifts proposed in order to effectuate a saving of death taxes.[26]

The standards articulated in *Trott* reflected the combination of objective and subjective factors that chancery courts had been using for substituted decision-making when reviewing requests for gifting by guardians. They are not unlike the standards discussed in cases from other states, such as those in *Strange*.[27]

Many states have enacted statutes that give the courts the authority to approve gifts by guardians.[28] New York's Mental

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25. *Id.*
26. *Id.* at 307.
27. *Strange*, 260 N.E.2d at 709-10.
28. *See, e.g.*, IDAHO CODE § 15-5-408(b) (Michie 2004); MISS. CODE ANN. § 93-13-

Hygiene Law, for example, has specific authorization and guidelines for considering gifting petitions by guardians.[29] Under this statute, a court may authorize a guardian "to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act."[30] The statute directs the court to consider "whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts,"[31] and "whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents."[32] The court may approve the gifting if it is satisfied by clear and convincing evidence that "a competent reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances."[33]

The Uniform Guardianship and Protective Proceedings Act of 1997[34] authorizes a guardian [conservator] to make gifts with court approval, "after notice to interested persons," subject to certain restrictions:

> If an estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts that the protected person might have been expected to make, in amounts that do not exceed in the aggregate for any calendar year 20% of the income of the estate in that year.[35]

This standard is more restrictive than the standards of some state statutes. Pursuant to New Jersey's statutes on this subject:

38(4)(a) (2004); N.H. REV. STAT. ANN. § 464-A:26-a (2004); N.Y. MENTAL HYGIENE LAW § 81.21 (McKinney 2004).

29. *See* N.Y. MENTAL HYG. LAW § 81.21 (McKinney Supp. 2004).
30. *Id.* at § 81.21(a).
31. *Id.* at § 81.21(d)(4).
32. *Id.* at § 81.21(d)(5).
33. *Id.* at § 81.21(e).
34. UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 427(a) (1997).
35. *Id.*

> The court has, for benefit of the ward, his dependents and members of his household, 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 of his estate. These powers include, but are not limited to power to convey or release the ward's present and contingent and expectant interests in real and personal property, . . . The court may exercise, or direct the exercise of, or release the powers of appointment of which the ward is donee, to renounce interests, to make gifts in trust or otherwise, or to change beneficiaries under insurance and annuity policies, [but] only if satisfied, after notice and hearing, that it is in the best interests of the ward.[36]

Additional guidance for the courts is contained in the statute, and states:

> If the estate is ample to provide for the purposes implicit in the distributions authorized by . . . [the statute], a guardian for the estate of a mental incompetent may apply to the court for authority to make gifts to charity and other objects as the ward might have been expected to make.[37]

As guardians began to ask courts for permission to make gifts in order to expedite the date of Medicaid eligibility for nursing home residents, some courts questioned whether such gifts were for the benefit of the estate of the ward or just for the benefit of the donees.[38] Some courts denied such petitions, finding that they failed to serve the best interests of the ward.[39]

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36. N.J. STAT. ANN. § 3B:12-49, 50 (West 1983).

37. N.J. STAT. ANN. § 3B:12-58 (West 1983).

38. It should be noted that courts are reluctant to allow a guardian to make charitable gifts even for salutary purposes including estate tax reduction, unless there is evidence that the plan is consistent with an expressed estate plan or pattern of gifting by the ward or is to an organization that will provide a tangible benefit to the ward. *See, e.g., In re* Jones, 401 N.E. 2d 351, 351-52 (Mass. 1980) (allowing a guardian to make charitable gifts); Estate of Hymes, 424 N.Y.S.2d 608 (Surrogate Ct. 1979) (allowing a guardian to make charitable gifts); *In re* Burns, 731 N.Y.S.2d 537 (App. Div. 2001) (allowing a guardian to make charitable gifts); *In re* Kenan, 134 S.E.2d 85, 85-86 (N.C. 1964) (disallowing a guardian to make charitable gifts).

39. *See, e.g.*, Medicaid planning: Forsyth v. Rowe, 629 A.2d. 379 (Conn. 1993); *In re* Probate of Marcus, 509 A.2d 1 (Conn. 1986); Williams *ex rel.* Squier v. Kan. Dep't of Soc.

Other courts found it prudent for the guardian to take advantage of gifting opportunities that were permitted by federal law. A 1998 New Jersey decision, *Matter of Labis,* involving transfers of assets from the incapacitated husband to his wife as part of Medicaid spend-down planning, held that the same strategies available to competent adults should be available to incompetent (incapacitated) adults and that the ward's best interests include the presumed desire to preserve assets for benefit of his wife.[40] The *Labis* court relied in part on decisions in other states[41] and held that it could "safely assume by his will that if Manuel were competent, he would take every lawful and reasonable action to minimize obligations to the state of [sic] a nursing home."[42]

Decisions in other states also applied these statutory and common law standards to allow gifts in connection with Medicaid eligibility planning. In the *In re Shah* decision, the court approved transfer of assets to the community spouse of a comatose Medicaid applicant.[43] In *In re John XX,* the court authorized a guardian to transfer $640,000 to adult children of the incapacitated person in advance of the Medicaid application.[44] In *In re Guardianship of F.E.H.,*[45] the court approved inter-spousal transfer of the marital home in connection with Medicaid eligibility planning, and *In re Daniels*[46] authorized the transfer of the Medicaid applicant's real estate to his daughter. An Illinois appeals court even held a guardian liable for breach of fiduciary duty for failure to consider the impacts of its actions

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& Rehab. Servs., 899 P.2d 452 (Kan. 1995); Ronney v. Dep't of Soc. Servs., 532 N.W.2d 910 (Mich. Ct. App. 1995).

40. *In re* Labis, 714 A.2d 335, 338-39 (N.J. Super. Ct. App. Div. 1998).

41. *In re* John XX, 652 N.Y.S.2d 329 (App. Div. 1996), *leave to appeal denied,* 89 N.Y.2d 814, 659 N.Y.S.2d 854, (App. Div. 1997) (transferring of $640,000 to adult children prior to Medicaid application); *In re* Baird, 634 N.Y.S.2d 971, 975 (Sup. Ct. 1995) (renouncing an inheritance); *In re* Daniels, 618 N.Y.S.2d 499, 501 (Sup. Ct. 1994) (transferring real estate to adult daughter); *In re* Guardianship of F.E.H., 453 N.W.2d 882, 889 (Wis. 1990) (involving inter-spousal transfer of marital home). The court also cited *In re* Guardianship of Connor, 525 N.E.2d 214, 216-17 (Ill. App. Ct. 1988) (finding breach of fiduciary duty on part of guardian bank for failure to consider impact of actions on Medicaid eligibility), as support for its holding that asset transfers, particularly transfer of the marital home, in connection with Medicaid eligibility planning are commonly used strategies.

42. *Labis,* 714 A.2d at 338.

43. *In re* Shah, 733 N.E.2d 1093 (N.Y. 2000).

44. *John XX,* 652 N.Y.S.2d at 329 .

45. *F.E.H.,* 453 N.W.2d at 882.

46. *Daniels,* 618 N.Y.S.2d at 499.

on Medicaid eligibility of the ward.[47]

The appellate court in the *Keri* case, on the other hand, asserted that while "saving on estate taxes . . . is not inconsistent with one's obligations as a citizen . . . many people might well be reluctant to become wards of the state by unnecessary self-impoverishment, even if that course would benefit their children."[48] The court declined to hold that one could presume that an incapacitated person would likely choose to give assets to "self-sufficient, adult children" and rely on Medicaid to pay for nursing home care.[49] Based on the absence of an explicit gifting authorization in the power of attorney that Mrs. Keri had signed, the court concluded that she would not necessarily opt to preserve some assets for her sons by way of gifts if given the opportunity. The court did not consider whether Mrs. Keri might do so if she were informed that her level of care in the nursing home would be unaffected. In essence, the court held that the guardian could not rely on *any* presumptions about what a "reasonably prudent person" would do; instead, the guardian would bear the burden to prove by clear and convincing evidence that this particular ward, if faced with these choices, in fact would have opted to give her assets to her "self-sufficient, adult children" and rely on Medicaid to pay for her care. Thus, the court refused to consider Medicaid benefits part of the ward's estate, despite the fact that thousands of incapacitated individuals in nursing homes are being well provided for on the Medicaid program.[50]

THE *KERI* COURT HOLDS THAT MEDICAID PLANNING BY GUARDIANS IS A LEGITIMATE TYPE OF ESTATE PLANNING

The issues that the Supreme Court of New Jersey addressed in the *Keri* case included:

- if a ward is eligible for Medicaid to pay the costs of her care, and she will receive equivalent care, is the estate

47. *Connor*, 525 N.E.2d at 214.
48. *In re Keri*, 811 A.2d 942, 946 (N.J. Super. Ct. App. Div. 2002).
49. *See id.* at 947.
50. *See id.*

"ample to provide" for her needs?[51]

- should there be any legal distinction made between gifting that results in decreased estate taxes and gifting that results in swifter eligibility for Medicaid?

- should a person who has a judicial guardian be prevented from implementing gift strategies that Congress has built into the Medicaid program and which are regularly utilized by people who do not have legal guardians?

- can there be a different level of proof required when the gifting by the guardian would be for estate tax reduction than if the gifting would be done to speed up Medicaid eligibility? If so, what is the justification for this distinction?[52]

The Supreme Court in *Keri* was asked to apply the same criteria used in estate-tax planning cases to Medicaid planning cases, and to hold that persons who have a guardian acting on their behalf have the same right to engage in "Medicaid planning" strategies as anyone else.

In its decision, the court observes that the criteria articulated in *Trott* have been applied by the courts to determine whether estate-planning proposals offered by guardians are in the best interests of the ward and to give effect to the ward's wishes were he able to express them.[53] This set of criteria establishes a framework comprised of both objective and subjective tests.[54] The court declares that this framework, which has been applied to requests for estate tax-reduction planning, is equally suitable for Medicaid spend-down planning requests.[55] As a global matter, the court adopted the five-pronged criteria of *Trott*.[56]

The court holds that in evaluating any requests for gifts by guardians, a court must find that the plan is in the best interests

51. *In re Keri*, 853 A.2d 909, 913 (N.J. 2004).
52. *See id.* at 909.
53. *See In re Trott*, 288 A.2d 303, 307 (Ch. Div. 1972).
54. *Id.*
55. *See In re Keri*, 853 A.2d at 916-17.
56. *In re Trott*, 288 A.2d at 307. *Id.* at 917.

of the incompetent person and that any proposed gifts are as the incompetent would have been expected to make. Expressing accord with New York decisions, the court establishes "a presumption in favor of [Medicaid] spend-down proposals by recognizing the benefit to the ward's estate of increasing the amounts available to beneficiaries by reducing payments to the government out of the estate."[57] The presumption can be rebutted by substantial evidence, described as a "high evidentiary burden."[58]

The court held that the spend-down plan will provide for the incompetent person's best interests if three key requirements are met.[59] First, the spend-down plan must involve transfers to the natural objects of the person's bounty.[60] Second, it must not contravene a prior intent or interest.[61] Third, it must not interrupt or diminish the incompetent person's care.[62] The court thus reversed the judgment of the lower court and approved the plan at issue.[63]

The *Keri* decision can be seen as a victory for equal protection. Those who failed to plan, never signed a comprehensive power of attorney, and require appointment of a legal guardian will have the same opportunity to utilize Medicaid planning strategies as those who did plan ahead. The guardians for those wards whose estates would never be considered large enough for estate tax reduction planning could now implement some *inter vivos* gift transfers with court approval. The court will apply the many factors enumerated in the statute and case law to insure that gifting of assets will not jeopardize the personal interests of the ward.

PLANNING CONSIDERATIONS

The *Keri* decision certainly gives the green light to the utilization of Medicaid spend-down gifting plans for individuals who must move into nursing homes or who are already living in nursing homes. An important consideration for an individual currently

57. *In re Keri*, 853 A.2d at 916-17 (citing *In re Trott*, 288 A.2d 303).
58. *Id.* at 914.
59. *See id.* at 916.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 920.

living in a facility that does not accept Medicaid is an early move to a Medicaid-qualifying home that does accept such payment, to ensure a transition that is least disruptive to the individual. Arguably, a nursing home lacks standing to be heard on the spend-down gifting plan that is under court review. However, the guardian continues to have the obligation to the nursing home to ensure that there will be a continuous source of payment until the ward reaches the point of Medicaid eligibility, that the guardian will not do anything that could jeopardize eligibility, and that an application for Medicaid will be timely filed and completed.

For individuals living in assisted living facilities that participate in the Medicaid waiver programs, the issues are more problematic. There are dramatic distinctions from state to state in the implementation of the waiver program. Fundamentally, this program is slot-based, and there are waiting lists. The individual applies for admission to the Medicaid program once he is financially and medically eligible and is then placed on a waiting list. Once a slot opens in the state's program, it is made available to the facility. In some cases, the facility maintains an internal waiting list that prevents the person currently residing in the facility from moving immediately into Medicaid payment at their facility.

If a guardian wants to implement a gifting spend-down plan for a ward that resides in assisted living, there must be consideration of this problem. What will the guardian do if the ward's assets are gone and there is no Medicaid payment available for the room in the assisted living facility? The guardian will need to apprise the court of the "back-up" plan that he will implement if this problem arises. That back-up plan may have to involve moving the ward to a nursing home.

Cases will arise in which the ward is living comfortably in a community setting. She may have live-in care, or she may have part-time care that supplements the care being provided by a family member. If the assets are gifted, a point may be reached where sufficient in-home care cannot be provided. In some states, Medicaid pays for twenty-four hour per day, seven days per week care in the home. In others, the community care programs are very limited and provide only part-time care. Additionally, certain Medicaid community programs have income caps, so that if the higher-income individual's assets

have been gifted, there may come a time when there are no personal assets and no government program that will pay for the care. These issues must be addressed when the guardian is presenting the plan to the court, as the court must find that:

> [T]he assets of the estate[64] of the incompetent remaining after the consummation of the proposed gifts are such that, in 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.[65]

A Medicaid spend-down plan proposed by a guardian may not be approved if it will expose an individual who resides in the community to the risk of being moved prematurely into a nursing home. The plan will need to balance the need to maintain the person for as long as possible in a community setting with the presumed wish of the ward to shelter some assets for their heirs.

Similarly suspect may be cases in which the donees are charities or individuals who do not qualify as "natural objects of the bounty."[66] There may be situations in which the individual has no children or close relatives, and the guardian may want to make charitable gifts. One option is for the guardian to establish that the ward had a clear-cut pattern or intent of supporting those charities to a degree similar to that sought by the guardian and not just that charitable giving could produce a tax benefit for the estate.[67]

In some cases, the ward may be able to testify that she is familiar with the charities and would like to make the donations in question. Such testimony may be admitted even if the ward is not globally able to manage her affairs.[68] One reason a ward

64. The "assets of the estate," as established by the *In re Keri* court, include all governmental programs, such as Medicaid, for which the ward could become eligible.

65. *In re* Trott, 288 A.2d 303, 307 (Ch. Div. 1972).

66. *See In re Keri*, 853 A.2d at 914-15.

67. *See, e.g., In re* Jones, 401 N.E. 2d 351, 355 (Mass. 1980) (finding that the list of charities on the ward's unsigned will and history of donation to these charities may serve as evidence of ward's pattern or intent of donation).

68. *See, e.g., In re* Burns, 731 N.Y.S.2d 537, 539 (App. Div. 2001).

may want to donate her assets to a charity may be that the charity is providing a tangible benefit to the ward, and she believes that a charitable gift would be an appropriate way of showing her appreciation.[69] On the other hand, the guardian may not be successful if the proposed plan contravenes an express estate plan, particularly if there is evidence that the ward had declined to make charitable gifts for estate tax planning.[70]

Finally, because guardians may not write wills for their wards, there will continue to be close scrutiny and possible disapproval of cases in which the spend-down plan is at variance with a previous testamentary plan; with an intestate inheritance, either in percentages or in recipients; or a disruption to an established trust arrangement.[71] For example, a challenging situation arises when the guardian wishes to take advantage of the "care-giver child" exemption to the Medicaid transfer penalties by transferring the ward's home to the one child who meets the criteria as the care-giver child, but the Last Will and testament bequeaths the estate equally to all of the children.[72] Transferring the house—which is often the major asset of the ward's estate—to one child would disrupt the estate plan or interfere with potential equal inheritance via intestacy.[73]

On the other hand, as the guardian will argue, utilizing this exemption is the only way to preserve the entire value of the house if the ward will be applying for Medicaid. The guardian must explain to the court that the exemption does not apply if the title is transferred to non-caregiver children along with caregiver children. There will be transfer penalties if title is given to these others. If the estate is not large enough to pay the full costs of care until these penalties run out, such a transfer would be ill-advised and could jeopardize the well-being of the ward. Similarly, the exemption may not apply if the caregiver receives some other partial interest, such as a life estate with a remainder in the non-care-giver children. To further complicate matters, the title could be encumbered if the court places

69. *See* Estate of Hymes, 424 N.Y.S.2d 608, 608-10 (Surrogate Ct. 1979) (approving such gifts by a guardian).

70. *In re* Trusteeship of Kenan, 134 S.E.2d 85, 91 (N.C. 1964).

71. *See, e.g., In re* Cohen, 760 A.2d 1128, 1137 (N.J. Super. Ct. App. Div. 2000).

72. 42 U.S.C. § 1396p(c)(2) (2005).

73. If there is no will, the intestate estate would pass equally to all of the children.

restrictions on the caregiver's ability to further transfer or sell the property. In advance of the court hearing, the attorney for the guardian should discuss these issues with the affected children, attain their consent, and advise them to confer among themselves about any subsequent arrangements they desire.

In those states that have not accepted the presumptions that are adopted in the *Keri* decision, the guardian will need to produce evidence of the subjective intentions and preferences of the ward. This subjective evidence can take many forms, including correspondence; evidence of conversations with the ward on the topic of nursing homes and Medicaid; statements made by the ward in connection with his or her friends' or relatives' nursing home issues; a pattern of generosity to children or grandchildren; and a history of taking advantage of other governmental programs such as Medicare, senior citizens' tax breaks, federal food programs, free transportation for seniors, pharmacy subsidies, and the like. All of this evidence can encourage a court to find that, if presented with the choice of expediting Medicaid eligibility to pay for nursing home care, the ward would presumably want to utilize that program and leave some assets for her heirs.

CONCLUSION

Pursuit of a guardianship is the method that must be used if the incapacitated individual has failed to appoint an agent with broad authority, such as a power of attorney. Careful planning for our clients should always include selection of a fiduciary and signing of appropriate documents so that these cases need not reach the courts at all. However, if the case must be in court, it is heartening to know that the New Jersey Supreme Court has articulated so clearly what so many feel is a just and fair standard for decision-making.

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