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Bankruptcy Issues for the Elderly

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A recent study showed that the average credit card debt in 2008 for those 65 and over was $10,235, which represented an increase from $8,138 in 2005.[1] Also, in low- to middle-income households, medical expenses were responsible for an average of $3,988 in credit card debt for those 65 and older.[2] These significant expenses are largely responsible for the increasing trend of bankruptcy filings for those over the age of 65.[3] But is filing for bankruptcy always the best solution for the elderly?

In general, an individual can choose between two chapters of the Bankruptcy Code. A Chapter 13 bankruptcy (or reorganization) allows a debtor to retain most of their property, but the debtor must make designated payments to a trustee pursuant to a Chapter 13 Plan.[4] The payments represent one (or both) of two sections of the Code: the amount of the debtor's disposable income after expenses[5] or the liquidation value of the debtor's non-exempt property.[6] Alternatively, it may be possible for a debtor to file a Chapter 7 bankruptcy (or liquidation) if the debtor's income is less than the median income in the state in which they are filing[7] or if the debtor is able to pass the "means test" by rebutting the presumption of abuse.[8] A debtor passes the means test and rebuts the presumption of abuse by deducting standard expenses and payments for secured debts, as outlined in the Bankruptcy Code.[9] If the expenses and deductions decrease the amount of projected disposable income to an insignificant amount, the debtor will be able to continue under Chapter 7 because it would not be an abuse of the bankruptcy process to file under that chapter. If the projected disposable income would be sufficient to fund a Chapter 13 plan and repay a portion of the debt owed, it would be an abuse of the bankruptcy process to file a Chapter 7 case instead.

When a bankruptcy case is filed, a stay of certain enumerated proceedings automatically commences.[10] For example, once a case is filed, a creditor may no longer take any act to

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collect a debt that arose pre-petition, such as a garnishment.[11] However, a creditor may seek relief from the automatic stay in order to take actions otherwise prohibited by 11 U.S.C.A. § 362(a).[12] Relief is granted based upon one of two showings: (i) cause, or (ii) there is no equity in the property and it "is not necessary to an effective reorganization."[13] For example, a creditor may seek relief from the automatic stay in order to continue an eviction action under state law of a tenant who is in default.

Once the bankruptcy case has been fully administered, a discharge will be entered that absolves the debtor of any responsibility for the payment of most kinds of debt.[14] The discharge is often referred to as the heart of the Bankruptcy Code from which a debtor can emerge with a fresh start. It "operates as a[] [perpetual] injunction against the commencement or continuation of an action … to collect, recover or offset any … debt as a personal liability."[15] Although the discharge removes any personal liability to repay the debt, the debt is not extinguished, and a creditor can take other actions not prohibited by the discharge injunction.[16] Bankruptcy may be beneficial to the elderly in many circumstances, but undesirable consequences can arise when a creditor is able to pursue those other actions.

One such instance includes filing for bankruptcy when the debtor does not own real property, but instead rents an apartment or is admitted to a nursing facility. More specifically, in circumstances where an elderly tenant or resident owes significant past due rent or care payments to a nursing facility, bankruptcy may actually cause additional difficulties. For example, if a resident of a nursing facility exhausts all private funds and then remains in the facility while awaiting Medicaid approval, significant debt can accumulate in the interim. Since it is unlikely that funds exist to pay for the care incurred for the period between private pay and Medicaid, bankruptcy is an option to discharge that debt. However, other detrimental effects may be caused by the bankruptcy filing that outweigh the discharge of the past due payments.

When a debtor files a bankruptcy petition under any chapter of the Code, the debtor must fully disclose all assets, including executory contracts and unexpired leases. An executory contract, although undefined by the Code, is generally thought to include any agreement where both parties have obligations left to be fulfilled.[17] By virtue of 11 U.S.C.A. § 365, a trustee is entitled to assume (perform) or reject (breach) any pre-petition executory contracts or unexpired leases.[18] If the trustee assumes the contract, the bankruptcy estate and the other party to the contract must perform.[19] However, if the trustee chooses to assume, any pre-petition delinquencies must be cured.[20] If, on the other hand, the trustee chooses to reject the executory contract, the contract is considered breached, performance is excused, and the debtor is responsible for damages arising from the breach.[21]

Again consider the factual circumstances laid out above. If a nursing facility resident files for bankruptcy due to mounting debt incurred before Medicaid approval, the admission agreement is considered an executory contract subject to assumption or rejection. However, the debtor, upon filing, will find themselves stuck between a rock and a hard place. If the trustee assumes the admission agreement with the nursing facility, the default must be cured. As already mentioned, this solution is unlikely (or else the need to file would not exist in the first place). If the trustee rejects the admission agreement, a breach has occurred and the debtor is responsible for damages. Those damages are considered a pre-petition debt and thus can be discharged in the bankruptcy.[22] Despite the discharge, the creditor has other avenues to pursue besides

trying to collect the debt, such as eviction proceedings.

Similar factual circumstances, as those described above, occurred in a recent Kansas case, *In re Boerger*.[23] In this case, a resident of a nursing facility accrued over $18,000 for care, room, and board while awaiting Medicaid eligibility.[24] When the nursing facility attempted to transfer or discharge the resident, the resident's agent sought a fair hearing with the Office of Administrative Hearings of the State of Kansas.[25] After being approved for Medicaid assistance, the debtor continued to reside in the same nursing facility.[26] The debtor then filed a Chapter 7 bankruptcy case to discharge the $18,000 arrearage.[27] During the bankruptcy process, the debtor's admission agreement with the nursing facility was ultimately rejected.[28] The nursing facility sought relief from the automatic stay, which was granted by the bankruptcy court, in order to pursue an action in state court.[29] The nursing facility desired to transfer the resident to another (less costly) facility in another city, and farther away from her family, or, in the alternative, to discharge the resident to her son.[30]

In most circumstances, case law indicates that a landlord may pursue state court eviction proceedings even though the underlying debt was discharged.[31] If the bankruptcy case is still being administered, the creditor must seek relief from the automatic stay in bankruptcy court in order to pursue the eviction in state court.[32] However, if the case is near completion and the discharge has been entered, then the creditor may pursue eviction since it is not an action to recover a debt as a personal liability, and therefore is not enjoined under 11 U.S.C.A. § 524(a)(2).

The elderly, however, have additional protection from transfer or discharge from a nursing facility due to the Nursing Home Reform Act,[33] and, in some states, like Kansas, state regulations.[34] Under these protections a resident may only be transferred from the nursing facility for limited reasons, including when the safety of individuals in the facility is endangered or the resident has failed to pay for their stay at the facility.[35] Some state regulations also include additional rights and protections afforded to the resident of a nursing facility. For example, in Kansas, a resident of a nursing facility has access and visitation rights to specified individuals, including "immediate family or other relatives of the resident."[36] These additional rights should be weighed and considered when a state agency makes a determination whether a transfer or discharge of a resident from a nursing facility is warranted.

Continuing with the discussion of *In re Boerger*, the nursing facility continued its attempts to transfer or discharge the resident, who at the time was physically frail, and was diagnosed with end-state Parkinson's disease and dementia.[37] In the end, the presiding officer determined that the transfer of the resident for non-payment of nursing care was unjustifiable as the arrearage had been discharged in the bankruptcy.[38] This begs the question, what would have been the result of the administrative hearing had the debtor not filed for bankruptcy? Under those facts, the resident would still have the $18,000 arrearage owing to the nursing facility, but the resident would be current on all payments after becoming eligible for Medicaid. Undoubtedly, the nursing facility could still have sought to evict the resident for non-payment of the arrearage. So, what reasoning would the presiding officer have had for refusing the transfer/discharge of the resident? Arguably, none. This result is very troubling and represents a unique problem, occurring only when bankruptcy and elder law collide.

Although the above result was desired and seemed just under the particular circumstances, another resident from a different jurisdiction may not be so lucky to have such a sympathetic presiding officer. More specifically, because the resident was approved for Medicaid and had been current after such approval, the transfer or discharge of the resident for the arrearage was unnecessary, and nothing would have been gained by such action. However, whether the presiding officer's

conclusion is supported by existing case law is more tenuous.

Similarly, the elderly can suffer the same detrimental effects as discussed above if an unexpired lease of residential property is rejected in bankruptcy. The same analysis will control, but instead the landlord will have the right to seek relief from the automatic stay to continue state eviction proceedings or initiate such proceedings once the discharge has been granted.[39]

However, the Bankruptcy Code, under 11 U.S.C.A. § 525(a), does afford limited protection against discriminatory treatment by a governmental unit. Section 525(a) states:[40]

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankruptcy or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, *or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act*.

This section of the Bankruptcy Code has been interpreted by some courts to "preclude[] a public housing authority from evicting a debtor-tenant from public housing based on nonpayment of discharged, prepetition rent."[41]

For example, in *In re Marcano*, an elderly couple lived in a residential building that was owned by the city but, under a city-approved program, the landlord was the tenant association for the building.[42] The tenant association sought recovery of possession of the debtors' unit based upon non-payment of rent.[43] The debtors, whose only income was Social Security, attempted to make up the default payments, but when threatened with eviction, filed a Chapter 7 bankruptcy petition.[44] The tenant association filed a motion for relief from the automatic stay to continue eviction proceedings in state court, and the debtors countered that "eviction based on non-payment of rent would be violative of § 525(a) of the Bankruptcy Code."[45] The bankruptcy court, after reviewing legislative history and case law, concluded that Congress intended "'governmental unit' to encompass entities that perform a 'public function' as well as quasi-governmental entities that perform functions that can 'seriously affect' a debtor's livelihood or fresh start."[46] Therefore, in determining whether the tenant association was a governmental unit, the court reviewed the state action, considering the degree of separation between the private actor and the State.[47] In this case, due to the excessive entwinement of the city in the control exercised over the tenant's association, the court determined that the association should be considered an instrumentality of the city and a government unit, subject to 11 U.S.C.A. § 525(a).[48] Further, the court held that the pre-petition arrearage was dischargeable, and the debtors could not be evicted due to the anti-discrimination protections provided by the Bankruptcy Code.[49]

Also consider *In re Oksentowicz*, where a debtor filed bankruptcy under Chapter 7 of the Code and received a discharge.[50] Afterward, the debtor completed a rental application at a federally subsidized senior apartment complex and was denied admittance because his credit report "did not meet their standards."[51] The debtor filed a motion in bankruptcy court, alleging a violation of 11 U.S.C.A. § 525(a).[52] The senior apartment complex asserted that it was not a governmental unit and that other reasons existed, besides the debtor's credit report, for denying the debtor's application.[53] The bankruptcy court determined that § 525(a) was designed to promote the fresh start policy behind the Bankruptcy Code "by prohibiting governmental entities from refusing to deal

with or denying a certain property interest to a debtor due to his or her bankruptcy filing."[54] Further, the court, in observance of legislative history, defined "governmental unit" very broadly, and, following *Marcano*, concluded that private entities entwined "with governmental policies, management or control" were subject to the anti-discrimination policy of § 525(a).[55]

However, not all courts have followed such a broad interpretation of governmental unit.[56] In *In re Liggins*, the court more narrowly construed the definition, and failed to analyze the degree of control the government exercised on a private entity through regulations.[57] The court concluded that "the definition of governmental unit, does not include language suggesting the inclusion of private entities … which merely receive public funds and are subject to governmental regulations."[58] In jurisdictions with a narrower 11 U.S.C.A. § 525(a) interpretation, an entity must be carrying on a governmental function in order to be considered a governmental unit.[59]

The cases reviewed clearly indicate that, depending on the jurisdiction and type of housing situation, the beneficial effects of filing for bankruptcy are greatly helpful in one situation, and unfortunately unhelpful in another. If the debtor owes past due rent, and the debtor's landlord is a governmental unit, the past due rent can be discharged, and the debtor may remain in possession of the rented premises without fear of eviction, as long as post-petition rent remains current. Conversely, however, a debtor who is a resident at a private nursing facility or who leases from a private landlord, may be evicted from the premises despite the discharge of past due rent.

Additionally, in certain circumstances, filing for bankruptcy may be unnecessary for the elderly, despite the accumulation of some debt. Specifically, if the only source of income for the person is Social Security (which is exempt from attachment/garnishment pursuant to 42 U.S.C.A. § 407), or any other exempt benefits, and the only property owned is exempt, bankruptcy would only cause the debtor to spend additional funds on an attorney, filing fee, and credit counseling. Attorney's fees for filing a Chapter 7 bankruptcy can cost anywhere from $1,200 for a simple case with few debts and disputes, to over $3,000 for a debtor with significant debts and ongoing disputes with creditors. Therefore, an attorney may advise a "judgment-proof"[60] debtor such as the one described above, not to file. However, the attorney may take other actions to assist the debtor, such as sending a letter to creditors evidencing the debtor's limited income and assets, and indicating an inability of the debtor to repay the debt owed. In such cases, the attorney and debtor hope that any continued harassment or collection efforts by creditors will subside, and the need to file an actual bankruptcy case is negated.

Unfortunately, as is often the case with the law, the particular facts surrounding a debtor's decision to file bankruptcy must be weighed and measured. In particular, a bankruptcy attorney should consider the debtor's personal property (whether they are exempt or non-exempt assets), source of income (whether the income is exempt from garnishment or attachment), under which chapter of the Code to file (Chapter 7 v. Chapter 13), residential arrangements (own, rent, or admitted to an adult care facility), the debtor's ability to bear the costs associated with filing (attorney's fees, filing fee, etc.), the debtor's desires (whether they really want to file), and the debtor's immediate needs (whether the debtor is judgment-proof or if creditors are about to bang down their door). After considering all of the factors, filing for bankruptcy may turn out to be the least attractive option.

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1. García and Draut, The Plastic Safety Net: How Households Are Coping in a Fragile Economy at p. 4 (2009), available at http://www.demos.org/pubs/psn_7_27_09.pdf.

2. García and Draut, The Plastic Safety Net: How Households Are Coping in a Fragile Economy at p. 8 (2009), available at http://www.demos.org/pubs/psn_7_27_09.pdf.

3. Golmant and Woods, Aging and Bankruptcy Revisited, 29 Am. Bankr. Inst. J. 34, 74-75 (2010). For example, in 2002, the study indicated that 4.8% of all bankruptcy filers were over age 65, while in 2007, the percentage rose to 7.4% for the same age category. That is a 54.2% increase from 2002 to 2007. 29 Am. Bankr. Inst. J. at 74-75. This study also indicated that health care costs were a major contributor to the indebtedness of the over 65 age bracket. 29 Am. Bankr. Inst. J. at 75.

4. 11 U.S.C.A. § 1325(a)(6).

5. 11 U.S.C.A. § 707(b).

6. 11 U.S.C.A. § 1325(a)(4). This section is often referred to as the "best interests of the creditors" test. It requires that the unsecured creditors get paid at least what they would have had the debtor filed a Chapter 7 case where the debtor is often required to liquidate non-exempt property.

7. For example, in Kansas the median income for a household of one is $41,210. See U.S. Trustee Program, Census Bureau Median Family Income By Family Size, available at http://www.justice.gov/ust/eo/bapcpa/20100315/bci_data/median_income_table.htm.

8. 11 U.S.C.A. § 707(b)(2)(A)(i).

9. 11 U.S.C.A. § 707(b)(2)(A)(i).

10. 11 U.S.C.A. § 362(a).

11. 11 U.S.C.A. § 362(a)(2).

12. 11 U.S.C.A. § 362(d).

13. 11 U.S.C.A. § 362(d). Relief from the automatic stay for cause is determined by weighing factors and considering the specific circumstances of the case. See *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1286, 23 Collier Bankr. Cas. 2d (MB) 132 (2d Cir. 1990).

14. 11 U.S.C.A. §§ 727(a), 1328. In general, a discharge can be obtained within six months after filing a Chapter 7 case, while a discharge in a Chapter 13 case will not be entered until after completion of the plan, which can take from three to five years.

15. 11 U.S.C.A. § 524(a)(2).

16. *In re Touloumis*, 170 B.R. 825, 830 (Bankr. S.D. N.Y. 1994) (citing *In re Hepburn*, 27 B.R. 135, 136, 8 Collier Bankr. Cas. 2d (MB) 219 (Bankr. E.D. N.Y. 1983)). See also *Matter of Hunter*, 970 F.2d 299, 27 Collier Bankr. Cas. 2d (MB) 536, Bankr. L. Rep. (CCH) ¶ 74764 (7th Cir. 1992) (citing cases where courts have allowed creditors' in rem actions against debtors).

17. Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973).

18. See 11 U.S.C.A. § 365(a).

19. Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227, 231 (1989).

20. 11 U.S.C.A. § 365(b)(1)(A) ("If there has been a default in an executory contract … the trustee may not assume such contract unless … the trustee cures, or provides adequate assurance that the trustee will promptly cure …").

21. Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227, 231-232 (1989). In general, a trustee will reject an executory contract or unexpired lease if the bankruptcy estate will benefit by such rejection. 74 Minn. L. Rev. at 231-232. Also of note, in a Chapter 7 case, if a trustee fails to assume an executory contract or unexpired lease within 60 days of the filing of the bankruptcy petition, it is deemed rejected. 11 U.S.C.A. § 365(d)(1).

22. Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227, 232 (1989).

23. *In re Boerger*, 2009 WL 2240391 (Bankr. D. Kan. 2009).

24. Transcript of Tape-Recorded Motion Hearing at 25, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

25. Transcript of Tape-Recorded Motion Hearing at 6, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

26. Transcript of Tape-Recorded Motion Hearing at 10, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

27. Transcript of Tape-Recorded Motion Hearing at 10-11, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

28. Transcript of Tape-Recorded Motion Hearing at 6, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

29. Transcript of Tape-Recorded Motion Hearing at 33, *In re Boerger*, Case No. 09-40136 (Bankr. D. Kan. 2009).

30. Exhibit D, Memorandum in Opposition to Respondent's Motion to Dismiss, *Boerger v. Pioneer Ridge Nursing Facility*, No. 09 P 0306 (Office of Administrative Hearings for the State of Kansas 2010).

31. See, e.g., *In re Touloumis*, 170 B.R. 825 (Bankr. S.D. N.Y. 1994) ("[A]lthough the discharge prevents the landlord from getting a personal judgment against the Debtor for the unpaid, pre-petition rent, it does not prevent the landlord from evicting the Debtor for its non-payment.").

32. *In re Touloumis*, 170 B.R. at 827-828. In considering an unexpired lease or executory contract, it is more likely that the bankruptcy court will grant relief from the stay "for cause." 170 B.R. at 828.

33. 42 U.S.C.A. § 1396r(c)(2)(A).

34. See, e.g., Kan. Admin. Regs. § 26-39-102(d) (listing the circumstances under which a resident may be transferred or discharged and the procedures for doing so).

35. 42 U.S.C.A. § 1396r(c)(2)(A)(iii), (v).

36. Kan. Admin. Regs. § 26-39-103(m)(1)(E).

37. *Boerger v. Pioneer Ridge Nursing Facility*, No. 09 P 0306 (Office of Administrative Hearings for the State of Kansas 2010).

38. *Boerger v. Pioneer Ridge Nursing Facility*, No. 09 P 0306 (Office of Administrative Hearings for the State of Kansas 2010).

39. See, e.g., *In re Collins*, 199 B.R. 561, 567, Bankr. L. Rep. (CCH) ¶ 77154 (Bankr. W.D. Pa. 1996) (describing the situation by saying "in general, the Bankruptcy Code, post-discharge, does not require spurned creditors to continue their past relationships with a debtor.").

40. 11 U.S.C.A. § 525(a) (emphasis added).

41. *In re Stoltz*, 315 F.3d 80, 84, 40 Bankr. Ct. Dec. (CRR) 165, Bankr. L. Rep. (CCH) ¶ 78784 (2d Cir. 2002).

42. *In re Marcano*, 288 B.R. 324, 326-327 (Bankr. S.D. N.Y. 2003).

43. *In re Marcano*, 288 B.R. at 327.

44. *In re Marcano*, 288 B.R. at 327.

45. *In re Marcano*, 288 B.R. at 327.

46. *In re Marcano*, 288 B.R. at 333. Governmental unit includes "United States; … department, agency, or instrumentality of the Untied States …, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state." 11 U.S.C.A. § 101(27).

47. *In re Marcano*, 288 B.R. at 333.

48. *In re Marcano*, 288 B.R. at 335.

49. *In re Marcano*, 288 B.R. at 339.

50. *In re Oksentowicz*, 314 B.R. 638, 52 Collier Bankr. Cas. 2d (MB) 1604 (Bankr. E.D. Mich. 2004).

51. *In re Oksentowicz*, 314 B.R. at 639, 52 Collier Bankr. Cas. 2d (MB) 1604.

52. *In re Oksentowicz*, 314 B.R. at 639, 52 Collier Bankr. Cas. 2d (MB) 1604.

53. *In re Oksentowicz*, 314 B.R. at 639, 52 Collier Bankr. Cas. 2d (MB) 1604.

54. *In re Oksentowicz*, 314 B.R. at 639, 52 Collier Bankr. Cas. 2d (MB) 1604 (quoting *In re Valentin*, 309 B.R. 715, 720 (Bankr. E.D. Pa. 2004)).

55. *In re Oksentowicz*, 314 B.R. at 641, 52 Collier Bankr. Cas. 2d (MB) 1604. The bankruptcy court commented on the alternative view expressed by some courts by saying, "[t]he cases cited above which concluded that entities which 'merely receive public funds and are subject to governmental regulations' do not qualify as governmental units did not adequately analyze the government's involvement. Nor did they consider that the entity was carrying out a governmental function-providing low income housing." *In re Oksentowicz*, 314 B.R. at 642, 52 Collier Bankr. Cas. 2d (MB) 1604.

56. See *In re Stoltz*, 315 F.3d 80, 90 n.5, 40 Bankr. Ct. Dec. (CRR) 165, Bankr. L. Rep. (CCH) ¶ 78784 (2d Cir. 2002); *In re Liggins*, 145 B.R. 227, 27 Collier Bankr. Cas. 2d (MB) 1210, Bankr. L. Rep. (CCH) ¶ 74952 (Bankr. E.D. Va. 1992).

57. *In re Liggins*, 145 B.R. 227, 232, 27 Collier Bankr. Cas. 2d (MB) 1210, Bankr. L. Rep. (CCH) ¶ 74952 (Bankr. E.D. Va. 1992).

58. *In re Liggins*, 145 B.R. at 232, 27 Collier Bankr. Cas. 2d (MB) 1210, Bankr. L. Rep. (CCH) ¶ 74952.

59. *In re Liggins*, 145 B.R. at 232, 27 Collier Bankr. Cas. 2d (MB) 1210, Bankr. L. Rep. (CCH) ¶ 74952.

60. A judgment-proof debtor typically owns very little personal property, and any that is owned is exempt, has an income source that is exempt, such as Social Security benefits, and lives in subsidized housing.

Recent Case Summaries

For Purposes of Proceedings to Terminate a Conservatorship, Beneficiary Under Testator's Will Did Not Have a Property Interest Protected By Due Process

In ***Ray v. Stewart*, 2010 WL 3619953 (Ga. 2010)**, the Supreme Court of Georgia held that a beneficiary did not have a property interest, protected by due process, with respect to receiving actual notice of proceedings for termination of a testator's conservatorship.

In 1989, Opal Ray Stewart [hereinafter "Stewart"] was appointed conservator for her incapacitated father, Willie Lee Ray, Sr. In December 2006, Mr. Ray died and his Last Will and Testament [hereinafter "the Will"] was probated in solemn form. Pursuant to the terms of the Will, Stewart was named executrix.

In December 2007, Steward filed a petition for final settlement of accounts and for discharge from office and liability as conservator. A citation was issued by the probate court and served on the conservator's surety, State Farm Fire and Casualty Company [hereinafter "State Farm"]. Notice was published in the county newspaper as required by Georgia statute. Additionally, because Stewart was also Mr. Ray's personal representative, a guardian ad litem was appointed to represent Mr. Ray. Upon review of the final return, the guardian ad litem consented to the discharge. In February 2008, after receiving no objections, the probate court discharged Stewart as conservator.

Nineteen months after the discharge, Brenda Ray [hereinafter "Appellant"], another daughter of Mr. Ray and potential beneficiary under the Will, filed a motion to set aside the judgment under **Ga. Stat. Ann. § 90-11-60** claiming that the provisions governing the settlement of a ward's estate violate the due

process of interested parties because such parties are not given actual notice of the proceedings. Both Stewart and State Farm opposed the motion. The probate court, following an evidentiary hearing, declared the statutes to be constitutional based on the fact that Appellant had no property interest in the conservatorship. Appellant appealed.

The court began its analysis by noting that, under **Ga. Stat. Ann. § 29-5-72(e)**, a conservatorship automatically terminates upon the death of the ward. However, a conservator must still petition for letters of discharge under **Ga. Stat. Ann. § 29-5-80(a)**. Ga. Stat. Ann. § 29-5-80(a) requires constructive notice to be "published one time in the newspaper in the county in which the petition is filed" and provides a time for filing objections. Where no objections are filed, the court shall issue an order dismissing the conservator. **Ga. Stat. Ann. § 29-5-80(b)**. Additionally, actual notice of a final settlement of the conservator's account and discharge of liability must be provided to the persons or entities specified in **Ga. Stat. Ann. § 29-5-81(b)**, including the surety on the conservator's bond and the ward's personal representative. As Stewart was both the conservator and ward's personal representative, the statute required appointment of a guardian ad litem.

Appellant did not dispute that the court followed the provisions of Ga. Stat. Ann. § 29-5-81(b), but rather argued that the provision did not afford her due process as a potential beneficiary of the deceased ward's estate. Appellant relied on *McKnight v. Boggs*, 253 Ga. 537, 322 S.E.2d 283 (1984) wherein the Georgia Supreme Court previously held that a legatee of a will previously filed for probate had a legally protected interest in the probate proceedings that could divest her of property. However, the court noted that while *McKnight* gave Appellant a legally protected interest in her father's estate under his will, no such interest arises in the proceedings to terminate the conservatorship.

Similarly, the court found that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) did not compel a contrary result. The court summarized the holding in *Mullane* as follows: "… notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose *legally protected interests are directly affected by the proceedings in question*." *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976) (emphasis supplied). In applying this holding, the court found that Appellant was neither "directly affected" nor did she have a "legally protected interest" in the proceedings to discharge a conservator. Thus, the notice by publication provided for under the statute did not deprive Appellant of due process under either the federal or Georgia Constitutions.

The court also rejected Appellant's claim that Stewart had a conflict of interest making her not legally available to respond to the discharge petition. In so doing, the court noted that the potential conflict of interest was remedied by Ga. Stat. Ann. § 29-5-81(b) and requirement that a guardian ad litem be appointed to represent the deceased ward and protect the ward's property rights.

Accordingly, the judgment of the lower court was affirmed.

Medicaid Applicant's Transfer to LLC For Less Than Fair Market Value Appropriately Resulted in a Divestment Penalty

In ***Mackey v. Department of Human Services*, 2010 WL 3488988 (Mich. Ct. App. 2010)**, the Court of Appeals of Michigan held that a Medicaid benefit divestment penalty was properly applied where applicant's investment in a closely-held limited liability company was rendered a transfer for less than fair market value.

On November 29, 2005, Elizabeth Marden [hereinafter "Petitioner] and her husband applied for Medicaid. The Mardens failed to disclose certain annuity contracts which would have rendered them ineligible for benefits.

On November 9, 2006, Mr. Marden died and, shortly thereafter, Petitioner's case was closed when she failed to return a required form for redetermination.

On January 11, 2007, Petitioner again applied for Medicaid. Her application was denied because she had too much money in her bank account. Following her second application, Petitioner received approximately $100,000 in payouts as a result of her husband's death. Prior to submitting a third request for Medicaid, Petitioner's daughter and attorney-in-fact, Betsy Mackey, formed the Marden Family L.L.C. [hereinafter "Marden LLC"]. Mackey was assigned 100 investment (non-voting) units of Marden LLC and all 100 voting units. Petitioner was assigned 111,460 investment units for which she (by use of Mackey's power of attorney) paid the Marden LLC $111,460. Mackey as sole voting member acted to disallow any transfer of the Marden LLC investment units during a two-year holding period. As a result, Petitioner could not sell, transfer, or liquidate her units for two years after the investment date without the consent of a super majority of voting members. Additionally, Petitioner would not receive payments from Marden LLC during the two years.

In September 2007, Petitioner again applied for Medicaid. Her application included a retroactive application for the month of August 2007. The Department of Human Services [hereinafter "DHS"] found Petitioner eligible for Medicaid, but applied a divestment penalty of 18 months and 23 days. Petitioner appealed. The hearing referee determined that Petitioner had not received fair market value for her money and affirmed DHS's decision.

Petitioner appealed to the circuit court. The circuit court reversed the hearing referee's determination and found that Petitioner's purchase of the shares of Marden LLC was for fair market value. The Court of Appeals of Michigan granted DHS's application for leave to appeal.

Following a brief background of the Medicaid program, the court turned to the standard of review applicable in this case, i.e., "whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." See *Dignan v. Michigan Public School Employees Retirement Bd.*, 253 Mich. App. 571, 659 N.W.2d 629, 175 Ed. Law Rep. 733 (2002). The court then recognized that at no point did Petitioner make any indication that the purpose of Marden LLC was for any reason other than to circumvent the Medicaid rules which would have otherwise rendered her ineligible for assistance. Specifically, Petitioner admitted at oral argument before the trial court that the purpose of Marden LLC was to allow her to qualify for Medicaid without suffering a divestment penalty. Noting that Medicaid contained loopholes which permit transfers that are inconsistent with the goals of the legislation [See *Mertz ex rel. Mertz v. Houstoun*, 155 F. Supp. 2d 415 (E.D.Pa. 2001).] and the court's judicial duty to enforce the purposes of the law as expressed in the applicable statutory provisions [See *James v. Richman*, 547 F.3d 214 (3d Cir. 2008).], the court turned to the actual statutory language and the rules set forth in the DHS Program Eligibility Manual [hereinafter "PEM"].

PEM 400 states that to be eligible for Medicaid long-term care benefits in Michigan, an individual must have less than $2,000 in countable assets. An applicant is subject to a divestment penalty where he or she transfers a resource for less than fair market value during the five-year "look-back" period and that resource is not otherwise excluded as a divestment. **42 U.S.C.A. § 1396p(c)(1)**; PEM 405. PEM 405 states that "[l]ess than fair market value[,] means the compensation received in return for a resource was worth less than the fair market value of the resource" and specifies that the compensation must have "tangible form" and "intrinsic value." As the court further pointed out, Black's Law Dictionary defines "fair market value" as "[t]he price that a seller is willing to pay *on the open market and in an arm's-length transac-*

tion; the point at which supply and demand intersect." [Emphasis added by the court.] It also defines an "arm's-length transaction" as "relating to dealings between two parties who are not related … and who are presumed to have roughly equal bargaining power; not involving a confidential relationship."

The court then pointed out that no Michigan court has attempted to define an arm's-length transaction. However, other courts have noted that an arm's-length transaction "is characterized by three elements: it is voluntary …; it generally takes place in an open market; and the parties act in their own self interest." See *Bison Tp. v. Perkins County*, 2000 SD 38, 607 N.W.2d 589 (S.D. 2000) (citing *Walters v. Knox County Bd. of Revision*, 47 Ohio St. 3d 23, 546 N.E.2d 932 (1989)). However, the Michigan courts have recognized that, with regard to financial matters, family members deal with each other differently than do strangers in an arm's-length transaction. See *Morrison v. Secura Ins.*, 286 Mich. App. 569, 781 N.W.2d 151 (2009). Accordingly, the court concluded that to determine the fair market value of a resource, it must determine the value of the resource on the open market.

The court outlined several cases where courts had considered assets which were transferred to circumvent the countable asset requirements for Medicaid eligibility. First, in *Buettner v. Wisconsin Dept. of Health & Family Services*, 264 Wis. 2d 700, 2003 WI App 90, 663 N.W.2d 282 (Ct. App. 2003), the Wisconsin Court Appeals concluded that a balloon annuity purchase from relatives constituted a divestment because the transfer was for less than fair market value. Similarly, in *Pyle v. Department of Public Welfare*, 730 A.2d 1046 (Pa. Commw. Ct. 1999) and *Ptashkin ex rel. Fliegelman v. Department of Public Welfare*, 731 A.2d 238 (Pa. Commw. Ct. 1999), the Commonwealth Court of Pennsylvania found that deals entered into by Medicaid applicants were "absurd" given that the applicants were surrendering the principal without any security while receiving a monthly payment lower than required by the prescribed interest rates. In neither case was the applicant receiving any real benefit from the transaction other than transferring a large sum of money to avoid paying for long term care. Finally, in *Wesner v. Velez, Medicare & Medicaid 303354*, 2010 WL 1609674 (D.N.J. 2010), the United States District Court for the District of New Jersey reasoned that the close relationship of the parties, together with the fiduciary duties which resulted from a power of attorney, and the admission that a promissory note was part of a "Medicaid planning device," demonstrated that the transaction was likely a "sham."

In the present case, the court recognized that the potential return, if Petitioner sold her interest after two years, would exceed the amount of her original investment. The court also noted that DHS made no claim regarding the formation or legitimacy of Marden LLC and, as Petitioner clearly pointed out, Marden LLC's terms of investment are consistent with relevant IRS and SEC regulations. Accordingly, the court found that the two-year waiting period did not, standing alone, render the transaction for less than fair market value.

The court then turned to its previously outlined definitions regarding "arm's-length" transactions. In doing so, the court noted that the evidence showed an unsecured private transaction between relatives, one of whom was the other's fiduciary, wherein shares of Marden LLC were purchased without the ability to sell or otherwise exchange the shares for a two-year period. Additionally, Marden LLC was operated exclusively by Petitioner's close relative and fiduciary and served no real business purpose other than to return Petitioner's investment, plus two years of compounded interest. Marden LLC made no monthly payments to Petitioner. Finally, the admitted purpose of Marden LLC was to make Petitioner eligible for Medicaid. Taken together, the court concluded that these facts "point to the inescapable conclusion that this was not an asset that was purchased on the open market, but instead an arrangement between relatives, not strangers in an arm's–length transaction." As a result, the compensation Petitioner would receive "was

worth less than the fair market value of the resource." Therefore, the court concluded that DHS properly found that such transaction was subject to the divestment penalty.

Finally, the court made a number of points as to why Petitioner's argument fails. One of these arguments centered on the trial court's ruling that the investment was essentially the conversion of an asset from an available form to one that was unavailable and uncountable. In finding that the trial court's determination was incorrect, the court pointed out that the key to asset conversion is that the conversion be "from one form to another of *equal value*." See PEM 405 (emphasis supplied). The court noted that PEM 405 provides examples such as the purchase of an automobile or boat, wherein the applicant buys an asset on the open market and presumably at the open market price. In the present case, it was not established that Petitioner received her assets for fair market value and, therefore, the transaction could not be considered a conversion to a form of equal value.

Accordingly, the determination of the circuit court was reversed.