

Decided on June 30, 2008

**Supreme Court, Queens County**

**In the Matter of the Application of New York City  
Health and Hospitals Corp., Elmhurst Hospital Center  
for the Appointment of a Guardian of Robert Miller, A  
Person Alleged to be Incapacitated.**

23717/06

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Charles J. Thomas, J.

Grovine Matone, Esq. the Guardian of the property, applies to the Court for an Order creating a Supplemental Needs Trust hereafter (SNT) for the benefit of her ward Robert Miller. The Guardian requests that the proposed medicaid planning be approved and that the proposed SNT submitted on behalf of Robert Miller be approved *nunc pro tunc* to July 1, 2005 in accordance with the findings of incapacity and the decision of this Court rendered April 19, 2007.

A petition was commenced on October 27, 2006 by the New York City Health and Hospitals Corp. to appoint a Guardian for Robert Miller, an allegedly incapacitated person. The Petition states that Mr. Miller suffered from several serious physical ailments including pneumonia and a collapsed lung. The Petition requested that standard powers be given to the Guardian appointed including the application for Medicaid benefits on behalf of Mr. Miller. There was nothing in the Petition to advise the Court that Mr. Miller had funds which required Estate Planning or the establishment of SNT. No request was made by the City in the Petition for the appointment of a Temporary Guardian to marshal Mr. Miller's assets for the purpose of Estate Planning, other than a standard vague reference to prevent financial exploitation due to the increased vulnerability of the alleged incapacitated person.

After several adjournments, the Court was unable to conduct a hearing at Regal Heights Rehabilitation Center until April 19, 2007. At that time the Court made a finding that Mr. Miller was incapacitated and that that incapacity had commenced prior to July 1, 2005.

At the conclusion of the hearing, the Court immediately appointed a Property Management Guardian and directed her to marshal the assets and submit to the Court an Estate [\*2]Plan for the benefit of Robert Miller, including but not limited to the establishment of an SNT, *nunc pro tunc* to July 2005. In marshaling the Incapacitated Person's assets and debts the Guardian determined that Mr. Miller's hospitalization was not paid by Health Insurance and that he had an outstanding bill.

The Property Guardian now submits to the Court, for approval, a First Party SNT and

requests that the Trust be approved *nunc pro tunc* to July 1, 2005. New York Human Resource Administration opposed the SNT on three grounds: (1) that the Court lacks the authority to create an SNT *nunc pro tunc*;

(2) that the Order creating the SNT must direct the Trustee to obtain a bond sufficient to cover the assets contained in the Trust; and (3) that, as part of any SNT, HRA be notified before the expenditure of any transactions "tending to substantially deplete the principal of the Trust", where the Trust is valued at more than \$100,000.00. or "involving transfers from the Trust for principal for less than fair market value" in accordance with 18NYCRR Section 360.4.5(5)(b)(iii).

HRA's opposition to *nunc pro tunc* approval is twofold. First, that the Court can not grant such relief *nunc pro tunc* claiming that a court can only *nunc pro tunc* a fact that is already in existence. To support its position HRA cites three cases: See *Mtr. of Rolland*, 818 NYS 432; *Mtr. Of Gillette*, 756 NYS2d 835 {195 Misc 2d 89} ; and *Mtr. of Watson*, 9 Misc 3d 560.

Second, HRA complains that if a Supplemental Needs Trust is created, it would make the incapacitated person's assets unavailable for Medicaid eligibility and budgeting purposes, and would require the Medicaid program to pay for hospital care provided the incapacitated person. The latter is, of course, the whole intention of legal Medicaid planning.

HRA relies upon three of these above stated cases to support its position opposing it's creation in this case. Each case is clearly distinguishable from the one before this Court. In the *Mtr. of Gillete*, (756 NYS2d 835 {195 Misc 2d 89} ). The Surrogate of Broome County refused to approve the retroactive establishment of a SNT claiming that the disabled person's agent-in-fact had established a Supplemental Needs Trust pursuant to a duly executed Power of Attorney. The court would not create what it considered to be essentially a second trust, even though the disabled person would be adversely affected, as the SNT was ineffective since it had been created by the incapacitated person's agent-in-fact rather than by order, as required by Federal Statute.

The *Gillete* court, however, did hold that "[o]rordinarily, a court can enter an order *nunc pro tunc* when no person will be prejudiced thereby." It simply would not establish a second trust when one was already in effect.

The right to *nunc pro tunc* relief, while frequently granted is usually done so in ministerial matters not "involving new exercises of discretion or a further turn of the fact finding wheel." Siegel, *New York Practice* 4th Ed. Par. 420, p. 716. The restriction is usually directed at preventing a trial court from exercising appellate review over itself "to correct by amendment error in substance affecting the judgment." *Kiker v. Nassau County*, 85 NY2d 879. Rather, *nunc pro tunc* relief "should be permissible for any judgment [or order] when the right sought to be retroactivated was a right at the earlier time..., and when all that is now sought is a paper — a judgment or order — saying so. That a substantial right may be affected by giving *nunc pro tunc* effect is better cited to support than to oppose the step." *Siegel*, supra 717. Unlike the Court in *Gillette*, Siegel acknowledges the fact that "litigation is designated to affect substantial rights",

[\*3](supra ).

The Appellate Division, Second Department dealt with the issue of *retroactively in matrimonial cases*. In *Jayson v. Jayson* (83 Misc 2d 417) a matrimonial action had been commenced by Hazel Jayson, the second wife of Robert Jayson. The second wife had obtained a decision of a divorce but Robert Jayson died prior to the entry of the judgment. Erica Jayson, Robert Jayson's first wife, commenced an action for an Order granting the entry of the judgment *nunc pro tunc* to protect the rights of her and her children to receive Social Security benefits.

The trial court in *Jayson*, relying on *Johnson v. Johnson*, (198 Misc. 691, 692 affd. 277 App. Div. 1143), held that retroactivity is limited "where the rights of the parties of record are not impaired or prejudiced in any conceivable degree". On appeal, the Appellate Division, reversed, holding that a judgment can be entered *nunc pro tunc* in a divorce action after the death of one of the parties, *if such party was entitled to have had the judgment entered when both parties were living*. *Jayson*, supra , at 688, emphasis added.

In the *Mtr. of Watson*, (9 Misc 3d 560) the court was asked by a guardian to grant an application to transfer the incapacitated person's funds retroactive to the date of the incapacitated person's admission to a facility in order to be eligible for medical funding. In that case, the Guardian had been appointed prior to his admission into a nursing facility but failed to make any provisions prior thereto. The *Watson* court acknowledged that the parties did not dispute the court's ability to approve such transfers retroactively but the County disputed that date to which the transfers could be made retroactive. The court in *Watson* approved the retroactive transfers to the date of the application rather than the earlier date of the incapacitated person's admission to the facility. In doing so the court viewed a Guardian, duly appointed, in the same light as a competent person. The court reasoned:

[s]ince the Court does not have authority to grant an application to a competent person to make a desired gift retroactive by several months to avoid the medicaid consequences, neither does it have the authority to grant the same relief to a guardian for the benefit of her incompetent. The premise behind MHL Sec. 81.21 in approving medicaid transfers was to give the guardian the same rights, that the incompetent would have had if not incompetent, but no greater.

Relying on the *Mtr. of Lauda*, the Court noted...

[g]oing back to the noted underlying rationale for permitting Medicaid planning in the first place, we do not believe greater restrictions should be placed on a competent person *except to the extent required by the former's incapacity*. (N.Y.L.J., July 2, 1996, p.25 (Sup. Ct.

Nassau Co.)). See also NY Law Rev. Comm. Comments to MHL 81.03)".

Here Mr. Miller was incapacitated at the time he was admitted to the facility and had neither a Guardian or agent authorized to act on his behalf in the creation of an SNT. While an incapacitated person, who has a Guardian to act on his or her behalf should not have a benefit greater than a competent person, an incapacitated person without the aid of a Guardian should not be given any lesser rights simply because he is incapacitated.

Just as the Court in *Watson*, tried to equalize the restrictions between a competent person [\*4] and a Guardian, this Court will not penalize an Incapacitated Person for the very incapacity this Court is charged with protecting.

Robert Miller was clearly entitled to a judgment which contained a properly established SNT. Such judgment would have been timely established but for his incapacity in 2005 and the failure by the City of New York to request such relief in its Petition which would have been immediately granted in the Order to Show Cause commencing the proceeding and if authorized, the Guardian would have acted prior to the critical date.

The Court notes that there is an inherent conflict of interest when one municipal agency commences a guardianship petition which may require a different municipal agency to pay for the hospital costs and care of an individual. Therefore, the court must grant the guardian's application.

To hold otherwise would create an incentive for the agency charged with bringing such Petitions to delay the commencement of such proceedings and refrain from requesting relief to which a respondent may be entitled.

As to the remaining objections raised by HRA, the language request by HRA in item (3) is not unreasonable and therefore shall be included in the final Order. As to the second objection raised by HRA, it is the Court's custom, as it will be in this case, that the order shall contain language that the Guardian shall be bonded for the entire guardianship which shall include the amounts included in the SNT.

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Charles J. Thomas, J.S.C.