

Matter of Grillo

2008 NY Slip Op 30532(U)

February 20, 2008

Surrogate's Court, Nassau County

Docket Number: 0341317/2007

Judge: John B. Riordan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

-----X
 In the Matter of the Application of MARK A. GRILLO
 and LYNN H. SWANSON-GRILLO, as
 Co-Administrators of the Estate of

File No. 341317

Dec. No. 780

MARK S. GRILLO,

Deceased,

to Determine the Validity and Enforceability of a Claim
 Against the Estate.
 -----X

This is a proceeding brought by Mark A. Grillo and Lynn H. Swanson-Grillo (the Grillos), in their capacity as co-administrators of the estate of Mark S. Grillo (Mark), their deceased son, to determine the validity and enforceability of a claim by the Nassau County Department of Social Services (DSS) for repayment of Medicaid assistance rendered to Mark during his lifetime. Before the court are the Grillos' motion and DSS's cross-motion for summary judgment. Specifically, the Grillos seek an order striking DSS's answer to the petition and determining that the amount of the lien is limited to Medicaid assistance expended after the creation and funding of a supplemental needs trust for Mark's benefit. DSS seeks an order dismissing the petition and determining that DSS's claim is valid and enforceable in its entirety.

Mark was born a triplet on July 4, 1995. As a result of a procedure he underwent at the age of three months at Long Island Jewish Medical Center, he suffered from severe cerebral palsy and required twenty-four-hour-a-day assistance for all of his daily living activities. The Grillos, individually and as Mark's parents and natural guardians, sued Long Island Jewish Medical Center and Steven J. Schneider, M.D. in Supreme Court, Queens County. The action was settled for a total of \$4,000,000 pursuant to an infant's compromise order signed on September 29, 2003

by the Honorable Alan LeVine and entered in the office of the Queens County Clerk on October 15, 2003. According to the terms of the order, the Grillos, as Mark's parents and natural guardians, were directed and authorized to create the Mark Grillo Supplemental Needs Trust (SNT) and appointed as its co-trustees. The order also directed the Grillos to pay the net settlement funds in the amount of \$2,412,698.55¹ to the SNT jointly with Charles Schwab & Co., Inc., in an account held at Charles Schwab & Co., Inc. Further, the infant's compromise order directed the payment of \$500,000 of the settlement proceeds to DSS "as and for payment and satisfaction" of an existing medicaid lien in the amount of \$845,218.49 asserted by DSS. The sum of \$500,000 was paid to DSS on March 15, 2004.

The Grillos,² as the parents and guardians of Mark, are the grantors, as well as the trustees of the SNT. The trust agreement was signed on December 16, 2003. According to its terms, the SNT was to terminate on Mark's death and the trustees were to distribute any principal and accumulated interest, in relevant part, as follows:

The New York State Department of Social Services, or other appropriate Medicaid entity within New York State[,] shall be reimbursed for the total Medicaid Assistance provided to MARK GRILLO during his lifetime (less a credit for any amounts previously paid in satisfaction or partial satisfaction of any social services lien), as consistent with Federal and State Law. . . .

¹As part of the settlement, the Grillos received \$500,000 for their derivative cause of action. Their attorneys received \$545,855.39 in legal fees and \$41,446.06 for costs and disbursements.

²At some point prior to the creation and funding of the SNT, the Grillos were appointed by Supreme Court, Nassau County, as co-guardians of Mark's person and property under Article 81 of the New York Mental Hygiene Law.

All remaining principal and accumulated interest shall be paid to the legal representative of the Estate of the Beneficiary [Mark] (SNT ¶ 3.1).

Mark died on January 27, 2006, a resident of Nassau County. He was ten years old.

Letters of administration issued to the Grillos on April 18, 2006. DSS has made a claim against Mark's estate in the amount of \$708,410.34, which DSS asserts is the amount due and owing for unpaid Medicaid benefits paid to Mark during his lifetime.

The total amount of Medicaid benefits paid on behalf of Mark is \$1,272,790.34. Of that amount, \$845,218.49 in benefits was expended prior to the funding of the SNT, with \$500,000 of that amount having been paid to DSS pursuant to the infant's compromise order, leaving a balance, according to DSS, of \$345,218.49 at the time the SNT was created. An additional \$358,191.85 in Medicaid benefits was paid for Mark's benefit after the SNT was created, leaving a balance due, according to DSS, of \$703,410.34.

The Grillos admit that \$358,191.85, the amount disbursed after the SNT was created, is due and owing. Citing Social Services Law § 369 (2) (b) (I) (B), they assert that DSS is entitled to recover previously paid Medicaid benefits from an estate only if the individual was fifty-five years old or older when the assistance was rendered. Thus, they contend that the \$345,218.49 balance at the time of the creation of the SNT is not owed to DSS because DSS's sole right of recovery stems from the terms of paragraph 3.1 of the SNT, which states that such recovery must be in accordance with federal and state law.

DSS asserts that the entire amount of the claim is due and owing from the SNT. DSS draws the court's attention to the fact that Congress allows the creation of supplemental needs trusts provided such trusts contain a provision that the state in question will "receive all amounts

remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter” (42 USC § 1396p [d] [4] [A]; *see* Social Services Law § 366 [2] [b] [2] [iii]). DSS states that “[w]ithout the enabling act of Congress, with its payback provision, all Medicaid Benefits paid because of this trust would have been paid improperly and thus owing to the State.”

The court agrees. New York State’s

right to reimbursement of all Medicaid expended on a beneficiary’s behalf flows from the terms of the SNT agreement itself an agreement voluntarily entered into by the beneficiary or his or her agent in order to obtain the significant advantage of preserving Medicaid eligibility while at the same time benefitting from the funds contained in the trust (*Matter of Abraham XX*, 36 AD3d 1085,1088 [3d Dept 2007], citing 42 USC § 1396p [d] [4] [A]; Social Services Law § 366 [2] [b] [2] [iii]; EPTL 7-1.12 [a] [5]).

Matter of Abraham XX, (36 AD3d 1085,1088 [3d Dept 2007]), is a case on which both the Grillos and DSS rely. In that case, the Third Department stated that 42 USC § 1396p [d] [4] [A] allows an individual qualified under EPTL 7-1.12 [a] [5] to establish a supplemental needs trust exempting the corpus and income thereof from inclusion as available resources provided the trust agreement contains a provision specifying that the “[s]tate will receive all amounts remaining in the trust upon the death of [the] individual up to an amount equal to the *total* medical assistance paid on behalf of the individual under a State [Medicaid] plan’ (42 USC § 1396p [d] [4] [A] [emphasis added]; *see* Social Services Law § 366 [2] [b] [2] [iii])” (*Matter of Abraham XX*, 36 AD3d 1085,1089 [3d Dept 2007]). The Third Department explained that 42 USC § 1396p “does not direct recovery of Medicaid funds” (*id.*). Instead, a state’s right to be repaid from a supplemental needs trust arises from the trust agreement, which names the state as

the primary remainderman (*id.*). “[S]ubsection (d) (4) (A) makes *total* reimbursement a condition of preserving Medicaid eligibility through an SNT” (*id.*). Thus, the words “as consistent with Federal and State Law” contained in the SNT in question do not provide the Grillos a basis by which to avoid repaying the \$345,218.49 balance on the Medicaid lien that existed at the time the SNT was created.

The infant’s compromise order dated September 29, 2003 states that the \$500,000 later paid to DSS on March 14, 2004 was “as and for payment and satisfaction” of the medicaid lien in the amount of \$845,218.49 that existed at the time. However, DSS claims that the \$500,000 payment was in partial satisfaction of the existing lien. The Grillos conceded that claim in paragraph 13 of their Verified Petition sworn to on April 7, 2004 in support of their petition to be named as Mark’s co-guardians under Article 81 of the New York Mental Hygiene Law wherein they aver that “the sum of \$500,000 was paid to the NCDSS as and for partial payment and satisfaction of social services/Medicaid lien. The balance of the lien will be deferred until termination of the SNT (i.e., upon the demise of the AIP).” The Verified Petition was filed with Supreme Court, Nassau County.

Accordingly, the Grillos’ motion is denied, and DSS’s cross-motion is granted to the extent that the court finds that DSS’s total claim for \$703,410.34 is valid and payable to DSS from the SNT.

Settle decree.

Dated: February 20, 2008

JOHN B. RIORDAN
Judge of the
Surrogate's Court

