

**Matter of Reeves**

2009 NY Slip Op 30794(U)

April 8, 2009

Supreme Court, Wayne County

Docket Number: 34649/2008

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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In the Matter of the Petitioner of  
ROBERT PETER OSTRANDER and  
DORIS C. OSTRANDER  
for the Modification of Conservator Powers for

DECISION  
AND  
ORDER

ROBERT STEPHAN REEVES,

Index No. 34649

Respondent

2008

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Kristin S. Jonsson, Esq., of counsel  
Attorneys for the Petitioners

Gary Lee Bennett, Esq.  
Attorney for Wayne County  
Department of Social Services

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The Petitioners Robert Peter Ostrander and Doris C. Ostrander have brought the instant application as Co-Conservators of the property of Robert Stephan Reeves, appointed by Order dated February 11, 1992, to modify the powers granted to them therein. (Applications made by Conservators are now governed by the provisions of Article 81 of the Mental Hygiene Law.) Specifically, the Co-Conservators seek to add provisions to that Order awarding them gifting and Medicaid planning powers *nunc pro tunc* to August 25, 2008. They also seek a finding by this

Court that the proposed Medicaid plan, including gifts to enumerated individuals and a loan by Respondent to one of the Co-Conservators to be evidenced by a Promissory Note, is valid and effective *nunc pro tunc* as of August 25, 2008.

The application is opposed by counsel for the Wayne County Department of Social Services, which was served with notice of this application pursuant of MHL §81.07(g)(1)(viii). (The Court determined that notice to the Department was appropriate, in that the proposed modifications to the Order involve Medicaid issues, and the Department oversees the Medicaid program in this County.)

Mr. Reeves is 76 years old and a private pay resident of the Wayne County Nursing Home. On December 27, 2008, Robert Ostrander as Co-Conservator entered into a written Admission Agreement with the Nursing Home. The agreement provides for the payment by Mr. Reeves of a daily private pay amount at the rate of \$270.00. The Agreement also contains a number of other provisions, including the following:

- A. personally guaranteed continuity of payment from Mr. Reeve's funds;
- B. pay the private pay rate "unless and until Medicaid coverage is

obtained”,

C. **not to make any transfers which jeopardize the WCNH’s ability to receive full payment (emphasis added);**

D. use any assets transferred from Mr. Reeves to pay for nursing home care until Medicaid coverage is in place;

E. use his personal resources, if necessary, to pay damages resulting to the WCNH from a breach of the promises made in Paragraph 4.

At the time of the commencement of this proceeding, the Respondent had the following assets and income:

Assets:

- a. checking account with a balance of approximately \$21,000;
- b. MONY account with a balance of approximately \$16,000;
- c. GNMA Scudder Fund with a balance of approximately \$55,000;

Income:

- a. Social Security \$575;
- b. Pension \$144;
- c. GNMA Scudder Fund \$250

Also, according to the Memorandum submitted on behalf of the

Department, Mr. Reeves had an outstanding balance of \$21,600.00 due to the Nursing Home as of the time of submission of the papers.

The Co-Conservators propose that the Respondent gift approximately \$43,000.00 to the individuals and charities specified in Respondent's Last Will and Testament, including Petitioners. In addition, the Petitioners would loan another \$36,000.00 to Co-Conservator Robert Ostrander, pursuant to a Promissory Note which would require him to repay the loan at 4% interest in 5 equal monthly installments of \$7,247.86.

The Co-Conservators maintain that the proposed Medicaid plan represents a procedure "accepted by the State of New York", citing a Fair Hearing Decision, Matter of Anna M., #M346001 (February 20, 2007), as well as a number of lower court decisions. They further maintain that deference should be given by the Court to fair hearing decisions, and that the conferring of nunc pro tunc powers to a guardian violates neither federal nor state law.

On the other hand, counsel for the Department has submitted two lengthy Memoranda of Law, setting forth numerous reasons for its opposition to the requested relief. The legal theories and sources relied on by the Department include contractual interference; the Debt Reduction Act

of 2005; the restrictions on gift-giving by a guardian as set forth in Mental Hygiene Law §81.21; those provisions of the Debtor and Creditor Law dealing with fraudulent conveyances; and policy considerations, both federal and state, as interpreted by various court opinions.

The Court has carefully weighed the arguments made by the Co-Conservators in favor of their requested modifications to the current order against the opposition by the Department to the alleged over-broadening of the Co-Conservators' powers. Both parties concede that there exists no appellate opinions directly on point which have approved the sort of proposed planning scheme now sought to be implemented (and judicially sanctioned) by the Co-Conservators. (The Court here notes that, while Fair Hearing decisions can be instructive, they are not entitled to the deference which the Co-Conservators urge.) Therefore, having given due consideration to the arguments presented, this Court is compelled to deny the Co-Conservators' application for the relief as requested. The reasons for this decision include the following:

- approval of the proposed plan would result in a unilateral modification of the agreement between the Nursing Home and the Co-Conservators (on behalf of the Respondent), and could therefore constitute contractual

interference as to the rights of the Nursing Home;

- the nunc pro tunc making of the proposed gifts does not appear to be in accordance with the factors required to be considered under Mental Hygiene Law §81.21(d);

- the Court finds it inappropriate to approve a questionable plan in an order which might later be construed so as to conflict with the process used to determine eligibility at such time as the Respondent may choose to apply for Medicaid;

- nunc pro tunc relief in circumstances such as these should be limited to the correction of ministerial errors;

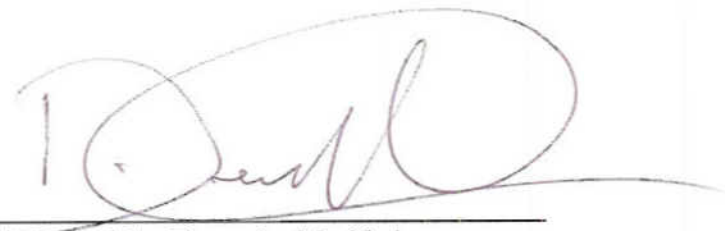
- while the Court of Appeals has recognized that certain kinds of transfers for Medicaid planning are within the scope of Article 81 (See, In re Shah, 95 NY2d 148 (2000)), this Court finds that the nunc pro tunc nature of the proposed transfers in this instance would violate the intent of the Medicaid program, which was not designed to provide medical benefits to those who render themselves “needy” through the use of such plans. (See, e.g. Matter of John “XX”, 226 AD2d 79 (3<sup>rd</sup> Dept, 1996)).

Therefore the Petition is dismissed, to the extent that it requests any and all nunc pro tunc relief. The Court is willing to grant the Co-

Conservators gift-giving powers, so long as such power is exercised prospectively and complies with the provisions of Mental Hygiene Law §81.21(d). The Co-Conservators may also engage in Medicaid planning for the Respondent prospectively, subject to whatever laws and regulations govern the eligibility process, should the Respondent make application for Medicaid benefits.

This Decision constitutes the Order of the Court. Counsel for the Co-Conservators may submit an Amended Judgment in accordance with this Decision.

Dated: April 8, 2009  
Lyons, New York



Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

FILED  
WAYNE COUNTY COURT  
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