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CHALLENGING ISSUES IN ELDER LAW: PART 2 Fiduciary Appointments

Remsen Street – The new rules for fiduciary appointments sparked debate and some confusion, at this week's seminar on Elder Law at the Brooklyn Bar Association.

Howard Krooks, Esq., identified appointments as one of the "Ten Most Significant Issues" in Elder Law, at his annual legal seminar. His remarks cleared up some concerns expressed by Brooklyn lawyers.

Other current issues include: public policy and ethics; the Arnold S. fair hearing decision; guardianship practice; 2003 regional Medicaid rates; spousal refusal; *Blumer* and income; arbitration and engagement letters; personal care contracts; the impact of new tax laws on life estates and irrevocable trusts.

Part 1 of this series presented hot issues regarding Medicaid eligibility. This article reviews the new Birnbaum prove fairness, and the appearance of fairness, in fiduciary appointments.

Roger B. Adler, Esq., the Second Department's representative on the Commission and former president of both the Kings County Criminal Bar and the Brooklyn Bar Associations, has recognized that the appearance can be as important as fairness in appointments.

State courts routinely appoint legal and financial guardians to individuals who are unable to manage their own affairs, and to businesses. Fiduciaries are generally lawyers. Secondary appointees include professionals like real estate brokers and accountants.

The Birnbaum rules place new limits on who can be appointed, and how much an appointee can get paid. Some of the rules went into effect on January 1, and others take effect June 1.

Previous Brooklyn Daily Eagle articles have discussed community concern about the effectiveness of rules intended to prevent political appointments. Monday, lawyers and judges expressed confusion about how the rules limit fees.

Krooks observed that the rules will probably be further defined.

Who is affected

The new rules apply to "a whole host of individuals" appointed by the court and attorneys, including: guardians, guardians ad litem, law guardians, court attorneys, court examiners, and others. Secondary appointees like accountants and real estate brokers are also affected.

Although Krooks said the rules do not require judicial approval for secondary appointments, local practice holds lawyers to a higher standard.

In Kings County, you need approval of counsel affirmed by a judge to appoint a secondary person in a lawsuit, lawyers said Monday. According to Ira Miller, Esq., an informal application in the form of a letter is acceptable, as long as the judge signs off on it.

"We are in the hometown of the Birnbaum Commission: Krooks observed, "There may be heightened sensitivity". Perhaps other counties do not allow such appointments at all, an audience member suggested.

The \$5,000 Rule

Monday, lawyers asked several questions about the "\$5,000 rule". According to this rule, a person can only accept one appointment a year in which the anticipated award exceeds \$5,000.

What if a lawyer anticipates the award will be \$5,000, but the actual award is a lot higher? Arguably, an attorney could accept a second appointment with an award over \$5,000, Krooks suggested.

Justice Muriel Hubsher, one of several judges at Monday's program, was skeptical.

But "how do you know what the award will be?" attorneys asked, pointing out the problem of estimating an award early on. "You can get \$4 million in a case where only a few thousand was expected", said Krooks.

Krooks described an actual appointment in which a young attorney was given an "easy, small appointment". Much to everyone's surprise, unknown assets were eventually discovered, and the novice guardian earned over \$4 million in fees.

"These are new rules", Krooks said. "They need to be vamped and revamped, but right now this is what we have to work with".

The \$50,000 Rule

There is another new cap: any person who is awarded more than \$50,000 in fees for appointments in any one calendar, will receive no appointments the next year.

"These rules have been highly contentious ever since word came down that they were going to be tinkered with, and I suspect that we are not done yet", said Krooks.

Judges and lawyers alike expressed appreciation for Krook's analysis, and some expresses their continued commitment to guardianship work, despite its limitations.

Who's not affected

While some lawyers may obtain large fiduciary fees, by luck or by design, Justice Hushber told the Brooklyn Daily Eagle that most appointed guardians, especially in Brooklyn, earn very little – if anything at all.

"It bothers me how many times, especially in Brooklyn, I have to ask lawyers to do this work, which is a lot of work, and if they're lucky, they can get \$600 from the city, because the person is indigent. Only the city will pay for that type of work", said Hubsher. Appointees can also earn the rate for 18-B lawyers do not bother to bill the city, because the city does not pay.

"One side is saying that the guardians are making a lot of money, [but] I'm embarrassed to give [a lot of] guardianships because we have a lot of indigent people in Brooklyn and [their guardians] don't generally get paid", said Hubsher.

With all of the confusing new rules, and the lack of payment, are guardianship appointments worth it?

"In my mind [the guardianship part] is the shining jewel of the court system, said Justice Hubsher. "Because those people who truly need help are being helped to get out of a life that is degrading, in places that are uninhabitable because of their incapacity, mental or otherwise."

She continued, "When I was young, I wanted to save the world, and I can't do that anymore. But I can [save] one piece at a time. I hope I can stay in the guardianship group, because it's very satisfying."