Special Needs and Elder Law Update: A Rundown of Recent Court Decisions

By Amy C. O'Hara

Over the past few years, courts have considered various issues involving elderly individuals and those with special needs. These issues included, among others, special needs trust (SNT) distributions, housing for the mentally ill and third-party liability for nursing home payments. Here's a rundown of some of those recent court decisions.

Special Education Advocacy

Can a student raise a claim under the Americans with Disabilities Act (ADA)[1] before exhausting his or her claim under the Individuals with Disabilities Education Act (IDEA)[2] first? The U.S. Supreme Court recently held that a student with a disability may do so when the remedy sought under the ADA isn't available under IDEA. In *Perez v. Sturgis Public Schools et al.*,[3] the court unanimously held that the IDEA exhaustion requirement didn't bar Miguel Luna Perez, a deaf student, from bringing an ADA claim when the relief sought of compensatory damages wasn't available under the IDEA. Reversing the U.S. Court of Appeals for the Sixth Circuit's ruling, the court noted that the IDEA's exhaustion requirement applies only to lawsuits that seek relief that are also available under the IDEA.

SNTs

An SNT preserves a trust beneficiary's eligibility for needs-based government benefits such as Medicaid and Supplemental Security Income (SSI). The assets in an SNT are exempt, allowing the beneficiary to maintain eligibility for benefit programs with asset limits. To be eligible for SSI, an individual must have nonexempt assets of $2,000 or less. One type of SNT is funded with assets or income that originally belonged to the beneficiary, or that the beneficiary has a right to, including proceeds from a medical malpractice action or an outright inheritance. This type of trust is commonly referred to as a first-party or self-settled SNT. One requirement of a first-party SNT is the trust must be established by the beneficiary's parent, grandparent, legal guardian, court or the beneficiary themself.[4]

Julie W. v. Comm'r, Soc. Sec. Admin[5] involved the question as to whether Julie had countable assets in excess of the $2,000 SSI limit. Julie was a beneficiary of her father's estate with her share totaling approximately $23,000. Her sister, as personal representative of her father's estate, established a first-party SNT to transfer Julie's share of the inheritance to protect it enabling Julie to maintain eligibility for SSI. The Social Security Administration (SSA) found that Julie had countable assets totaling $23,000 as it counted the assets held in her trust. The trust was unequivocally established by Julie's sister and not by her parent, even though her sister was the personal representative of her father's estate, and therefore, the trust wasn't properly established, causing the trust assets to be deemed available and Julie to lose eligibility for SSI.

In *McGee v. State Dept. of Health Care Servs.*,[6] the issue focused on the discretion a trustee has in making distributions from a first-party SNT. In a proceeding to settle an accounting, the trial court disallowed certain trust distributions, including distributions made for food, the beneficiary's non-service animal pets, automobile and housing expenses, and surcharged the trustee on the basis that the distributions weren't related to or made reasonably necessary by the beneficiary's condition and didn't constitute special needs as defined by the trust. On appeal, the court reversed, finding that the trial court applied too narrow of a standard. The court opinion provided a detailed analysis regarding special needs and relied heavily on SSA's Program Operations Manual System,[7] which is the internal operational reference used by SSA employees to process claims for Social Security benefits, including SSI. The court noted that when Congress enacted the statute authorizing SNTs, it didn't define the term "special needs." The court endorsed the general position of the purposes of SNTs in that:

> [t]he trust instrument requires the trustee when making distributions to take into consideration the resource and income limitations of public assistance programs such as SSI and [Medicaid] for which the beneficiary is eligible. The purpose of the special needs trust is to preserve the beneficiary's eligibility for public assistance while allowing the trust to supplement those benefits when they are unavailable or insufficient to meet the beneficiary's special needs. The trustee may make distributions that reduce or eliminate the beneficiary's eligibility for public benefits, but only if he independently determines such distributions would be in the beneficiary's best interest.[8]

Guardianship

New York's dead man statute precludes parties interested in contested proceedings from testifying about personal transactions or communications with individuals suffering from

mental illness or who are deceased.[9] In *Matter of Corinne S.*[10] a New York court was presented with an issue of first impression, whether New York's dead man statute bars testimony with an alleged individual with mental illness in an ongoing guardianship proceeding. The alleged incapacitated person, Stephen, suffered from physical and cognitive deficits after sustaining two separate strokes and an automobile accident and was involved in a contested proceeding for the appointment of a guardian of his personal and property management needs. Mark Wysocki, a cross-petitioner in the proceeding, had extensive conversations with Stephen related to his business and personal transactions and the petitioner and other cross-petitioners objected to the testimony. The court noted that the New York dead man statute makes direct reference to individuals with mental illnesses but doesn't otherwise discuss an individual's capacity or whether the individual needs a guardian. New York Mental Hygiene Law defines mental illness as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation."[11] The court determined that there was insufficient evidence to determine that Stephen was incapacitated due to mental disease or mental condition as defined under the New York law and there hasn't been any testimony by doctors, physicians or psychiatrists, and no medical record or testimony was submitted into evidence indicating that Stephen suffered from mental illness.

Mental Health and Housing

In 1999, the U.S. Supreme Court held in *Olmstead v. L.C. ex rel. Zimring*[12] that "institutional placement of individuals who can handle and benefit from community settings perpetuates unwarranted assumptions that individuals so isolated are incapable or unworthy of participating in community life" and emphasized the importance of determining the appropriateness of serving individuals with disabilities in community-based settings. In response to the *Olmstead* decision, the New York State Department of Health (DOH) implemented certain reforms to the state's mental health system, including providing options for more community-based, integrated housing for individuals with mental illness. In doing so, the DOH also instituted a cap on the percentage of residents with mental illness in transitional adult homes on the basis that these homes don't have the capability to manage high populations of individuals with mental illness.

In *Oceanview Home For Adults, Inc. v. Zucker,*[13] Oceanview Manor sued New York State after it was cited by the New York commissioner of health for exceeding the allowable percentage of mental health patients in its facility, alleging that the admissions cap violated the federal Fair Housing Act (FHA),[14] which prohibits discrimination in housing practices against certain protected classes, including individuals with physical and mental disabilities. New York's lower court agreed and held that the New York admissions cap violated the FHA because it discriminated against individuals with serious mental illness in terms of their housing and enjoined enforcement of the regulations promulgated by the DOH. On appeal, the appellate court noted that the Department of Justice filed a statement of interest with the trial court and urged the court to apply a standard of review espoused by the U.S. Court of Appeals for the Sixth, Ninth and Tenth Circuits, in which a party seeking to enforce a regulation that facially discriminates against a protected class needs to: (1) show that the restriction benefits the protected class, and (2) respond to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. The appellate court applied this standard (instead of the least restrictive alternative standards applied by the lower court) because it "best achieves a balance to implement the ADA and FHA mandates"[15] and is a less onerous standard. The appellate court determined that the respondent sufficiently demonstrated that the admissions cap was implemented to benefit individuals with mentally illness and wasn't intended to discriminate against such individuals. The appellate court noted that the admissions cap only applied to people with a serious mental illness and whose severity and duration of mental illness resulted in substantial functional disability and that the "cap is specifically tailored to the very individuals who are the subject of the integration mandate."[16]

Nursing Home Payments

The Federal Nursing Home Reform Act (FNHRA) provides, in part, that a nursing facility must not require a third-party guarantee of payment to the facility as a condition of admission to, or continued stay in, the facility.[17] This doesn't prevent, however, a nursing facility from requiring an individual who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract without incurring personal financial liability to provide payment from the resident's income or resources for such care.[18]

In *Laurels of Huber Heights v. Taylor,*[19] the question was whether a nursing facility's lawsuit against a resident's husband who signed a promissory note agreeing to pay for his wife's outstanding debt owed to the facility violated the FNHRA, which prohibits third-party liability as a condition of admission or continued stays in the facility. On appeal, an Ohio appeals court reversed the trial court's decision as to the personal financial liability of the resident's husband to pay a promissory note that was executed between the nursing facility and the resident's husband concerning an outstanding bill owed to the nursing facility for services already rendered. The promissory note was executed to pay the outstanding debts of the resident in exchange for Laurels' promise not to

take legal action to collect on these debts. The appeals court agreed with Laurels that the contract between Laurels and the husband was a separate and distinct consideration from the resident's admission or continued care at Laurels and that federal and state authorities governing contracts between third parties and nursing facilities don't provide an all-encompassing prohibition against a nursing facility's contracting with a third party to accept liability on a resident's bill.

Family Home Exclusion

Federal law provides that a home is excluded in determining the resources available of an individual applying for Medicaid.[20] A home is any property in which an individual and their spouse has an ownership interest and that serves as their principal place of residence.[21] Generally, if an individual is in a nursing facility and intends to return home, the home remains an excluded resource. Further, if an individual leaves the home to live in a nursing facility, the home is still considered the individual's principal place of residence, irrespective of the individual's intent to return, as long as the individual's spouse continues to live there.[22]

In *Dept. of Human Services v. Hobart*,[23] an Oregon appeals court held that transfers between spouses for Medicaid eligibility purposes has little to do with whether states may provide for the recovery of asset transfers after the deaths of the Medicaid recipient and his or her spouse in connection with Medicaid estate recovery. In 1994, Alexandra Hobart, and her husband purchased their family home and lived there until Alexandra entered a nursing facility around 2012, which Medicaid began paying for on her behalf starting in 2013. In April 2016, Alexandra transferred her interest in the family home to her husband who then conveyed it to a trust in September 2016. Alexandra passed away in August 2016, followed by her husband in December 2016. In February 2017, the trustees of the trust, the children of Alexandra and husband, conveyed the family home to themselves as beneficiaries. Oregon's Department of Human Services (DHS) sued the children to recover Medicaid benefits paid on behalf of Alexandra. Under the expanded definition of "estate," any assets available for Medicaid estate recovery are limited to the assets the Medicaid recipient had legal title to or interest in at the time of death.[24] The court of appeals agreed with the trial court's holding that that there was no consideration for Alexandra's transfer of property and that in making the transfer, sher and her husband intended to prevent DHS from recovering from Alexandra's estate.

In *Texas Health and Human Services Commission v. Burt*,[25] a Texas appeals court held that the commission's determination that Medicaid applicants must establish "prior occupancy" of a home prior to applying for Medicaid for the home to be excluded was incorrect because the applicants intended to move back if they were able to leave the nursing facility.

Clyde and Dorothy Burt (the Burts) purchased their family home in 1974 and lived there until 2010 when they sold it to their daughter Linda Wallace and her husband (the Wallaces). Thereafter, the Burts moved into a rental property owned by the Wallaces. In August 2017, the Burts moved to a nursing facility and, thereafter, during the same month they bought a half-interest in the family home from the Wallaces where they previously lived for decades, designated the family home as their place of residence and noted in writing their intent to return home in the event one or both of them should be able to leave the nursing facility.[26] The Burts subsequently sought Medicaid benefits effective Sept. 1, 2017, which were denied due to the inclusion of the Burts' half-interest in the home in calculating their Medicaid eligibility. The commission argued that the Burts' interest in a home should be included as a countable resource because their interest was purchased after entering a skilled nursing facility, which demonstrated that they didn't intend to return home.

The Texas court of appeals noted that many courts have consistently held that the "intent to return" analysis focuses on the applicant's subjective intent and that the subjective intent should be part of the consideration in determining whether the home should be excluded from Medicaid eligibility resource calculations and not an objective expectations standard.[27]

Reasonable Efforts Exclusion

Gardner v. Ohio Dept. of Job and Family Services,[28] involves a matter in which a Medicaid applicant was denied benefits based on exceeding the Medicaid eligibility resource limit because the Ohio Department of Job and Family Services (ODJFS) didn't exclude real property the applicant was making reasonable efforts to sell and had attempted to sell for over a year. An Ohio appeals court held that the methodology used by the ODJFS in determining resource eligibility can't be more restrictive than the methodology used for SSI and that a Medicaid eligibility methodology that doesn't include a reasonable-efforts exclusion is more restrictive than SSI's eligibility criteria. As a result, the court held that ODJFS must provide for a reasonable-efforts exclusion when applying Medicaid eligibility resource limits.

Private Right of Action Against Nursing Home

In a 7-2 ruling, the U.S. Supreme Court held in *Health & Hospital Corp. of Marion County v. Talevski*[29] that nursing home residents have a right to sue for violations of the FNHRA. Gorgi Talevski, suffering from dementia, was chemically restrained with six powerful psychotropic medications that his family believed contributed to his rapid de-

cline including losing the ability to communicate and eat on his own. Further, the nursing home attempted to transfer Talevski several times without first notifying his family and thereafter against their wishes. FNHRA provides in part that nursing home residents have rights to be free from physical and chemical restraints and cannot be discharged or transferred except when certain preconditions are met.[30] Talevski's family made efforts to enforce FNHRA's protections against improper restraints and transfers; however, to no avail. Applying the precedent established in its *Fitzgerald* and *Gonzaga Univ.* cases, the U.S. Supreme Court stated that Section 1983[31] can be "presumptively used to enforce unambiguously conferred federal individual rights, unless a private right of action under Section 1983 would thwart any enforcement mechanism that the rights-creating statute contains for protection of the rights it has created."[32] The U.S. Supreme Court looked at FNHRA and agreed that the FNHRA's unnecessary restraint and predischarge notice provisions do confer individual rights that can be enforced in a private Section 1983 proceeding.

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Endnotes

1. 42 U.S.C. 12101, *et seq.*
2. 20 U.S.C. 1400, *et seq.*
3. *Perez v. Sturgis Public Schools et al.*, 143 S.Ct. 859 (2023).
4. 42 U.S.C. 1396p(d)(4)(A).
5. *Julie W. v. Comm'r., Soc. Sec. Admin.*, 2023 WL 1860803, 3:19-cv-00596-YY (D. Or. Feb. 9, 2023).
6. *McGee v. State Dept. of Health Care Servs.,* ___ Cal.Rptr.3d ____, 2023 WL 3612421 (Cal. App. 3d, May 24, 2023).
7. *https://secure.ssa.gov/apps10/.*
8. *McGee* at p.8.
9. N.Y. C.P.L.R. 4519.
10. *Matter of Corinne S.*, 187 N.Y.S.3d 584 (N.Y. Sup. Ct. Nassau Cty. May 5, 2023).
11. N.Y. Mental Hyg. L. 1.03(20).
12. *Olmstead v. L.C. ex rel. Zimring* 527 U.S. 581 (1999).
13. *Oceanview Home For Adults, Inc. v. Zucker*, ___ N.Y.S.3d____ 2023 WL 3235674, (NYS App. Div. May 4, 2023).
14. 42 U.S.C. 3601, *et seq.*
15. *Oceanview* at 5.
16. *Ibid.*at 7 citing 18 N.Y.C.R.R. 487.2(c).
17. 42 U.S.C. 1396r (c)(5)(A)(ii); 42 C.F.R. 483.15(a)(3).
18. *Ibid.*
19. *Laurels of Huber Hts. v. Taylor*, 2022 WL 1279050 (Ohio Ct. App. April 29, 2022).
20. 42 U.S.C. 1382b(a)(1).
21. 20 C.F.R. 416.1212(a).
22. 20 C.F.R. 416.1212(c).
23. *Dept. of Human Services v. Hobart*, 507 P.3d 299 (Or. Ct. App. March 2, 2022).
24. *Ibid.*, citing 42 U.S.C. 1396p(b)(4)(B).
25. *Tex. Health & Human Servs. Comm'n v. Estate of Burt*, 644 S.W.3d 888 (Tex. App. 2022).
26. *Ibid.*
27. *Ibid.*
28. *Gardner v. Ohio Dept. of Job & Family Servs.,* 2022 WL 3907765 (Ohio Ct. App. Aug. 31, 2022).
29. *Health and Hosp. Corp. of Marion Cty. V. Talevski*, ___ S.Ct. ___ , 2023 WL 3872515 (2023).
30. 42 U.S.C. 1396r (c)(5)(A)(ii) and (c)(2)(A)-(B).
31. 42 U.S.C. 1983.
32. Talevski at 3 citing *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 253-255 (2009) and *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, and n. 4 (2002).