

# THE JURIS DOCTOR FAMILY WATCH

A NEWSLETTER FOCUSING ON  
ESTATE PLANNING FOR  
ASSET PROTECTION

Daniel H. McKinney & Associates  
Estate Planning Group

Daniel H. McKinney  
Ohio State Bar Association Board Certified:  
Estate Planning, Trust & Probate Law



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## IF TRANSFERRING PROPERTY CONSIDER MEDICAID

On September 30, 2002, Justyna Kinasz signed a quit claim deed transferring her home to her daughter, Mary Reagan, for \$20.00. The property was listed on the Auditor's tax roll at \$29,000. A week later Reagan gave the deed to an attorney with instructions to record it when he had an opportunity, there being no hurry. The attorney recorded the deed over a year later on November 7, 2003. On October 7, 2003, Kinasz entered a nursing home and the same day, Reagan filed an application for Medicaid benefits on her behalf. The Ohio Department of Job and Family Services approved the application effective October 1, 2003, but with a six month period of restricted eligibility beginning November 1, 2003, the month the deed was recorded, during which time, the Department would not pay for nursing home care.

In legal proceedings, Reagan argued the six month period of ineligibility should begin in September, 2002, the date the deed was signed.

To be eligible for nursing home Medicaid, a persons's countable resources cannot exceed \$1,500. To prevent individuals from qualifying for Medicaid by transferring resources, the agency reviews transfers to determine whether a transfer was improper.

There is nothing "wrong" or illegal about an "improper transfer". Improper is a term used to identify those assets transferred for less than fair market value. If they are, the person is ineligible for nursing home Medicaid for a period of time. This period of time is the value of the resource divided by the "Average Private Pay Rate" which is determined annually by the Department of Job and Family Services. The period of time begins to run the month of the transfer.

Tax records showed the tax mailing address remained in Kinasz's name and she continued to reside in the residence until she entered the nursing home. There was no evidence that costs

connected with the property were borne by anyone other than Kinasz.

A deed must be delivered to transfer ownership of land. Recording the deed perfects delivery and the transfer becomes irrevocable. An effective delivery, also requires acceptance on the part of the grantee coupled with the mutual intent to pass title to the property.

There was no evidence of an intent to pass title to the property at the time the deeds were signed. Instead, the facts indicate that Kinasz continued to exercise legal ownership.

Medicaid entitlement can be worth hundreds of thousands of dollars. The rules are very technical and professionals versed in elder law should be consulted before disposing of any property of an elderly person.

*Kinasz-Reagan v. Ohio Department of Job and Family Services, 164 Ohio App.3d 458.*

## DOES YOUR HOMEOWNER POLICY COVER WATER DAMAGE?

In a recent case, a young couple was out of the country when a heavy rain caused significant water damage to their improved basement. Aghast at the devastation upon their return, they called a plumber who determined that the sump pump had failed. With foresight they had purchased a "Water Backup and Sump Pump Overflow" rider to their homeowner policy. They notified their insurer who sent an adjuster to investigate, after which, to their astonishment, they received a denial letter.

Our firm was retained and we determined that the rider by its terms covered loss from "conditions which cause water..to back up from outside the residence premises or which cause overflow from a sump pump or sump well designed to drain water from the interior foundation areas..."

The rider also stated "we insure for direct, physical loss caused by water which overflows from a sump pump or sump well designed to drain subsurface water from the interior foundation area even if such overflow results from the mechanical breakdown of the sump pump."

The reason given for the denial was a policy exclusion for flood, surface water, or water that

seeps or leaks through the building and/or foundation.

We interviewed the plumber who explained that the house has an exterior sump pit drainage system with a drainage pipe that collects subsurface water and pipes it inside to the sump well where the sump pump expels the water to the exterior surface and to the street gutters. In the heavy rains during the owners' absence, the drainage system functioned correctly but the pump malfunctioned. In fact, the system is designed to reduce hydrostatic pressure to the exterior of the foundation and thereby prevent seepage and leakage through the foundation. Thus, the only reason there was water damage was the faulty pump. In fact, a new pump was installed and in a recent heavy rain, worked constantly to maintain the basement completely dry.

Is the insurer in bad faith for denying the claim and causing their insured to hire attorneys to seek damages? Is the insurer liable on its contract Sump Pump Overflow Rider? Should there also have been flood insurance through the U.S. Government?

Stay tuned for the answers.

## IRS NOT LIABLE FOR TAX ADVICE

In a recent tax case, Stephanie Barbee had been employed by the Texas Workforce Commission and participated in the Employees Retirement System of Texas, a Code Sec. 401(a) plan. When she left her employment she withdrew \$13,817 from the plan to defray her husband's educational expenses at the University of North Texas. The Barbees reported the withdrawal as income and the IRS assessed a 10% withdrawal penalty of \$1,382.

The Barbees contended that because the withdrawal was not used for higher education expenses, they were not subject to the 10% penalty and were assured by various IRS employees that the penalty was not applicable.

The 10% penalty is imposed for distributions for a "qualified retirement plan" equal to 10 percent of the withdrawal that is includable in gross income unless one of the statutory exceptions applies. Both 401(a) plans and IRAs are qualified

plans but the applicable exemption that permits withdrawal without the 10% penalty applies only to IRAs. The Employee Retirement System of Texas is not an IRA.

The Barbees argued that they were misled by IRS employees and agents who assured them that the 10% additional tax penalty did not apply and they had other IRA accounts from which they could have made withdrawals. But they lost these arguments also. The tax court held that the IRS is not bound by errors made by employees and the existence of IRA accounts did not change the decision.

Moral of the story: professional tax advice may be the best investment you could make. Professionals are liable for the advice they give, government employees are not.

*Richard L. and Stephanie Barbee v. IRS, T.C. 2006-71*

## BROKEN ENGAGEMENT: WHO KEEPS THE GIFTS?

In May, Lester Cooper was seriously injured requiring an extended hospitalization during which Julie, whom Cooper had met a year earlier, and Julie's mother, Janet, visited frequently. Although Julie was married to another man at the time, a romantic relationship developed between Cooper and Julie and Cooper proposed. Julie accepted, indicating she would marry him after she divorced her husband which she did the following October.

Cooper ultimately received \$180,000 for his injuries. After being released from the hospital, Cooper moved in with Janet and Julie and over the next couple of months, Cooper purchased a number of items for Julie, including a diamond engagement ring, a car, a computer, a tanning bed, and horses. Cooper also paid off Janet's car loan and made various improvements on her house, including having a new furnace and wood flooring installed. By December, the settlement money had run out. In June, an incident occurred between Janet and Cooper and he moved out of the house. He and Julie continued their relationship but the following month Cooper informed Julie he was suing Janet to recover the money he had invested in her house. Julie responded by telling Cooper she could not be with him if he did that. That same month Cooper filed suit against both Julie and Janet for unjust enrichment.

The concept of unjust enrichment is applicable when a person has conferred a benefit on someone and it is unjust for the recipient to retain the benefit without payment.

If a person gives gifts during the engagement period in contemplation of marriage and the marriage does not occur, is the donor entitled to recover the gifts and, if so, is it absolute or conditional? Courts are split on these issues. How any case will be decided depends on the jurisdiction.

Cooper said the "no fault" rule should apply to gifts given in contemplation of marriage meaning the gifts are returned if the marriage does not occur regardless of who is at fault in ending the engagement. Julie, on the other hand, said Cooper was at fault and should not recover the gifts because he unjustifiably broke the engagement by suing her mother.

The first possible approach is that an

agreement to marry where one party is already married is void as against public policy. While this approach punishes the donor for his conduct, it rewards a party that is equally guilty.

A second approach treats all gifts during the engagement period as irrevocable gifts unless they are expressly made conditional on a marriage occurring. But this approach attempts to apply logic to an emotional situation and only rarely during an engagement does a donor think about putting a condition on gifts.

The third approach treats the engagement ring as a conditional gift but treats all others as irrevocable gifts unless expressly made conditional. This approach recognizes the significance of the engagement ring as a promise to marry and requires its return to the giver.

The fourth, fault based approach permits the donor to recover gifts unless he or she unjustifiably broke the engagement. This helps if the donee has spent money toward the wedding.

The fifth and no-fault approach follows the divorce movement away from fault requirements because it invites litigious acrimony.

Ultimately, the court decided that generally, once any gift is made, it is irrevocable unless the donor imposes a condition on the gift. Whether a gift is conditional or absolute depends on the donor's intent and express declaration.

Cooper expressed no condition on gifts he made to Julie. Nor did he indicate any gifts made to Janet were conditional but expressly stated he gave the money to Janet "because nobody lives nowhere for free". Since the gifts were absolute and unconditional there could be no unjust enrichment and since Julie had already returned the engagement ring, the court never decided that issue.

When couples are young and have very little in the way of financial resources, this issue generally comes up most often where the engagement ring is at issue. Other cases arise because the couple has greater financial resources, one party is more generous, one party feels cheated, or heirlooms are involved.

*Cooper v. Smith et al* 155 Ohio App3d 218

## IRS DEMONSTRATES FLEXIBILITY FOR UNFORESEEN CIRCUMSTANCES IN SALE OF HOME

John Smith was employed as a narcotics investigator of the Street Crimes Unit of the Chicago Police Department. Smith and his wife purchased a house they used as their principal residence and two months later Smith conducted a highly-publicized arrest of an alleged drug dealer.\* Shortly thereafter, the Police Department learned that associates of the alleged dealer had discovered Smith's home address and planned to kill Smith in his home. The department transferred Smith out of the Street Crimes Unit and provided 24-hour security for Smith and his family. Smith's family moved out of the house and later sold it.

On the date the residence was sold, Smith had not owned and used the property as his principal residence for two years during the five years preceding the sale. Smith requested a private letter ruling that he be entitled to exclude gain from the sale of the residence.

Gross income will not include gain from the

sale of real property if, during the five-year period prior to sale it was owned and used as the taxpayer's principal residence for periods aggregating at least two years. The exclusions are \$500,000 for married and \$250,000 for single tax payers. If the two year requirement is not met, the exclusion is still applicable if the primary reason for the sale is a change in employment, health or unforeseen circumstances.\*\*

Unforeseen circumstances means the event is not anticipated before purchasing the residence, for example, death, divorce, multiple births from the same pregnancy, etc. The IRS determined that the circumstances were unforeseen and Smith was entitled to exclude gain up to \$500,000.

\* fictional name and dates used here since identifying information are not disclosed in private letter rulings

\*\* IRC Section 121 et seq.

Daniel H. McKinney & Associates  
McKinney & Namei, Co., LPA  
15 E. 8<sup>th</sup> St.  
Cincinnati, OH 45202