Legal research paper for wills trusts and estates essay sample

Mark Down, who is 74 years old, made a will leaving all of his assets to his children. He also executed a power of attorney, giving his son, Slowe, permission to handle all of his financial assets. Slowe is now worried that Mark may need Medicaid assistance in the future and wants to remove his assets, from his name, and give them to his children. Under the current law, Mark will be ineligible for Medicaid for a period of 5 years after the gift transfer is made, so it's in Marks best interest to get all of his assets transferred as soon as possible. Because Mark doesn't want to deal with the financial matters himself, the issue is whether or not Slowe can transfer Marks assets under his power of attorney.

In the case, Matter of Ferrara, 7 N. Y. 3d 244 (N. Y. 2006), George Ferrari made a will in June 1999, leaving all of his property to the Salvation Army. Later that year, as his health began to deteriorate, George called on his brother, John, and Johns son, Dominick, for assistance. George wanted the family members to have control of his property and distribute it however they wanted to. On January 25, 2000, George signed a durable general power of attorney, which appointed John and Dominick, as his attorneys-in-fact. In addition, he signed a typewritten provision allowing John and Dominick to make gifts without limitation in amount, to themselves. Three weeks later, George's health deteriorated and he passed away. During that three week period, Dominick transferred about 820, 000 of his uncles assets to himself.

Upon learning of George's death, the Salvation Army filed a claim, with the Surrogates court, seeking a turnover of George's assets. Finding that George had been competent and correctly completed the forms prior to his death,

the salvation army’s case was dismissed. The Salvation Army, then appealed, and the appellate division also dismissed the case. When the case reached the state’s highest court, the New York State Court of Appeals disagreed with both the Surrogate court and Appellate division. The court stated that the statute of limitation could be waived, by adding additional language allowing unlimited gifting in the power of attorney form. Otherwise, the $10, 000 gift limit, per person, per year must be followed. The court concluded that, in section 5-1502m of the general obligations law, all gifts made pursuant to a power of attorney must be in the best interests of the principal. Therefore, they found that the statute’s intent had not been followed by George’s relatives in this case, because nothing in section 5-1502m indicates that the best interest requirement is waived when additional language increases the gift amount.

In another case, Matter of Mildred Keri 811 A. 2d 942 (NJ App. Div. 2002), a mentally incompetent person, Mildred’s son sought approval to engage in Medicaid planning, which included giving much of the proceeds of the sale of her house to her two sons. In 1996, Mildred executed a general power of attorney naming her son, Richard, as her attorney-in-fact. Although it authorized him to apply for Medicaid on her behalf, it did not state that he could make gifts to himself or anyone else. Richard’s plan was to sell Mildred’s home and put her in a nursing home. He planned to take $98, 000 of the proceeds, as a gift to share equally between him and his brother, and leave Mildred $78, 000 to pay for her nursing home care, during the ineligible period for Medicaid, which would result from the gift.

The judge granted the sale of her home and nursing home placement, but refused to authorize the Medicaid plan. The reason for that was because, the power of attorney form did not include additional language, allowing him to make such large gifts. The power of attorney form did not state anything about gifts at all. The court also stated that while competent, if the principal does not specify a Medicaid plan, then Medicaid planning is not allowed, unless the beneficiary is a needy spouse. Therefore, the court said that " when the incompetent has not indicated a preference for Medicaid planning while competent, we will not prematurely force enrollment on the public dole at the guardian's request for the benefit of the incompetent's self-sufficient children".

Both of the above stated cases are different, but each one pertains to what Slowe wants to do with his fathers assets. The matter of Ferrara case is much different than what Slowe wants to do. In that case, Dominick transferred his uncles assets solely for his own benefit. Slowe is wanting to transfer his fathers assets to benefit his father, so he will be eligible for Medicaid one day. Slowe's father also has a will, leaving all of his assets to his children, which clearly tells what he wants to do with his assets when he dies. In the Matter of Ferrara, it was not George's intent to leave his assets to his family members. He stated, in his will, that he wanted all of his assets to go to the Salvation Army when he died.

In the matter of Mildred Keri, Mildred had a will leaving all of her assets to her two children when she died. This case is very similar to what Slowe wants to do with his fathers assets. In both cases, the parents both have wills leaving all of their assets to their children. The children are also seeking the

gift transfers to benefit their parents, in both cases. However, in order for Richard to have made the gifts transfers, Mildred would have needed to include the additional language of unlimited gifting, in the power of attorney form, while she was still competent.

Therefore, while Slowe’s father is still competent, it would be in his best interests to edit the power of attorney form leaving Slowe as his attorney-in-fact. He should add additional language authorizing Slowe, to make gifts of unlimited amount, on his behalf. He should also include that he authorizes Slowe to make gifts in regard to planning for Medicaid, in order to minimize his assets. Although some states may allow the transfer of assets as gifts, under a general power of attorney, it is best to be on the safe side and include the additional language, to be sure there is not a question of what Slowe’s father wants and there is never a problem if Medicaid takes the issue to court. In conclusion, although, there will be a 5 year look back period of ineligibility for Medicaid, because of the gift transfers, it is in the best interest of Slowe’s father, to go ahead and authorize Slowe, to make the transfers, as soon as possible.