

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
ORPHANS COURT DIVISION

In re: **OLGA ADLER** : Orphans' Court No. 1144IC of 2001  
an Incapacitated Person :

A M E N D E D  
O P I N I O N

**Joseph D. O'Keefe, J.**

**19 March 2003**

On 29 November 2002, Judy DeLeo and Robert Adler, in their capacity as co-guardians of the Estate of Olga Adler, an Incapacitated Person, filed a Petition for Substitution of Judgment Pursuant to 20 Pa. C.S.A. §5536 for estate planning purposes. On 16 December 2002, both the Commonwealth of Pennsylvania, Department of Public Welfare and Paul's Run Health Care Center filed objections to the Petition for Substitution of Judgment. On 30 January 2003 this Court convened to hear testimony.

Facts and Procedural History

Olga Adler is a ninety-six-year-old incapacitated person. Owing to her declining health, Ms. Adler was admitted to Paul's Run Health Care Center ("Paul's Run) in June of

2001. Paul's Run provides the skilled nursing home care that Ms. Adler will require for the remainder of her life. On 3 October 2001, Olga Adler was adjudicated an incapacitated person by the Honorable Joseph D. O'Keefe, Administrative Judge of the Orphans' Court of Philadelphia County ("the Court"). As a consequence of the Court's finding of Ms. Adler's incapacity, the Court appointed Judy DeLeo and Robert Adler, the niece and nephew of Olga Adler, the Plenary Guardians of Olga Adler's Estate and Person. Olga Adler has no children.

On 7 August 2002, Judy DeLeo and Robert Adler filed a petition with the Court requesting that the Court approve the transfer of Olga Adler's interest in her residence, located at 10823 Hawley Road, Philadelphia, Pennsylvania, to her sister Ida Adler. The Department of Public Welfare did not object to this petition and the Court approved the transfer on 24 October 2002. The co-guardians subsequently transferred Olga Adler's interest in the property to Ida Adler, in fee, on 31 October 2002, for the consideration of one dollar. On 25 November 2002, less than one month after the initial transfer, the Hawley Road property was reconveyed from Ida Adler, in fee, to Ida Adler and Robert Adler, as joint tenants with right of survivorship for the consideration of one dollar.

On 29 November 2002, Judy DeLeo and Robert Adler, co-guardians of the Estate of Olga Adler, filed another petition with the Court. The co-guardians requested that the Court substitute its judgment for that of the Court's ward and approve certain estate planning transfers. The petition requested the approval of a gift of \$20,816.76 to the ward's sister, Ida Adler, and a gift of \$20,816.76 to the ward's brother, Charles Adler. The petition also sought the approval of the payment of \$1,985.96 to Harvey Abramson for attorneys fees. As set forth in the petition, the co-guardians' purpose behind this estate plan was to give away Olga Adler's assets in order to accelerate the time period in which she would become destitute and presumably eligible for taxpayer-funded Medicaid to pay for her continued support and maintenance at Paul's Run.

## Legal Analysis

### **I. The Co-Guardians Have Created a Conflict of Interest Between Themselves and their Ward.**

This Court is being asked to substitute its judgment for that of Olga Adler for the first phase of the co-guardian estate plan. In order to veil the appearance of any conflict of interest, the co-guardians propose a gift plan that would deplete the ward's estate for the benefit of her brother and sister. Olga Adler, Ida Adler, and Charles Adler are siblings all of whom presently reside at Paul's Run. They are each using their own separate funds to pay for the cost of their respective care. There is no explanation offered in the Petition for Estate Planning as to why Ida Adler and Charles Adler would need additional funds from Olga Adler's Estate. The real reason for the transfer is because Ida and Charles Adler are being used as conduits to funnel Olga Adler's estate to other family members.

The *modus operandi* for the co-guardians and the true purpose behind this estate plan was established by the co-guardians' previous petition to divest Olga Adler's interest in her real property. Judy DeLeo and Robert Adler petitioned this Court to transfer Olga Adler's interest in her residence located at 10823 Hawley Road, Philadelphia, Pennsylvania to her sister, Ida Adler. The Court approved this transfer on 24 October 2002. On 31 October 2002, the co-guardians transferred the property to Ida Adler in fee. Less than one month later, the same property was transferred by Judy DeLeo and Robert Adler, as agents for Ida Adler, to Ida Adler and Robert Adler as joint tenants with right of survivorship. The ultimate beneficiary of Olga Adler's interest in her real property is the co-guardian of her estate,

Robert Adler.<sup>1</sup>

Having demonstrated that the co-guardian is the person who eventually profited from the real estate planning, there certainly is reason to believe that if this Court approved the pending petition, there would be subsequent transfers that would benefit one or both of the co-guardians.

The instant proceeding, concerning a request by the co-guardians to invade the incapacitated person's estate requires a thorough examination of the relevant sections of 20 Pa. C.S.A. §5500, et seq. This section of the Probate, Estates and Fiduciaries Code sets forth the requirements governing the provision of services to incapacitated persons.<sup>2</sup>

“Incapacitated person” as defined by 20 Pa. C.S.A. §5501 includes any adult individual whose “ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.”

In enacting this law, the Pennsylvania Legislature recognized that protection of an incapacitated person may require the appointment of a guardian to manage the individual's financial resources. Upon petition and hearing, the Orphans' Court may appoint any qualified individual as guardian whose interests do not conflict with those of the incapacitated person.<sup>3</sup>

In Pennsylvania, courts have determined that a fiduciary relationship exists between a guardian and a ward, and have compared this relationship to that between attorneys and clients, principals and agents. The relationship exists in any situation where one is “bound to

---

<sup>1</sup>

Not only has Ida Adler's interest in her real property been transferred by her agents, Judy DeLeo and Robert Adler, but these two individuals have also made substantial gifts of Ida Adler's assets to themselves.

<sup>2</sup> 20 Pa. C.S.A. §5502.

<sup>3</sup> 20Pa. C.S.A. §5511(f).

act for the benefit of another and can take no advantage to himself.”<sup>4</sup> Generally, courts have determined that “[a] guardian must manage the estate of his ward *exclusively* for the benefit of the ward, and will not be permitted to obtain any undue profit or advantage from his position. A guardian is bound to protect the interest of his ward, and may not place himself voluntarily in a position in which his own personal interests are in conflict with those of his ward.”<sup>5</sup>

Judy DeLeo and Robert Adler were appointed co-guardians of Olga Adler’s estate on 3 October 2001. The 7 August 2002, Petition for Estate Planning, that was filed by the co-guardian, resulted in the complete divestiture of the ward’s interest in her residence. The co-guardian Robert Adler benefitted from that estate planning. The filing of a second Petition for Estate Planning on 29 November 2002 indicates the co-guardians may now be seeking to gain additional assets at the expense of the ward.

The general rule of law indicates a presumption of fraud if a conflict of interest exists: “Where a guardian engages in any transaction involving his ward’s estate out of which the guardian obtains personal benefit, the transaction is suspicious and presumptively fraudulent, even in the absence of corrupt intent or design.”<sup>6</sup> In Matovich, the court found that the prohibition against self-serving actions by a fiduciary with his ward’s property was absolute and determined that any disposition of a ward’s property favorable to the guardian should be stricken, regardless of intent.<sup>7</sup>

Other legal authority suggests that “[c]ourts watch with great jealousy transactions of guardians with their wards or any dealings between them affecting the estates of the wards. The equitable rule concerning dealings between guardian and ward is very stringent. The

---

4

Re: Guardianship of Joseph Matovich, No. 387 July Term, (C.P. Alleg. Co. 1942) at 51, quoting Shook v. Bergstrasser et ux, 356 Pa. 167, 171 (1947).

<sup>5</sup> 39 C.J.S. Guardian and Ward § 98.

<sup>6</sup> 39 C.J.S. Guardian and Ward §98.

<sup>7</sup>

Matovich, at 52; see also, Chorpenning’s Appeal, 32 Pa. 515 (1859); Noonan Estate, 361 Pa. 26 (1949); Downing Estate, 162 Pa. Super. Ct. 354, 360 (1948).

relation is so intimate, the dependence so complete, the influence so great, that any transactions between the two parties or by the guardian alone through which the guardian obtains a benefit... are, in the highest sense, suspicious and presumptively fraudulent.”<sup>8</sup>

The proposed transfer of these funds by the Petitioners would result in no benefit to Olga Adler. As evidenced by the Petition presently before this Court, Judy DeLeo and Robert Adler retained the services of an attorney to do an “Asset Protection Plan.” The purpose of this plan was to make Olga Adler eligible for Medicaid by removing her available assets. Unquestionably, these assets would not be protected if they had been spent to pay the nursing home costs of Ida and Charles Adler. There is an ulterior motive for these transfers and the only other parties at interest are the niece and nephews. Accordingly, this transaction clearly indicates self-dealing by the guardians. It is apparent in this matter that the co-guardians would not only receive a benefit from the transaction, but the wards continued care could be seriously jeopardized in the future. At the time the Petition for Estate Planning was filed, Olga Adler had more than \$85,000.00 available for her needs. Under the co-guardians’ proposal, after giving away one-half of the ward’s assets for less than fair consideration and exhausting her remaining assets, she would be completely destitute and dependent upon the state’s taxpayers for her needs.

In Delaware County, the court has considered a case on which a guardian petitioned to invade the principal of the estate of an incapacitated individual who was in a nursing home. In Re: Robert A. Boyle,<sup>9</sup> the court protected the ward’s estate. In Boyle, the court found that the incapacitated person’s income was barely sufficient to cover his nursing home care, and refused to allow his wife to receive support payments from the remaining principal of his estate. The court found that “[i]f the principal is invaded and reduced, the future will see the income reduced accordingly. It is then easily foreseeable that with ordinary, inflationary increases in nursing home expenses, the alleged incompetent’s estate would shortly be

---

<sup>8</sup> 39 Am Jr. 2d Guardian and Ward §211.

<sup>9</sup> 60 Del. 436 (O.C. Del. Co. 1972).

insufficient to provide income necessary for his own maintenance and care.”<sup>10</sup>

A similar situation exists in the instant case. If this estate planning petition is approved, Olga Adler’s estate will be depleted. Family members will profit; Ms. Adler will suffer a loss; and the taxpayers will be burdened with the payment of her nursing home bills. Accordingly, the Court will not allow the co-guardians to invade Ms. Adler’s principal for the stated purpose of rendering her eligible for medical assistance. A guardian must be circumspect in dealings with the ward’s property, and it is obvious to the Court that the goal of these co-guardians is their own profit rather than any concern for the ward’s best interest.

## **II. The Court Will Not Approve Rendering the Ward Destitute to the Benefit of the Guardians.**

Petitioners argue that the Court should apply the doctrine of substituted judgment, which sets forth the theory that the court on behalf of its ward, should exercise its judgment to do that which it might reasonably suppose the ward would have done if the ward had retained capacity. This theory, adopted in Hambleton’s Appeal<sup>11</sup> has been codified at 20 Pa. C.S.A. §5536(b) as follows:

(b) **Estate plan.** The court, upon petition and with notice to all parties in interest and for good cause shown, shall have the power to substitute its judgment for that of the incapacitated person with respect to the estate and affairs of the incapacitated person for the benefit of the incapacitated person, his family, members of his household, his friends and charities in which he was interested. This power shall include, but is not limited to, the power to:

(1) Make gifts, outright or in trust.<sup>12</sup>

---

<sup>10</sup> Boyle at 438.

<sup>11</sup>

102 Pa. 50 (1883) (the court, having charge of the [incapacitated person] should maintain circumstances to continue to benefit the ward)

<sup>12</sup> 20 Pa. C.S.A. §5536(b)(1).

Petitioners are requesting the Court's approval to make a present gift of the ward's property to her brother and sister through the Court's power to substitute its judgment for that of the ward. Petitioners present no factual support for such a request, and in fact, Petitioners ignore the section of the statute which sets forth the factors that a court must consider before exercising its power to make a substitute judgment:

In the exercise of its judgment for that of the incapacitated person, the court, first being satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, may adopt a plan of gifts which results in minimizing current or prospective taxes, or which carries out a lifetime giving pattern. The court in exercising its judgment shall consider the testamentary and inter vivos intentions of the incapacitated person insofar as they can be ascertained.<sup>13</sup>

In the present case, assets exist which are clearly available for the maintenance, support and well-being of Olga Adler. Ms. Adler's assets have been used for the past year to pay for her care. The Petitioners' request, to divert the current assets and qualify Ms. Adler for medical assistance, relies upon a mischaracterization of Medicaid. Medicaid is not an asset. There is no right to receive Medicaid. Rather, Medicaid is an entitlement program and has never been considered an "asset" for any reason. The purpose of the Medical Assistance Program in Pennsylvania is to provide assistance to the needy and distressed, to enable them to maintain a decent and healthful standard of living, and to do this in such a way as to promote self-dependency. 55 Pa. Code §101.1(c)(1). Olga Adler is not needy. She has in excess of \$85,000.00 at her disposal to provide for her needs. The only manner in which she will become needy is if her co-guardians were permitted to invade her estate and liquidate it.

Under Petitioners' scheme, the funds available for Ms. Adler's care will be stripped from her estate to presumably qualify her for medical assistance. However, in order to

---

<sup>13</sup> 20 Pa. C.S.A. §5536(b).



provide assistance to the truly needy, the Public Welfare Code requires that applicants for medical assistance first must use their own resources before applying for benefits.<sup>14</sup> Olga Adler's funds are already available and being used for her care and should continue to be used for that purpose.

Petitioners rely on specific requirements for Medicaid eligibility to support the argument that Ms. Adler's current funds are not required for her nursing care. Under eligibility requirements, after the expiration of an ineligibility period for transfers exchanged for less than fair consideration, a recipient without resources may qualify for medical assistance.<sup>15</sup> The mere fact that there would be a determination that the proposed gifting would be for less than fair consideration raises a red flag to this Court. The ward receives no benefit from these gifts. The co-guardians propose to set aside an amount sufficient to pay for nursing home care for this ineligibility period and shelter \$41,633.52 presumably for the benefit of Ida and Charles Adler. Petitioners request that this Court determine that Olga Adler would want her siblings to have her money rather than utilize it to support herself in the manner she currently enjoys. This request contravenes logic and runs contrary to the law. Olga Adler would not have chosen to voluntarily impoverish herself for the sole benefit of other individuals.

Petitioners do not cite *any* Pennsylvania cases to support their position. Instead, the co-guardians request that this Court rely on several New York cases and a New Jersey case in making its determination. Unfortunately for the Petitioners, in the most recent New Jersey case to address this issue, In the Matter of Mildred Keri,<sup>16</sup> the court rejected a guardian's attempt to pursue "Medicaid planning" on behalf of an incapacitated person ("Keri"). The guardian had sought to make a gift of the sale proceeds of Keri's home to himself and his

---

<sup>14</sup> 55 Pa. Code §178.1(g).

<sup>15</sup> 55 Pa. Code §178.104.

<sup>16</sup>

356 N.J. Super. 170, 811 A.2d 942 (2002) (Superior Court of New Jersey, Appellate Division, approved for publication on December 19, 2002),

brother, who were Keri's adult children. The guardian proposed to take \$92,000.00, while leaving Keri with \$78,000.00 to pay for her nursing home care. The court reasoned that the guardian's plan, "if followed by a competent person, is nothing other than self-imposed impoverishment to obtain, at taxpayers' expense, benefits for the truly needy."<sup>17</sup> The court noted that the Supreme Court of Connecticut "rejected a similar Medicaid scheme."<sup>18</sup> The court distinguished the New Jersey case cited by Petitioners, In re Labis,<sup>19</sup> by stating that the beneficiary in Labis was the incapacitated person's wife who was "needy". The court further held that when an incapacitated person "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."<sup>20</sup> Fortunately for the taxpayers of the Commonwealth, the Pennsylvania Courts have staunchly supported the proposition that receiving public assistance is not presumed to be a goal of estate planning and individuals should use their own funds before relying on the taxpayers for their medical care.

In Estate of Rosenberg v. Department of Public Welfare,<sup>21</sup> the Supreme Court, concurring with the Commonwealth Court, rejected the argument that it was the intention of the testator that the trust funds should not be used to pay for his wife's nursing home care. The court did not accept the argument that it was the testator's intent that his wife should rely on public assistance and thereby preserve the trust for their heirs. The Court determined that "[such a] result would require a presumption that every testator intends his survivors to utilize public assistance if possible so that a testamentary trust instrument such as this must be interpreted to make the widow eligible for medical assistance benefits in order to maximize the inheritance of the remaindermen... [W]e do not subscribe to the ... notion, that

---

<sup>17</sup> Keri at 5.

<sup>18</sup> Keri at 5.

<sup>19</sup> 714 A.2d 335 (N.J. Super. A.D. 1998)

<sup>20</sup> Labis at 12.

<sup>21</sup> 679 A.2d 767 (Pa. 1996)

receiving public assistance is the presumed goal of estate planning.<sup>22</sup> Neither does this Court assume that Ms. Adler ever had any intention of becoming a recipient of Medical Assistance, since the co-guardians presented no evidence to support that presumption.

It is not every person's intent to sacrifice his or her own comfort for the benefit of others or potential heirs. Indeed, most people seek to enjoy the benefits of their own property for as long as possible. Ms. Adler's lifetime accumulation of wealth attests to this fact.

Although residing in a nursing home, Olga Adler may still reap the benefits of her life's efforts. Ms. Adler may require private duty nursing or experimental surgery at some point. Medicaid does not cover these expenses. Ms. Adler may be a candidate for homeopathic or other non-traditional treatments, which are not compensable for Medical Assistance recipients. Additionally, while her personal assets remain, Ms. Adler may still be able to enjoy occasional trips from the nursing home, or subscriptions to newspapers and magazines. Ms. Adler may enjoy certain foods or clothes beyond the means of an indigent Medicaid recipient, who is permitted only to receive the maximum amount of \$30.00 per month for personal needs. Given Ms. Adler's advanced age, funding for her supplemental needs shall not be prematurely exhausted. Ms. Adler is entitled to the long-term use and legal protection of her own assets and she should not be forced into poverty at the behest of her co-guardians.

Section 5536(b) requires the court, in exercising its judgment, to consider the testamentary and *inter vivos* intentions of the incapacitated person insofar as they can be ascertained.<sup>23</sup> Under the facts provided by the co-guardians, there is no indication that Olga Adler ever intended to perform any "Medicaid estate planning" at the time of her admission to Paul's Run. Estate planning is often considered at the time of executing a will. As set forth in the Petition for Estate Planning, Ms. Adler chose not to plan for her estate through executing a will.

---

<sup>22</sup> Rosenberg 679 A.2d at 772.

<sup>23</sup> 20 Pa. C.S.A. §5536(b).

It is plainly permissible for guardians in Pennsylvania to perform estate planning and to make distributions from estates when such actions are in the best interests of the ward.<sup>24</sup> Nevertheless, any taint of self-dealing will require a court to deny the request.<sup>25</sup> It is apparent in this matter that any action the co-guardians may take to “preserve” the estate of the ward by converting it to their own use will result in self-dealing. In the instant case, allowing the type of planning proposed by the co-guardians would “preserve” the estate for Petitioners or other family members, but would inure to the clear detriment of Ms. Adler, and the taxpayers of Pennsylvania.

### **III. The Proposed Estate Planning is Inequitable to Those Who Use Their Own Funds to Support Themselves and It Runs Contrary to Public Policy.**

Counsel for the co-guardians asserted to the Court that this type of “estate planning” is acceptable and is approved by the Commonwealth of Pennsylvania’s Department of Public Welfare. The assertion is not accurate. Public policy in Pennsylvania does not endorse the premise that a ward’s best interest would be advanced by giving away assets to qualify for welfare. On the contrary, in Pomroy v. Department of Public Welfare,<sup>26</sup> the Pennsylvania Commonwealth Court addressed the inaction of court-appointed guardians to act in the best interest of the ward. The guardians inaction resulted in the ward being denied Medical Assistance - Nursing Home Care (“MA-NHC”). The Court affirmed DPW’s position that it was in the ward’s best interest to utilize all of her resources for her nursing home care prior to seeking MA-NHC. The Court reasoned that a fiduciary, acting on behalf of an incapacitated person, “has an obligation to pursue and use resources” of the ward for the ward’s benefit,

---

<sup>24</sup>

Gay Estate, 3 Phila. 119 (O.C. Phila. 1979); see also, Harris Estate, 351 Pa. 368 (1945); Groff Estate, 16 Fid. Rep. 1 (O.C. Montg. 1965).

<sup>25</sup> Matovich, *supra*.

<sup>26</sup> 750 A.2d 395 (Pa. Cmwlth 2002)

prior to seeking governmental assistance. Similarly, in Estate of Wyinegar<sup>27</sup> the Pennsylvania Superior Court held that the guardian of an incapacitated person must elect against the will of his deceased wife's estate. The Court held that the ward's best interest was served not by limiting the ward's estate, but by augmenting the ward's estate spousal election.

In Castleberry v. Department of Public Welfare,<sup>28</sup> a reimbursement case, the Commonwealth Court determined that "requiring reimbursement from persons who receive assistance in lieu of the utilization of certain resources insures that they are treated equitably with other persons who have the same kind of resources but who use their resources instead of seeking public assistance. Inherent in this concept is a further saving of tax moneys, since persons are thereby encouraged to find ways of remaining independent of public assistance."<sup>29</sup> In the same manner, there is no need for Ms. Adler to receive welfare while her present resources are available for her care. Permitting this petition would unjustly penalize those who choose to voluntarily support themselves and do not rely on the state to pay for their nursing home care. At the same time, those people who do voluntarily support themselves, would involuntarily also support Ms. Adler through their tax dollars.<sup>30</sup>

The referenced sections of the Public Welfare Code set forth the public policy of the Commonwealth of Pennsylvania. An individual must use all available resources before relying on government-financed medical care. Medicaid, as an entitlement program, is based upon need. The constant drain of public funding requires that Medicaid dollars be allocated to those persons who cannot afford any other medical coverage. It is not meant to provide an

---

<sup>27</sup> 711 A.2d 492 (Pa. Super. 1998)

<sup>28</sup> 387 A.2d 1360 (1978)

<sup>29</sup> Castleberry, 387 A.2d at 1363.

<sup>30</sup>

In addition to all first party resources that Ms. Adler must use for her nursing home care, she must also use any third party resources that would be available for her maintenance. Such third party resources include other health insurance, Medicare, tort recoveries, etc. These resources must be used to the fullest extent available. Medicaid is the payor of last resort. 55 Pa. Code §178.6(a). Dempsey v. Department of Public Welfare, 756 A.2d 90 (Pa. Cmwlth. 2000); Bird v. Department of Public Welfare, 731 A.2d 660 (Pa. Cmwlth. 1999); Ptashkin v. Department of Public Welfare, 731 A.2d 238 (Pa. Cmwlth. 1999).

economic windfall to the relatives of an incapacitated person.<sup>31</sup>

Thus, it is not in the best interests of the taxpayers of the Commonwealth of Pennsylvania, the Department of Public Welfare's Medical Assistance Program, and most importantly, Olga Adler, to approve this proposed estate planning and make this Court's ward destitute.

#### **IV The Incapacitated Person is Not Being Denied Equal Protection.**

The Petitioners attempt to use an "equal protection" argument to cloak their intentions of dissipating Olga Adler's estate. When the Pennsylvania Legislature amended 20 P.S. §5536 it established the standard that the courts must apply before approving a petition for estate planning. The last paragraph of 20 Pa. C.S.A. §5536(b) provides:

In the exercise of its judgment for that of the incapacitated person, the Court, first being satisfied that assets exist which are not required for the maintenance, support and well-being of the incapacitated person, may adopt a plan of gifts which results in minimizing current or prospective taxes, or which carries out a lifetime pattern.

When the Orphans' Court adjudicates an individual as incapacitated, that person comes under the mantle of the Court's protective care. The court-appointed guardian must provide the Court with his assurance that he will accept his fiduciary duty to act in the best interest of the ward. The co-guardians in this case have never suggested that it is in the best interests of Olga Adler to make gifts to minimize current or prospective taxes. There has

---

31

Other states have considered the issue of Medicaid eligibility for those whose financial need is questionable, and have determined that scarce public resources must be preserved for the truly needy. Romo v. Kirschmer, 181 Ariz. 2391, (1995); See Hatcher v. Department of Health, 545 So. 2d 400, 402 (Fla. Appl. 1989) ("Recipients of public assistance should not be able to avoid the spirit of the law by use of a guardian."); Forsyth v. Rowe, 629 A.2d at 385 (1993) ("the Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the state.")

been no evidence that Olga Adler has ever had a pattern of gift giving. Nothing has been offered by the Petitioners that it was the ward's desire to be added to the welfare rolls of the Commonwealth. Her accumulated wealth belies that position.

The ward is not being deprived of equal protection. Owing to her incapacity, certain criteria must be satisfied according to the Legislature's prescription before the principal of the ward's estate can be distributed. This monitoring by the Orphans' Court provides a safeguard to protect the assets of vulnerable individuals such as Olga Adler. The court can approve a bona fide estate plan as long as it is in the ward's best interest.<sup>32</sup>

The co-guardians proposed "half-a-loaf" estate plan provides no benefit for Olga Adler. It violates the standard in that it would exhaust existing assets that could be used for the maintenance, support and well-being of the ward. Pennsylvania law requires that a guardian of the estate of an incapacitated person honor his fiduciary responsibility by protecting, preserving and properly administering the ward's estate.

Contrary to the Petitioners' claim, the ward is not being denied equal protection by this Court's denial of their Petition for Estate Planning. To the contrary, the ward is afforded even greater protection under the Court's supervision. This judicial safeguard assures the preservation of the ward's assets for her own welfare and enjoyment.

---

32

Numerous estate planning petitions filed with the Orphans' Court have gone uncontested by the Department of Public Welfare, including the transfer of an incapacitated, institutionalized spouse's interest in the marital home to the community spouse in fee (55 Pa. Code §178.104(e)(1)(i)); the transfer of an institutionalized ward's assets to a trust for the benefit of a disabled child (55 Pa. Code §178.104(e)(2)(iii)); and the transfer of an institutionalized, incapacitated spouse's assets to the individual's community spouse for that spouse's sole benefit (55 Pa. Code §178.104(e)(2)(i)). In fact, the Department of Public Welfare did not object to the first estate planning petition that was filed by Olga Adler's co-guardians whereby Olga Adler was permitted to transfer her interest in her residential property to her sister, Ida Adler. Ida had an equity interest in the home and had resided in the property for over one year prior to Olga entering the nursing home. 55 Pa. Code §178.104(e)(1)(iii).

### Conclusion

Based upon the foregoing determinations, this Court grants the Commonwealth of Pennsylvania, Department of Public Welfare's and Paul's Run Health Care Center's request that the Petition for Substitution of Judgment Pursuant to 20 Pa. C.S.A. §5536 on behalf of Olga Adler be denied.



IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
ORPHANS COURT DIVISION

In re: **OLGA ADLER** :  
an Incapacitated Person : Orphans' Court No. 1144AI of 2001  
: Control No. 022499

ORDER

**AND NOW UPON THIS** 13th day of March 2003, upon consideration of Petitioners' Petition for Substitution of Judgment Pursuant to 20 Pa. C.S.A. §5536 and consideration of the both the Commonwealth of Pennsylvania, Department of Public Welfare's and Paul's Run Health Care Center's objections thereto , this Court now **DENIES** Petitioners' Petition for Substitution of Judgment Pursuant to 20 Pa. C.S.A. §5536 on behalf of Olga Adler.

**IT IS FURTHER ORDERED** and **DECREED** that Petitioners, Judy DeLeo and Robert Adler, Plenary Guardians of the person and estate of Olga Adler, are permitted to transfer One Thousand Nine Hundred Eighty-Five Dollars and 96/100 (\$1,985.96) to Harvey Abramson, Esquire for services rendered and costs expended.

Petitioners shall file proof that the aforesaid distributions have been accomplished within sixty (60) days of the date of this order.

**BY THE COURT**

---

**JOSEPH D. O'KEEFE, A. J.**

**ORPHANS' COURT DIVISION**

