STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of Case No. 2015-804523-PO

EDWARD J. TYLUTKI, A Protected Individual

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OPINION

The matter before the Court arises from Rose Tylutki's Petition for a Protective Order seeking increased spousal support to provide financial protection for her, as a dependent community spouse. This Petition specifically seeks relief as follows: (1) that this Court award/determine "Countable Assets" under Medicaid totaling $180,636.45 for her spousal support; (2) that the principal of the "Solely for the Benefit Trust" for Rose Tylutki, dated June 5, 2014, shall not be deemed available to the Protected Person from the date it was executed and funded; and (3) the Petitioner be awarded monthly spousal support in the amount of $4,041.04 from the parties' combined income.

The Department of Human Services (DHS), represented by the Michigan Attorney General, has objected to the Petition arguing that a Medicaid application is currently pending and therefore, DHS has exclusive jurisdiction until the administrative proceedings are complete. DHS also argues that the Court should not act now because the Department may only use *pre-existing* court-ordered support when it determines Medicaid eligibility.

A hearing was held on March 24, 2015, and the Court took this matter under advisement to render an Opinion.

STATEMENT OF FACTS

Rose Tylutki and Edward Tylutki are parties to a long-term marriage. Both of them worked and presently receive social security and pension income totaling $4,041.04 per month. Edward Tylutki receives $2,300.47 per month while Rose receives $1,740.57. They currently have "countable assets" for Medicaid eligibility purposes of $180,636.45. These assets include bank accounts and a $10,000 life insurance policy.

Edward Tylutki is eighty-five (85) years of age and is currently residing in a nursing home facility, Imperial Health Care Center, located in Dearborn Heights Michigan. He suffers from memory loss and is unable to ambulate without assistance. According to the Guardian ad Litem, he is incapacitated and in need of full time care. As such, Edward Tylutki, the alleged protected individual, is "institutionalized" for purposes of the Medicare Catastrophic Coverage Act of 1988 and is an "institutionalized spouse", as defined in 40 USC 1396r-5. The Petitioner is a "community spouse" under the same statute.

Rose Tylutki is seventy-nine (79) years of age and has a life expectancy of an additional 10.04 years. Pursuant to Medicaid rules, as a "community spouse", the Petitioner can receive one-half (1/2) of the couple's countable assets up to the limit of $117,240.00 in 2014. Mr. and Mrs. Tylutki, however, have countable assets of about $180,000.00 and therefore the Petitioner would currently be entitled to only $90,000. This amount can be increased pursuant to a Court Order if the community spouse can establish exceptional circumstances resulting in significant financial distress. The instant petition is a protective order requesting, in part, increased spousal support to provide for financial protection for the Petitioner, a dependent community spouse.

Prior to submitting a Medicaid application for her husband, the Petitioner, as the "community spouse", through counsel, executed an "Irrevocable Solely for the Benefit of Trust" ("SBOT') for Rose Tylutki, dated June 5, 2014, and funded it with funds in excess of $75,000.00. The Trust was drafted in compliance with the requirements of Michigan Bridges Eligibility Manual (BEM) Items 401 and 405, dealing with SBOT agreements, effective July 1, 2014.

On June 27, 2014, Petitioner through her co-counsel, Paul M. Lubienski, filed an application for Medicaid with more than one hundred pages of documentation. DHS sent a Verification Checklist on August 19, 2014, allegedly requesting the same information previously provided. That information was due by August 29, 2014. On September 8, 2014, the application for Medicaid was denied due to failure to verify assets.

On October 23, 2014, the Petitioner requested an administrative hearing and also filed a second application for Medicaid. In December, 2014, an administrative hearing was allegedly held; however, Petitioner's counsel claims he did not receive notice of the hearing and did not appear. The request for an administrative hearing was denied. Subsequently, the Petitioner requested reconsideration of this denial which was also dismissed.

On February 17, 2015, an appeal was filed with the Wayne County Circuit Court and is pending before Circuit Judge Daphne Means Curtis. According to counsel, the sole issue on appeal is DHS's refusal to conduct an administrative hearing in this matter or give Petitioner and her counsel proper notice of the hearing before the Administrative Law Judge.

On January 30, 2015, Rose Tylutki filed the instant petition for a protective order. The Petitioner argues that this Court has exclusive jurisdiction to decide this petition

pursuant to the Estates and Protected Individuals Code ("EPIC").

On March 20, 2015, the Michigan Attorney General, on behalf of DHS objected to the Petition, arguing that this Court, at present, lacks subject matter jurisdiction because the Petitioner has failed to properly exhaust her administrative remedies. In this regard, the Respondent asserts that, under the guise of seeking a protective order, the Petitioner is asking this Court to inappropriately intervene in a pending administrative review of a Medicaid eligibility determination. The Attorney General contends the Petitioner is attempting to circumvent the completion of the review of Medicaid eligibility which is the subject of an administrative appeal currently pending before the Wayne County Circuit Court.

ISSUES AND CONCLUSIONS OF LAW

The specific issue before this Court is whether it has subject matter jurisdiction to grant the relief sought in this Petition for Protective Order. The Probate Court has broad jurisdiction over conservatorships and protective proceedings. MCL 700.5401(3) specifically provides that the Probate Court may appoint a conservator or make a protective order as follows:

> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
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> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
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> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

Jurisdiction over protective proceedings is more particularly described in MCL 700. 5402 as follows:

> After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:
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> (a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.
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> (b) Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or *for the use of the protected individual or any of the protected individual's dependents* or other claimants. (emphasis added)

Additionally, MCL 700.5407(2)(c) further provides as follows:

> (c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. *Those powers include, but are not limited to, all of the following*:
>
> (*i*) To make gifts.
> (*ii*) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.
> (*iii*) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.
> (*iv*) To enter into a contract.
> (*v*) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.
> (*vi*) To exercise an option of the protected individual to purchase securities or other property.
> (*vii*) To exercise a right to elect an option and change a beneficiary under an insurance or annuity policy and to surrender the policy for its cash value.
> (*viii*) To exercise a right to an elective share in the estate of the individual's deceased spouse.
> (*ix*) To renounce or disclaim an interest by testate or intestate succession or by inter vivos transfer. (emphasis added)

It is clear that the Probate Court has exclusive jurisdiction and broad discretion in the area of protective proceedings or protective orders under EPIC. The question before the court is whether Medicaid issues somehow impair the jurisdiction of the court to act under EPIC.

Medicaid is a joint federal-state program providing assistance to the needy. Federal law requires each state to designate a single State agency to administer the Medicaid program and to conduct hearings for contested cases. 42 USC 1396a(a)(5).

In Michigan, the Legislature has determined that DHS is the single State agency to make determinations and to hold fair hearings in contested matters. Pursuant to MCL 400.6, DHS maintains the authority to develop regulations and to implement the goals and principles of the assistance program created under the Social Welfare Act, including all the standards and policies related to applications and recipients that are necessary or desirable to administer this program. In order to accomplish these duties the Director of the Department of Human Services is to promulgate rules to conduct hearings pursuant to the Administrative Procedures Act (APA). See MCL 24 201 to MCL 24 328; MCL 400.9.

The APA permits judicial review only when a person has exhausted the administrative remedies available within an agency and is dissatisfied with the final decision by an agency. Generally a person must exhaust those remedies before seeking judicial review. See MCL 24.301; *Int'l Bus. Machines Corp. v. State, Dep't of Treasury, Revenue Div.*, 75 Mich. App. 604, 608-610; 255 N.W.2d 702, 704 (1977).

Furthermore, if statutory language establishes the intent to endow a state agency with exclusive jurisdiction, the courts must decline to exercise jurisdiction until all

administrative proceedings are complete. *L & L Wine & Liquor Corp. v. Liquor Control Comm.*, 274 Mich. App. 354, 356, 733 N.W.2d 107 (2007); *Papas v. Michigan Gaming Control Bd*, 257 Mich. App. 647, 657; 669 N.W.2d 326 (2003). There is a judicially created exception to the exhaustion requirement for cases where appeal to the administrative agency would be futile. *Manor House Apartments v. City of Warren*, 204 Mich. App. 603, 605, 516 N.W.2d 530 (1994). To invoke this exception, "it must be 'clear that an appeal to an administrative board is an exercise in futility and nothing more than a formal step on the way to the courthouse.' " *Id.* (citation omitted).

Futility will not be presumed. Courts are to generally assume that the administrative process will properly correct alleged errors. *Huron Valley Schools v. Secretary of State*, 266 Mich. App. 638, 649, 702 N.W.2d 862 (2005); *L & L Wine & Liquor Corp. v. Liquor Control Comm'n*, 274 Mich. App. 354, 358, 733 N.W.2d 107, (2007). While in this case, pursuit of the administrative process is likely futile in light of the Department's new policy in its memorandum dated August 20, 2014, from Terrance M. Bauer, Director, Field Operations Administration, it is not necessary for the Court to address that issue. It is also not necessary to address the Department's authority or to review the Department's decision since this Court is not reviewing the Department's decision. That matter will be addressed by the Circuit Court.

The Department claims there are two ways in which the Petitioner can properly request to alter or increase the community spouse's spousal support. One, after the Department has made a determination of the community spouse income allowance, upon a request for hearing, the Administrative Law Judge may adjust the Medicaid recipient's income to divert more to the community spouse, if it is found there are exceptional

circumstances resulting in significant financial distress. See 42 USC. § 1396r-5(e)(2)(B); BAM 600, pg. 30.

Second, when a support order is already in place, the Attorney General claims that "the Department *may* base its determination on court-ordered support that is in an amount greater than the community spouse allowance calculated under Department policy" relying upon 42 USC§ 1396r-5(d)(5), which provides as follows:

> (5) Court ordered support
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> If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse *shall* be not less than the amount of the monthly income so ordered.
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> 42 USC. § 1396r-5 (West) [emphasis added]

While the Department uses the word *may*, the statute uses the word *shall.* The statute controls. The Department argues that at the time they determined Mr. Tylutki's eligibility for Medicaid, there was no Court order and thus no basis for this Court to reinterpret or impose its own determination of Medicaid eligibility. Instead, it is argued that under these facts the Petitioner can only seek such a redetermination from DHS.

In adopting the Medicare Catastrophic Coverage Act of 1988 (MCCA), Congress sought to protect community spouses from "pauperization" while preventing financially secure couples from obtaining Medicaid assistance. *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 480, 122 S. Ct. 962, 967, 151 L. Ed. 2d 935 (2002). The Court finds that the Department reads the statute too narrowly. The law clearly contemplates that a court order that follows an initial determination shall be honored. The statute expressly provides that "After an institutionalized spouse is determined *or redetermined* to be eligible" the monthly income allowance for the community spouse

shall not be less than the amount ordered by the court. See 42 USC 1396r-5. Congress amended the act in 1989 to add the words "or redetermined" after the word "determined" to make it clear that court orders for support must be honored, not only at application, but also at any redetermination of eligibility . In this case, there has been a determination. If a court subsequently orders support, that would be an order in existence at the time of redetermination. Redeterminations occur when there is a change in circumstances and at regular annual reviews. To accept the Department's interpretation of the statute, the Court would be required to ignore the 1989 amendment.

Further, as far as protective orders that affect the transfer of assets for the support of the community spouse, the statute provides as follows:

> "An institutionalized spouse may, without regard to section 1396(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made *as soon after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).*" 42 USC. 1396r5(d)(6)(f)(1).

The law clearly contemplates and authorizes the consideration of court-ordered transfers that occur after an initial determination. The language as soon *after* the date of the initial determination of eligibility contradicts the Department's position that a protective order must be issued *before* a person applies for Medicaid.

Nothing in EPIC divests this Court of its exclusive jurisdiction to enter protective orders for the benefit of protected individuals or their dependents. The Probate Court's jurisdiction cannot be proscribed by the Department's policy manual or an internal memo. In all of this, the Department overlooks the fact that it, and not the Probate Court,

makes the decision on Medicaid eligibility. This Court, by granting Tylutki's petition, does not order the Department to do anything. The Department has chosen to modify how it evaluates Medicaid applications. Whether that is consistent with the law is not for this Court to determine at this time.

The Department correctly states that the Court must determine a basis for issuing a protective order under MCL 700.5407(2)(c). That provision authorizes the Court to act for the benefit of the individual and members of the individual's immediate family. The statute does not require that the Court should consider the impact of its order on other people or governmental bodies. This Court's jurisdiction to act does not fade away because it might result in undesirable consequences for other parties. It may be that the Department will ignore this Court's order or it may be that it may accept the order now or later. That decision will not be reviewed by this Court at this time.

The Department concludes by claiming that the Tylutki's are seeking this protective order without a bona fide showing that *the protected person* needed relief. The Department ignores the fact that the law permits the Court to enter orders to protect the protected person's *immediate family*. In this case, the protected person clearly expressed to the guardian ad litem that he wanted the Court to grant this petition in order to protect his wife upon his demise. The Department does not challenge the merits of the petition, only the timing.

The Court will grant the petition as prayed. An order may be presented.

APR 2 1 2015

Date

JUDGE MILTON L. MACK, JR.

Hon. Milton L. Mack, Jr.
Judge of Probate