

STATE OF MICHIGAN
IN THE MIDLAND COUNTY PROBATE COURT

In Re: Samuel J. Armstrong

File No. 13-6880-PO

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At a session of Court held in the City of Midland,
Midland County
On the 27th day of December, 2013

PRESENT: Dorene S. Allen, P32468
Presiding Judge, Probate Court

OPINION

A Petition for a Protective Order was filed October 10, 2013 on behalf of Samuel J. Armstrong ("Armstrong"). Armstrong is sixty years old. This Court appointed a Guardian Ad

Litem, Barry George, who is also an attorney ("GAL"). The GAL submitted two reports. The first report dated November 5, 2013 goes to the issue of Armstrong's incapacity as well as the relief requested. Upon the filing of the Objection to the Petition for Protective Order by the Michigan Department of Human Services through their attorney, the Michigan Department of Attorney General ("DHS"), the GAL submitted a Supplemental Report dated December 2, 2013, addressing the issues identified by the DHS.

This Court's first finding goes to the basis for the Protective Order, that Armstrong requires a protective order as a result of mental deficiency. The GAL reports are very clear and convincing that there is a necessity for a protective order as a result of Armstrong's incapacity. Indeed, there is a physician's statement of record on November 19, 2008 that, also as a result of multiple strokes, Armstrong has a cognitive impairment. The GAL report agrees with the assessment that Armstrong suffers from cognitive impairment. Tragically, it is unlikely that he will ever return home from the nursing home in which he has resided for a number of years. Although there is a durable power of attorney dated January 22, 2003, in which Armstrong appointed his wife Susan Armstrong ("Susan Armstrong") as his agent, the requested relief in the Petition exceeds the terms of the durable power of attorney. However, it is important to note that there is, in Paragraph 20 of that durable power of attorney, the right and ability of Susan Armstrong to negotiate fully debts and expenses for and on behalf of Armstrong.

This Court finds that Armstrong (1) is unable to manage property and business affairs effectively for the reason of mental deficiency (strokes) and (2) Armstrong has property that will be wasted or dissipated unless proper management is provided. Very importantly, for purposes of this Petition before the Court, there is clearly money needed not only for Armstrong's welfare, but also that of his family (wife and daughter) MCL 700.5401(3)(b).

Further, this Court finds that the assets of Armstrong are extremely modest. It is uncontested by the facts in the Court proceeding that Armstrong has personal property of \$600.00 and income of \$652.00 per month from Social Security Disability benefit.

The request in the Petition is for payments to Armstrong's spouse, Susan Armstrong, in the amount of \$652.00 per month. Additionally, there is a request that there be a termination of Armstrong's rights in the estate and/or revocable trust of Susan K. Armstrong.

The argument of DHS, *inter alia*, is that Petitioner's only remedy is through administrative proceedings instead of pursuing the remedy requested in this Probate Court. This Court disagrees. It is clear that the jurisdiction of this Court is primary and exclusive:

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:

...

(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.

MCL 700.5402(b) (emphasis added).

The argument of the Attorney General both in the written brief and oral arguments is that there is exclusive federal jurisdiction. In fact, federal law itself recognizes the role of state courts in the determination of spousal income and support issues. If a state court has ordered an institutionalized spouse to pay spousal support, ". . . the community spouse monthly income allowance for the spouse shall not be less than the amount of the monthly income so ordered." 42 USC 1396r-5(d).

There is a policy manual of DHS that itself acknowledges the validity of court orders for support in determining the patient pay amount. Bridges Eligibility Manual 546. It is important to note that this is not a request for a Medicaid determination but rather the request is for the support of a family allowance to go from the institutionalized spouse (Armstrong) to the community spouse (Susan Armstrong).

Under medical terminology, Armstrong is considered an "institutionalized spouse" and Susan Armstrong is the "community spouse." There is a very justifiable public policy concern from the federal and state funding perspective that couples not impoverish themselves just so that Medicaid benefits can inure to the benefit of both parties. It is poor public policy to allow those with substantial means to use the type of a protective order to further insulate their wealth. There is discretion on the part of the Probate Court to deny such petitions. In the experience of this Court, historically this type of a petition was used by the wealthy and sophisticated. In those cases through the years, notices were given to DHS and their attorney, the Michigan Attorney General's office, and no objections were raised DHS or the Attorney General.

This Court finds that Susan Armstrong works three part-time jobs as a Certified Nurse Assistant, earning \$1,981 per month. She does not own a home. She has debts which total \$2,328. Clearly she is bringing in less money than her very legitimate expenses. This is true despite working three jobs. Additionally, the couple has a daughter who is in college deserving of the support that could be accomplished by the requested relief.

There is very clear law in this state and nationally that is it not necessary to go to the administrative hearings process if it is an exercise in futility. *L & L Wine and Liquor Corporation v. Liquor Control Commission*, 274 Mich App 354, 357 (2007). The DHS policy manual BAM 600 at 36-37, would prevent an administrative law judge from ordering spousal support under circumstances presented in this petition, therefore making an administrative remedy an exercise in futility. In BAM 600, 36-37, the DHS prohibits administrative law judges from increasing the Community Spouse Income Allowance (CSIA) to provide additional income to the community spouse for goods and services purchased for day-to-day living including clothing, food and shelter, among a whole laundry list of everyday expenses. These are the normal expenses that Susan Armstrong needs. It is clear that Michigan law does not require a citizen to undertake a vain and useless act in the administrative process. The administrative law

judge would be prohibited from considering exceptional circumstances such as are presented by this Petition; therefore, any administrative process is futile.

Certainly the law has not changed. What has changed is the public policy of the lens through which this law is seen. Probate courts through its judges are given exclusive jurisdiction and the discretion that goes with that to either grant or deny petitions such as is before this Court. As indicated, until the instant case, there were no objections by DHS to these types of petitions.

The task of this Court, therefore, is to apply the law in light of the most recent objection by DHS. This Court agrees with the GAL's argument that DHS has taken a very narrow and inaccurate view of the policy and statutes that are applicable. The clear intent of the law is not to impoverish the community spouse. When marital assets of a marital couple are substantial, that goal of protecting the community spouse need not apply.

Here we have precisely the set of facts contemplated by the public policy to support the community spouse. The community spouse, Susan Armstrong, is of very modest means and great need, held together by the glue of working three jobs. This Court sees this as a compelling case where implementation of the relief requested is precisely what should be done to further the policy behind the rules and regulations.

This Court further considers the request to terminate Armstrong's elective rights and statutory allowances, either against the estate of Susan Armstrong or against any trust established by her. Again, this Court has the right pursuant to MCL 700.5407(2)(viii) to "exercise a right to an elective share". This Court grants this request. If the community spouse, Susan Armstrong, were to predecease the spouse receiving Medicaid benefits, Armstrong, all of the property would go back to the spouse on Medicaid and cause them to be disqualified. This Court declines to have this result in this case.

ORDER

This Court grants all the relief requested by the Petitioner. Samuel J. Armstrong shall pay \$652.00 per month to Susan K. Armstrong as spousal support retroactively enforced as of the date of the Petition if possible; if not possible retroactively, the payment amounts shall be effective immediately. All rights Samuel J. Armstrong would otherwise have in the estate of Susan K. Armstrong, or in a trust that would be revocable by Susan K. Armstrong at her death, if she were to predecease him, including the right to the share of an elective share of a surviving spouse, homestead allowance, exempt property, or family allowance, are irrevocably waived and shall not be asserted.

December 27, 2013



Judge Dorene S. Allen P32468