Trustees should do more for disabled beneficiary: judge

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By Joseph Ax

NEW YORK, Jan 8 (Reuters) - On her final day as Manhattan Surrogate, Kristen Booth Glen issued a "clarion call" for trustees who oversee funds for beneficiaries with mental and physical disabilities, saying they must use trust money to improve the beneficiaries' lives.

In ordering two trustees to account for a multimillion-dollar trust for a severely disabled man referred to in the ruling as Mark, Glen criticized them for failing to take affirmative steps to assess Mark's needs and failing to spend money to improve his life.

"This history, and the legal consequences that flow from it ... should provide a clarion call for all fiduciaries of trusts whose beneficiaries are known to have disabilities," she said in a Dec. 31 decision. "It is not sufficient for the trustees to simply safeguard the Mark Trust's assets; instead, the trustees have a duty to Mark to inquire into his condition and to apply trust income to improving it."

Mark, who has spent most of his adult life in institutional care, was isolated and wholly dependent until a few years ago, when Glen ordered the trustees to hire a care manager to evaluate him, she wrote. Since then, he has gone from a non-communicative, aggressive patient to someone who can manage daily tasks like rinsing dishes and walking for exercise, progress both "extraordinary" and "heartwarming," she wrote.

An experienced estate lawyer, who is identified only by his initials, H.J.P., in the ruling, served as one trustee; Chase Manhattan Bank served as the other.

Even though the trustees had "absolute discretion" to decide how to spend the money, Glen said they abused that discretion by failing to act. As a result, she said, their commissions should be denied or reduced for the period of time during which they took no action.

Bernard Krooks, who was not involved in the case and whose firm Littman Krooks specializes in estate planning, said it was the first case he could recall in which a judge took it upon herself to investigate whether a fiduciary was taking sufficient action. Trustees are now "on notice," he said.

"What's interesting about this case is it imposes an affirmative obligation. If you're appointed a trustee, you can't just sit back and pay the bills -- you have an affirmative obligation to find out where the beneficiary is living, what his or her needs are, and make payments to improve their life," Krooks said.

ABUSE OF DISCRETION

Mark's mother died of cancer in 2005, leaving behind approximately $10 million to be divided into two trusts, one for Mark and one for his brother, Charles. Before her death, she placed Mark in a residential care facility.

In 2006, H.J.P. applied to become Mark's guardian under Article 17-A of the Surrogate's Court Procedure Act.

H.J.P. submitted assessments from healthcare providers that Mark suffered from autism and severe retardation, engaged in frequent aggressive behaviors and required assistance in daily tasks, according to the decision.

An attorney for Mental Hygiene Legal Services, which represented Mark for the purposes of the application, reported that effective communication with Mark was impossible and that he was non-verbal.

At a hearing on the application in 2007, Glen chastised H.J.P. and Chase for not visiting Mark to ascertain his needs for themselves or spending any money from his trust in the years since his mother's death, according to the ruling.

She told them to hire a certified care manager, who eventually suggested that various items such as electronics and a playground that would help Mark's behavior be purchased with trust money.

In the years since, Glen wrote, Mark has made significant progress. The case, she said, demonstrates that trustees who have discretion to decide whether to spend funds must also take steps to exercise their discretion.

"Courts will intervene not only when the trustee behaves recklessly, but also when the trustee fails to exercise judgment altogether," she wrote. "The trustees abused their discretion by failing to exercise it."

Glen said there was little case law on inactive fiduciaries but cited a 1931 Appellate Division, Fourth Department,

decision, In re Van Zandt's Will, in which the court ruled that executors had to approve payments to a needy beneficiary despite having discretion over spending.

"As in Van Zandt, it was not sufficient for the trustees merely to prudently invest the trust corpus and to safeguard its assets," Glen wrote. "Both case law and basic principles of trust administration and fiduciary obligation require the trustees to take appropriate steps to keep abreast of Mark's condition, needs, and quality of life, and to utilize trust assets for his actual benefit."

Roy Carlin, a lawyer for H.J.P., declined to comment. A lawyer representing Chase could not be reached. A Chase spokesman did not have an immediate comment.

The decision ordered the trustees to provide an updated accounting of Mark's trust fund, as well as the other trust fund.

Glen stepped down on Dec. 31 after reaching the mandatory retirement age of 70.

The case is Matter of JP Morgan Chase Bank N.A. (Marie H.), Surrogate Court, New York County, No. 2006-1307.

For H.J.P.: Roy Carlin.

For Chase: Jennifer McCarthy of Davidson, Dawson & Clark.