

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE
FAMILY DIVISION

In the Matter of:

EMMA J. MOLESWORTH

File No. 13-35707-PO

PETITIONER, PAUL MOLESWORTH'S, PETITION FOR PROTECTIVE ORDER
BEFORE THE HONORABLE THOMAS J. DIGNAN

Corunna, Michigan - Wednesday, May 15, 2013

APPEARANCES:

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TABLE OF CONTENTS

WITNESSES:

None

EXHIBITS:

None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
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Corunna, Michigan

Wednesday, May 15, 2013 - 10:48 a.m.

THE COURT: Next is the matter of Emma J. Molesworth, File Number 13-35707. This is a Petition by Paul Molesworth for a Protective Order. Ms. McClear is here on behalf of the Petitioner. And, are you Ms. Brown?

MS. BROWN: I am.

THE COURT: Thank you. The Court notes that this was filed on March 30, 2013. The Respondent, Michigan Department of Attorney General filed an appearance and the Court stamped it April 15th. There is a memo filed with the Court from the Petitioner questioning whether or not she was an interested party. First of all, I didn't receive your response until--you may be seated--I didn't receive your response until yesterday. And, I'm not a stickler on the Court Rule requirements for when written responses come in, but we do expect from the Attorney General's office at least the top of the line of merits in performance, and I--I only expect that because you tell us too. I mean, frankly, the Attorney General's office, while throughout the State of Michigan, saying we are the El Sid. And, so, I made the same comment about a state police trooper. I said I only expect more because you're saying we should.

But, I will consider your response. You know, much like the other popular ruling that goes to the weight over the

1 admissibility, late responses only affect my ability to have
2 enough time to review them. Not whether or not I will review
3 them. So--

4 MS. BROWN: Your Honor, it's my understanding with
5 the Court Rule that responses are due before the hearing, but
6 there's not a specific time. We did fax it in on Monday
7 morning and asked that it get directly to you because I
8 understood that it was long and that it was up.

9 THE COURT: Yeah, and that part--you know, it was
10 file stamped in the Court on May 14th which was yesterday. It
11 could have been faxed. We've got three different Courts going
12 here and half of my files have to make it from another
13 building and then for whatever reason it didn't get stamped--

14 MS. BROWN: I understand.

15 THE COURT: I have had an opportunity to review it.
16 Ms. McClear, it's your Motion, you may proceed.

17 MS. MCCLEAR: Thank you. Your Honor, we are here
18 on a Verified Petition for a Protective Order filed by Paul
19 Molesworth requesting relief for himself as respect to his
20 wife, Emma Molesworth. This is a matter that requires notice
21 given to interested parties under MCR 5125.24. At the time
22 the Petition was filed, Mrs. Molesworth was in Pleasant View.
23 At the time, due to her condition, we expected--fully expected
24 to be completing rehabilitation and moving into private pay
25 for her care. Consequently, we believe that we would be

1 needing Medicaid at some point in the future. For that
2 reason, when I filed the Petition for Protective Order, I
3 noticed the Department of Human Services as was required by
4 the Court Rule, not because I had filed an application yet,
5 not because an application was pending or that benefits were
6 received, but because I anticipated it to be the case and I
7 was erring on the better side of valor. However, at this
8 point, Mrs. Molesworth has returned home. This does not
9 effect my Petition, but it does effect who's an interested
10 party and who the Court needs to hear today. I--She has not
11 filed an application for benefits. She's not receiving
12 benefits and there's nothing pending. Under the Court Rule,
13 therefore, the Attorney General and the department she
14 represents, are not interested parties and have no more say in
15 this matter than they would have had in the prior guardianship
16 hearing that you just heard. I notified counsel Brown on
17 April 15th, the facts--I believe that this was, in fact, the
18 case and that her client was not an interested party and yet
19 she is here today. So, I am of the position that the Court
20 wishes to listen to her, that's fine with me. But, she really
21 is not an interested party. Really has absolutely no standing
22 in this matter. Would the Court like to address that before I
23 proceed with the Petition itself?

24 THE COURT: No. Go ahead. I think that--

25 MS. MCCLEAR: All right.

1 THE COURT: As I read this, I went back and forth
2 and I think I decided I'm going to go on with one and then the
3 other.

4 MS. MCCLEAR: All right.

5 THE COURT: I, too, have standing questions in my
6 head, but I need to-

7 MS. MCCLEAR: All right. The purpose of this
8 Protective Order, the reason it's being sought, is that in the
9 event Medicaid is necessary; full-time nursing home care is
10 necessary for Mrs. Molesworth, Mr. Molesworth would like to
11 increase what's called the protective spousal amount that he's
12 entitled to and his spousal income allowance if his wife
13 enters a nursing home.

14 Ms. Brown has eloquently addressed what those issues
15 mean in her brief. But, essentially as I explain to clients,
16 they're as follows: The Court--The Department of Human
17 Services, under their own regulations, says that when a couple
18 is involved in a Medicaid application for one of them for
19 nursing home benefits, there is a minimum amount that the
20 spouse who stays at home, commonly referred to as the at-home
21 spouse, is allowed to keep. That amount is, at a minimum,
22 around \$24,000.00 right now, I don't have the exact figure in
23 my mind. My point being is that if a couple applied for
24 Medicaid with only \$24,000.00 in the bank, the spouse at home
25 would be allowed to keep all of it. The maximum amount a

1 couple is allowed to keep, this is called the protective
2 spousal amount, yet the PSA, is about \$115,000.00 right now.
3 But here's how the Department figures that. If a couple had
4 \$115,000.00 and they applied for Medicaid, the Court--the
5 Department would divide that figure in half. One-half would
6 be kept by the at-home spouse. The other half would have to
7 be spent down to \$2,000.00 by the--what's called the
8 institutional spouse. Now , if a couple had \$230,000.00, then
9 the at-home spouse could keep the full \$115,000.00.

10 In this particular case, the couple has in terms of
11 what the Department counts as assets not including the house,
12 not including the car, not including the prepaid funeral
13 policies, about \$178,000.00 at the time I filed this Petition.
14 That would have been divided in half and it would be about
15 \$90,000.00, just under that, to each spouse. It--the
16 Department by its own rules states that if on a Medicaid
17 application you think perhaps that's not sufficient you can
18 ask for administrative relief although I don't know that that
19 is actually been granted. There's also various means to spend
20 down. Now the other aspect of this is what's called the
21 community spouse income allowance. If a person's spouse is
22 going into a nursing home that couple has income coming in.
23 Usually it's social security, sometimes it's pension,
24 sometimes it's veteran's benefits. Whatever it is, the spouse
25 at home is allowed to keep a certain amount up to around

1 \$39,000.00 gross. The rest of it has to be paid into the
2 nursing home.

3 The Department's own rules allow under D.A.M.--I'm
4 sorry, the Department's own rules allow two ways to increase
5 the amount the spouse who is staying at home is allowed to
6 keep when their spouse goes into a nursing home. One way is
7 go through an administrative process with the Department
8 itself. Doug Chalgian, who is undoubtedly an expert on this
9 issue State wide, an attorney, states in his ICLE publication,
10 *Medicaid Planning*, that he doesn't know of a case where such a
11 request has ever been granted. In fact, the administrative
12 process is a poor one.

13 Therefore, some of us, and me in particular in this
14 particular case, choosed the other route noted by the
15 Department of Human Services in their regulations which--and
16 approved of in their regulations, which is to ask the Court
17 for a protective order which would increase the spousal income
18 allowance and that is what we are doing here today. And, we
19 are also here asking the Court to allow Mr. Molesworth to keep
20 all of the parties assets rather than some of the parties
21 assets. In terms of facts, Mrs. Molesworth is home now. She
22 signed a waiver and consent to this proceeding. She is not
23 incompetent now. She was not well in the very beginning. But
24 there's no question of competency now. One of the reasons for
25 this Petition is that Mr. Molesworth would like to have

1 flexibility in planning for his own future care and decisions.
2 He's healthy. He's 75. He could live another 20, 25 years.
3 I have all kinds of clients in their late 90's.

4 The Attorney General office, in her brief, states
5 that this gentleman just wants to move their--his assets to
6 his kids. Absolutely not. He just wants to be able to use
7 his assets for himself. As I believe, the Court can take as a
8 matter of obvious fact, \$178,000.00 between a person and the
9 end of life is not a whole lot of money. As they used to say,
10 a million dollars ain't what it used to be. I would note that
11 under the Protective Order statute, the--an Order can be
12 sought for the benefit of the spouse, the spouse at home. Not
13 just for--this obviously is not going to benefit Mrs.
14 Molesworth except to the extent that she wants her husband
15 taken care of. She knows that if he can no longer take care
16 of her at home as is the case in millions of households in
17 this country, she is going to have to go somewhere where there
18 are more people to take care of her. When you have 75 and 79
19 which is her age, adults living together, at some point
20 somebody ain't going to be able to take the other one to the
21 bathroom or lift them in and out of bed or dress them or do
22 whatever. And the only thing between staying at home and not
23 staying at home is money.

24 The Protective Order statute cited in 13 of my
25 Petition notes that the Court may authorize assets belonging

1 to Mrs. Molesworth be transferred with or without
2 consideration to the person's spouse; in this case, Mr.
3 Molesworth. This authority can be exercised simply because it
4 benefits Mr. Molesworth. Mr. Molesworth could accomplish
5 these transfers by power of attorney. However, he can't
6 accomplish them by powers of attorney and make it past the
7 Medicaid regulations. Because they require a Court order in
8 order for this type of transfer to be honored and for this--
9 these funds to be recognized as truly belonging to Mr.
10 Molesworth, not available for the care of Mrs. Molesworth.

11 We are asking, thankfully, that all of the parties
12 assets and they are listed on Exhibit B here indicating how
13 they're titled and which is very personal information that
14 he's been willing to put in here. The value of the house is
15 simply double the SEV which means it's not really worth what
16 it states here. We are asking for frankly the full--the full
17 amount of the parties assets to be available to Mr.
18 Molesworth. The Court should note that transfers of assets
19 and gifts between spouse are sacrosanct. This is not a
20 divestment as the Court may or be familiar with the word in
21 connection with Medicaid applications. This is not the same
22 as writing a check for the parties assets to the children, or
23 to a charity, or to something like that. This is simply being
24 allowed to keep the assets in the household for the support of
25 one of the parties. This type of transfer is allowed. We

1 need the Court Order to ratify it.

2 The Department of Human Service regulations, despite
3 the objections of the Attorney General as to basically the
4 policy aspects of the situation and the loop hole that the
5 Protective Order provides, are simply out of place in these
6 circumstances. The AG would have the Court believe that the
7 Department's own regulations are a loop hole and should be
8 avoided at all cost. That is simply not true. They wrote the
9 regulations. The regulations are what they--are what they
10 are. And they have many, many years to look at these
11 regulations and they still, if what Ms. Brown states to be her
12 beliefs are true, they've got a long way to go. Because the
13 bottom line is, Paul Molesworth could go to the casino tonight
14 and he could gamble away every cent that he has and they would
15 qualify for Medicaid tomorrow.

16 I'm asking the Court to consider the effect of what
17 do not amount to a great amount of assets to Mr. Molesworth's
18 wife and his future for the next number of years. The dye is
19 somewhat cast as to his wife in terms of her physical ability.
20 She is--she is doing a tiny bit better every day, but at some
21 point in life and, you know, and he knows rather, that the
22 next fall will be a big one and she probably won't be coming
23 home again. I will respond to the Attorney General's comments
24 after I've heard them. Thank you.

25 THE COURT: Thank you. Ms. Brown? I think one

1 thing if not even if the issue of standing exists, clearly
2 that doesn't eradicate the issue of rightness. Even if she
3 was still in a home, she hasn't filed for any benefits.

4 MS. BROWN: I understand.

5 THE COURT: You're asking for, kind of restraint
6 which, I mean--which you're entitled to ask for. But, just so
7 you might know what concerns me.

8 MS. BROWN: I understand. Many Courts are
9 presented with petitions like this and have no idea how it's
10 going to effect Medicaid and Medicaid policy.

11 THE COURT: I think you got one softball and that's
12 that Ms. McClear came right out of the bat and didn't leave
13 enough room with her intent for this Petition which I suppose
14 she could have obfuscated and so, I mean, you know, she did
15 come forward and said this anticipates a claim for Medicaid,
16 but I'm sorry, you may go ahead.

17 MS. BROWN: That is correct. The--I--I guess we
18 just want to inform the Courts that aren't so aware that there
19 are a great number of congressional deals around Federal
20 policy to deal with what Medicaid is and how it should be
21 distributed. It is intended for the neediest individuals.
22 From Congress, even our Supreme Court have disparaged loop
23 holes that allow some people to get past the restraints
24 intended by the policies. And that's exactly what this is.
25 So, I tried to explain in there that Congress in 1988, there

1 is specifically--dealt with the issue of what--how some
2 spouses were impoverished, and we tried to do what was fair.
3 And that policy has been in effect since that time. At that
4 time in 19--actually from 1983 to 1988 when it went into
5 effect, there probably was the problem of spousal
6 impoverishment and many spouses were actually divorcing so
7 that they could divide the accounts and would not be
8 impoverished. And, that is essentially the reason why there
9 is this specific small part of the full policy that says in
10 the event that there is a spousal support order already in
11 effect, the Department will respect it. It was never intended
12 as a way to get around, or to make the Courts that do the
13 determinations for Medicaid. And, in fact, because now--

14 THE COURT: I don't think the Court can do the
15 determination for Medicaid. I mean if, in fact, Ms.
16 Molesworth applies for Medicaid, is there not another--at
17 least starting administratively due process procedure as to
18 whether or not she qualifies.

19 MS. BROWN: Essentially, if you have--if you have
20 totally impoverished Emma Molesworth, artificially we feel,
21 impoverished her, then she will qualify. And the couple would
22 get far more benefits than they will get more than anyone else
23 who applies across the United States would ordinarily get
24 without that.

25 THE COURT: Well, people can I'm--I mean, my

1 question is, have--are there already not safeguards toward
2 artificial impoverishment. For instance, the--last I hear,
3 the five year look-back on the transfer of real estate. I
4 mean, people who get a diagnosis of Alzheimer's to keep them
5 from just simply deeding away everything they have. That can
6 actually be disqualified under current rules, can it not?

7 MS. BROWN: Yes. Absolutely. If you give away any
8 assets or income within five years of your application. This
9 --a Court Order is not the same thing.

10 THE COURT: Okay. But, it could be. I mean--

11 MS. BROWN: No. We can't--if you--

12 THE COURT: No, I understand.

13 MS. BROWN: Excuse me.

14 THE COURT: Okay. Thank you. I didn't mean to
15 interrupt you.

16 MS. BROWN: If I was interrupting you, I regret it.
17 But, if you make a Court Order giving everything to him,
18 impoverishing her, the State and all policy will respect that.
19 They will say this is done and that's because it isn't a
20 Federal law. It's in the effect that a--if a Court Order is
21 in effect then that's what the Court Orders that. And, it's
22 pretty much because at the time that the statute was written
23 in 1988, which I went to some lengths in my brief, probably
24 more than you wanted to know.

1 THE COURT: No. I thought it was interesting.

2 MS. BROWN: About why that specific loop hole is
3 there. It is not intended to be a second route for people to
4 go to the Courts to floun shop for a county Probate Court or a
5 Circuit Court that is willing to give this to them.

6 THE COURT: Okay. Thank you. I'm sorry--

7 MS. BROWN: Well, I was going to say that as far as
8 I know there's only been one other case so far in Michigan.
9 It was Judge Feyen in--oh, I can look again. It's right here
10 someplace. And I didn't know if you had any interest in
11 seeing that. That was--that was not in his--was before
12 application. It was one in which it was actually after
13 application, but he does explain some issues about--

14 MS. MCCLEAR: Your Honor--

15 MS. BROWN: I'm actually looking for it right now.

16 THE COURT: Which Judge was it?

17 MS. BROWN: It was Judge Mark Feyen, F-e-y-e-n.

18 And he said that he had been doing them. He didn't realize--
19 it was Ottawa. I do have copies if you would like them.

20 MS. MCCLEAR: I would.

21 THE COURT: I may already have it. I use--I've got
22 this--I know you're not from here. Ms. McClear certainly
23 knows. I'm new at this. This is my six month on the job and
24 I've really enjoyed this wonderful new research tool I have

1 available to me and that's the Probate Judge's Listserv.
2 And, I put this very issue out on the Listserv and I
3 actually got a--to a variety of responses, of course, you get
4 three Judges in a room and you'll find four different ways of
5 how something can be handled. But, one actually sent a 57
6 page file on--well, not the Court file, but on a continued
7 extremely lengthy guardian ad litem report and basis in a
8 petition. And, so I've--I'm familiar with some of that. And,
9 I think it was Judge Thelen, that's why when you said Feyen I
10 thought maybe it was the same one, but I can't recall the
11 name, but I did look at it.

12 MS. BROWN: Your Honor, the reason that these are
13 coming up at this time is because Director Corrigan has asked
14 us to look into this issue.

15 THE COURT: Thank you. Okay. I found your brief
16 very interesting. I found that it touched a lot on the
17 philosophical concepts behind government, and I'm going to use
18 the word from the 70's, a government welfare benefit. It also
19 triggered many memories in my two dozen years of practice the
20 irony that it seems like it was always the most, you know,
21 politically conservative individual who felt the world was
22 going to hell in a handbasket because we were paying free
23 money to unwed mothers that suddenly thought--you know, were
24 most desirous of lapping up as much as they could at the end
25 of their life and I find no difference. You know, Medicaid

1 dollars are Medicaid dollars. But, one of the arguments you
2 make is that one of the recent changes I think--not that
3 recent--one of the older changes, 1988, was because the
4 divorce--or the public policy which encouraged people, elderly
5 people married the longest whom we all as a society believe
6 are the best examples for the institution of marriage to get a
7 divorce to save some of the assets. But, I think--I think
8 that is still true today. Mrs. Molesworth has not been deemed
9 to be incompetent by any Court that I'm aware of, and she
10 could very well, in fact, if the relief was not granted get a
11 divorce and simply enter into a property settlement and non-
12 modifiable alimony that accomplished the same goal and at the
13 end of the day it would be signed by a Judge.

14 The fact is that you have represented, Ms. Brown,
15 and I accept as true, that if the Court signs this Order then
16 it is not challenged or can not be challenged in determining
17 eligibility, but I find the ability to make these Orders
18 challengeable is within the legislative branch of our
19 government both State and Federally. I also find that the
20 legislative branch has been very active in this area in the
21 last several years both creating initially a three year look-
22 back extending that to a five year look-back. Now allowing
23 liens on real estate. My brother-in-law's sister died alone,
24 no kids, and he wrote a check from her estate for the money
25 she received from her final months once the house was sold.

1 So I find that it is within the obvious ability an obligation
2 if this is a loop hole. I don't like that word. I think the
3 law is the law. It says what it says and, you know, the terms
4 technicalities and loop holes just means somebody was clever
5 enough to mandate the following of the law as written by
6 somebody else. If this is a loop hole, then the legislative
7 branch of the government can close it and that it is not for
8 the judicial.

9 I also find there are ripeness issues with this, if
10 not standard. She is at home, and I do question the standing
11 to challenge this, that I guess I have not ruled that you
12 didn't have standing just because I did find your brief
13 interesting. I think--I think as Ms. McClear points out, Mr.
14 Molesworth could blow the money. He could enter into a
15 divorce judgment that grants him the assets, likely have the
16 same effect. I actually, again, based on your brief, I'm
17 going to go one step further than what Mr. Molesworth has
18 argued. He claims that the benefit to Mrs. Molesworth is only
19 preserving some assets for her husband. I find there's
20 additional benefit beyond that. Ms. Brown pointed out in her
21 brief that Medicaid doesn't cover everything and that if he
22 were, you know, we would have to trust his motivations because
23 there are certain things like--I can't recall them right off-
24 hand. Some types of maybe dental and other types of care that
25 is not covered by a Title IX Medicaid program and, therefore,

1 | it does provide a benefit to Ms. Molesworth to have assets
2 | preserved to cover things that are not covered by Medicaid. I
3 | find the Order to be compliant with MCL 700.5407(2)(c) and
4 | there was no objection from the Attorney General for any of
5 | the provisions specifically. There's certainly no evidence
6 | presented within the Order so I am granting the relief sought
7 | by the Petitioner and signing the Order. Thank you for
8 | coming today, ma'am. Thank you, Ms. McClear.

9 | MS. MCCLEAR: Thank you.

10 | MS. BROWN: Your Honor, may I clarify something?
11 | Your Honor, you have granted him all of her income despite the
12 | fact that it would be deductible for her to purchase such
13 | things or to maintain \$2,000.00 should she need the assets?

14 | THE COURT: Yes. That is correct. And my
15 | basis for that is that if the required, you know, I trust him
16 | to provide those things. If she's required to spend that down
17 | then it's simply gone. It's not available for anyone to
18 | provide those things.

19 | MS. BROWN: Well, it would essentially be available
20 | to the State who has to provide.

21 | THE COURT: But there are limitations on what the
22 | State will provide. I'm talking about the extraordinary
23 | things such as, you even mentioned in your brief,
24 | extraordinary things not covered by Medicaid. And, so I find
25 | that to be in her, you know, creating a benefit for her.

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MS. BROWN: So, your Honor, when we come to this Court, we don't have to ask what the spouse's motivation is or whether there's any security that should something happen to him that she would continue to be cared for. Because she will be totally impoverished should something happen to Mr. Molesworth and/or should he decide that he's not interested in Mrs. Molesworth anymore.

THE COURT: You are free to seek his motivation when we come to Court, and I don't think you needed to because I thought it was pretty clear here. But, yes, you're free to make any argument you want. Heard some more interesting than others, but I believe people should have their say and they will have their say.

MS. BROWN: Thank you, your Honor.

THE COURT: Thank you.

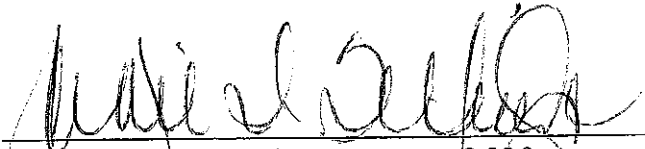
MS. MCCLEAR: Thank you.

THE COURT: Court's adjourned.

(At 11:21 a.m., Court adjourned)

I certify that this transcript, consisting of 21 pages, is a complete, true, and correct transcript of the Petition for Protective Order heard in this case before the Honorable Thomas J. Dignan on May 15, 2013, for which was recorded and transcribed by Janis I. Selfridge, Certified Electronic Recorder.

May 30, 2013



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