In the Matter of MILDRED KERI, An Incapacitated Person.	SUPREME COURT OF NEW JERSEY DOCKET NO. 54,020 CIVIL ACTION ON PETITION FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Sat Below: Hon. Edwin H. Stern, P.J.A.D. Hon. Donald S. Coburn, J.A.D. Hon. Edwin R. Alley, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF PETITIONER, RICHARD KERI

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STATEMENT OF THE MATTER INVOLVED

The Appellate Division framed the matter involved as follows:

> "a competent individual may engage in [Medicaid] planning, subject to [applicable Medicaid penalty periods of ineligibility]. The question for us to resolve is whether it should be permitted by a guardian for the benefit of an incompetent's self-sufficient, adult children."

(SCA6 to SCA7)(emphasis supplied).[1] After so framing the issue, the Appellate Division announced and applied to this case a new standard, in which a Medicaid application by a guardian/child of an incapacitated person is subjected to heightened scrutiny. The Appellate Division concluded that the petitioner herein failed to satisfy that new standard, and denied that application.

In conjunction with an application by petitioner Richard Keri for appointment as guardian of his mother, Mildred Keri, Richard Keri also sought permission to sell his mother's home and to transfer a portion of the proceeds of sale to her heirs, as a part of a Medicaid spend-down plan to accelerate his mother's eligibility for Medicaid while preserving a portion of his mother's estate for her heirs. (Pa11 to Pa16). This Medicaid planning proposal was unopposed; in fact, it was recommended by the court-appointed counsel for Mrs. Keri.

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[1]As set forth herein, in so framing the issue, the Appellate Division's focus on the "beneficiary" of the gifting improperly shifts focus away from what should be the sole inquiry: the incapacitated person's right to self-determination, including the

Nevertheless, after granting Richard Keri's application to be appointed guardian of his mother, the trial court denied Mr. Keri's application to conduct Medicaid planning. In so doing, the trial court chose to disregard prior case law and the record in this case, and instead announced that,

> I do not [pauperize] human beings and citizens of the United States solely to make them [wards] of the taxpayers. I don't know when probate judges got in to this business of doing estate planning post-incompetency, but I don't do it.

(SCA17).

On appeal, the Appellate Division distinguished the instant case from those involving Medicaid planning applications filed by a guardian/spouse of the ward, articulated a more stringent standard for analyzing Medicaid planning applications filed by a guardian/child, declined to remand the case to permit the guardian an opportunity to meet this more stringent standard, and affirmed the denial of the guardian's Medicaid planning application.

Petitioner Richard Keri (hereinafter referred to as "the guardian") submits that the reasoning of the Appellate Division decision is flawed; that the decision is unsupported by established law; and that special reasons warrant certification of this important public issue.

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right to engage in estate planning to benefit the objects of her bounty.

QUESTIONS PRESENTED

1. **DID THE APPELLATE DIVISION VIOLATE THE EQUAL PROTECTION MANDATES OF THE NEW JERSEY AND FEDERAL CONSTITUTIONS BY MANDATING HIGHER STANDARDS FOR MEDICAID PLANNING ON BEHALF OF INCAPACITATED PERSONS THAN FOR COMPETENT PERSONS?**

2. **ARE THE INTERESTS OF JUSTICE SERVED BY IMPOSING A HIGHER SUBSTITUTED DECISION-MAKING STANDARD FOR FINANCIAL PLANNING THAN FOR DISCONTINUING LIFE-SUSTAINING MEDICAL INTERVENTION ON BEHALF OF AN INCAPACITATED PERSON?**

3. **IS THE RIGHT TO SELF-DETERMINATION OF AN INCAPACITATED PERSON VIOLATED BY BANNING A GUARDIAN/CHILD'S APPLICATION TO CONDUCT MEDICAID PLANNING FOR A WARD/PARENT WHO HAS NOT EXPRESSLY ARTICULATED A PREFERENCE FOR SUCH PLANNING PRIOR TO BECOMING INCAPACITATED?**

4. **DID THE APPELLATE DIVISION ERR IN VARYING THE STANDARDS FOR ALLOWING A GUARDIAN/SPOUSE'S MEDICAID PLANNING APPLICATION AND A GUARDIAN/CHILD'S MEDICAID PLANNING APPLICATION?**

5. **DID THE APPELLATE DIVISION ERR IN VARYING THE STANDARDS FOR PERMITTING A GUARDIAN TO ENGAGE IN MEDICAID PLANNING, AS OPPOSED TO OTHER FINANCIAL OR ESTATE PLANNING ON BEHALF OF A WARD?**

6. **DID THE APPELLATE DIVISION ERR IN LIMITING A GUARDIAN'S DECISION-MAKING AUTHORITY BY MANDATING THE USE OF A "PURELY SUBJECTIVE STANDARD" FOR ANALYZING A GUARDIAN/CHILD'S REQUEST TO CONDUCT MEDICAID PLANNING ON BEHALF OF THE WARD/PARENT?**

ERRORS COMPLAINED OF

A. THE APPELLATE DIVISION'S REQUIREMENT THAT A MEDICAID PLANNING APPLICATION BY A GUARDIAN/CHILD OF THE WARD/PARENT BE EVALUATED USING A "PURELY SUBJECTIVE STANDARD" IS IN CONFLICT WITH PRIOR DECISIONS OF THE NEW JERSEY SUPREME COURT

1. The Decision Is In Conflict With In re Conroy.

In In re Conroy, 98 N.J. 321 (1984), this Court addressed the daunting task of establishing standards to evaluate a guardian's application to withhold or withdraw life-sustaining treatment from an incapacitated person.

In so doing, the Court embraced the notion that becoming incapacitated does not necessitate the loss of a person's right to self-determination or, at the very least, that person's right to benefit from the exercise of substituted decision-making on his or her behalf. Id. at 359, 364.

The result was the Court's endorsement of the concept of a continuum that utilizes the substituted judgment standard as a starting point and resorts to the best interests standard as a fallback position, in cases in which no indication of personal preference is expressed. Id. at 359 to 367; Cantor, N., Discarding Substituted Judgment and Best Interests: Toward a Constructive Preference Standard for Dying, Previously Competent Patients Without Advance Directives, 48 Rutgers L. Rev. 1193, 1223-1224 (1996); Pollack, S., Life and Death Decisions: Who Makes Them and by What Standards?, 41 Rutgers L. Rev. 505, 505-506, 518 (1989).

In other words, the fact that an incapacitated person failed to expressly indicate a preference regarding a personal matter does not foreclose the right of a guardian to conduct substituted decision-making on the ward's behalf. Instead, utilizing the above-referenced continuum, if there were some evidence of a preference for a certain action, that evidence would be given effect; if there were no such evidence, the application would be evaluated under the best interests standard.

The Conroy Court made a finding that, although the guardian/nephew stood to inherit the ward/aunt's estate, the guardian's actions were being taken for the best interests of the ward. 98 N.J. at 339. Notably, however, the Court made no presumption that, because the guardian would benefit financially from the ward's early demise, a heightened standard should be applied to his action, or in similar future actions.

The Conroy Court approached its analysis by recognizing that the Legislature, as an elected body, is the institution that possesses the resources and ability to best reflect social values and to address such situations, and that the case involved an issue "more suitably addressed in the legislative forum." Id. at 344. In contrast, in the case in issue, the Appellate Division disregarded the guidance of the legislature in several respects. First, the court below disregarded the fact that the New Jersey statutes allow a guardian to make decisions regarding such vital issues as placement in nursing home, gifting and other issues,

subject to the incapacitated person's best interests, see N.J.S.A. 3B:12-36 et seq., and instead substituted the "pure subjective standard" described herein for certain decisions. Second, in addressing the "troublesome" issue of Medicaid planning to which it reacted in the instant case, the Appellate Division ignored the fact that the legislature dealt with the issue of intentional Medicaid self-impoverishment by providing for the imposition of a penalty period on non-exempt transfers. 42 U.S.C. §1396p. Finally, by concluding that placement in a nursing home in conjunction with a Medicaid plan might not be in the best interests of a ward (SCA13), the court below erred in failing to recognize statutory protections in place for nursing home residents who apply for Medicaid benefits.[2] 42 U.S.C. §§1395l(c)(4); 1396r(c)(4)(A); 42 C.F.R. §483.12(c)(1); N.J.S.A. 26:2H-12.8.

In the instant case, contrary to the dictates of Conroy, and disregarding subjective evidence of Mrs. Keri's intent,[3] the

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[2] The court below also disregarded the trial court's conclusion, supported by the evidence, that nursing home care had become necessary given Mrs. Keri's condition. (See SCA4, SCA20).

[3] With regard to the application of the continuum, the Conroy court noted that the existence of a durable power of attorney or a health care proxy might be evidence of a person's intent to permit the withdrawal of life-sustaining treatment. 98 N.J. at 361. In the case in issue, however, the Appellate Division disregarded the fact that Mrs. Keri's will left her estate to her two sons equally; that she executed a general power of attorney naming the guardian as her agent; and that the power of attorney explicitly authorized the agent "to deal on my behalf with respect to … Medicaid, and all other governmental benefits or entitlements…" (SCA4; Pa26). Thus, the Appellate Division creates (CONTINUED ON PAGE 7)

Appellate Division ruled that, where a guardian/child applies to the court for permission to conduct Medicaid planning for the ward/parent, unless there is evidence that the ward, while competent, expressly indicated a preference to engage in Medicaid planning, the court would ignore the other standards of the "substituted judgment/best interests continuum"; would presume that Medicaid planning had been considered and rejected by the now-incapacitated person; and would deny the application.

2. The Decision Is In Conflict With L.M. v. Division of Medical Assistance and Health Services.

This Court was presented with a property settlement agreement entered into between the guardian/child of an incapacitated nursing home resident and the spouse seeking to divorce him in In re L.M., 140 N.J. 480 (1995). There, the settlement agreement provided for the transfer of the ward's pension interest to the spouse. This Court recognized the agreement as, in whole or in part, an attempt at Medicaid planning. Id. at 489. Nevertheless,

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an anomaly in which, if a durable power of attorney allows gifting but never mentions Medicaid, a child may conduct Medicaid planning on an incapacitated parent's behalf without court intervention, but if the parent's durable power of attorney explicitly allows the agent/child to deal with Medicaid but does not allow gifting, the child would have to apply for guardianship and for court approval of Medicaid planning, which would be denied unless the ward explicitly indicated a preference for Medicaid planning.

it held that the transfer, which was incorporated into a Qualified Domestic Relations Order ("QDRO"), successfully shielded the pension from Medicaid consideration. Id.

In so doing, the L.M. Court acknowledged that the case might encourage divorce for purposes of Medicaid planning, thus burdening the limited resources of the state. However, rather than allowing that possibility to deprive the litigants of their right to conduct Medicaid planning, the Court conveyed its hope that future "modifications of the Medicaid eligibility requirements will make it unnecessary for **families** in the future to resort to the extreme steps taken" by the L.M. litigants. Id. at 500 (emphasis supplied).

The L.M. case presented our Supreme Court with a guardian/child seeking to conduct Medicaid planning by entering into a settlement agreement with the ward's spouse, who was filing for divorce from bed and board. Id. This arrangement is considered to be one of the more "extreme Medicaid planning strategies." H. Fliegelman and D. Fliegelman, Giving Guardians The Power To Do Medicaid Planning, 32 Wake Forest L. Rev. 341, 364 (Summer 1997). The fact that the parties involved in the L.M. Medicaid plan were the guardian/child and the divorcing spouse presented at least as much potential for a conflict of interest as the case in issue, which involves an uncontested Medicaid planning attempt by a guardian/son whom the ward had designated as her agent and beneficiary of her estate.

Rather than accepting the guidance provided by this Court in L.M., the Appellate Division in the instant case chose to distinguish Medicaid planning applications by guardian/children from those by guardian/spouses; concluded that such cases involve a heightened risk of conflict of interest "when the gift-beneficiaries are children," (SCA13); and created a bright-line presumption against all such applications.

B. THE DECISION IS IN CONFLICT WITH OTHER APPELLATE DIVISION DECISIONS ALLOWING GIFTING FOR MEDICAID SPEND-DOWNS AND FOR ESTATE PLANNING PURPOSES OTHER THAN MEDICAID SPEND-DOWNS.

In addition to conflicting with existing Supreme Court decisions, the Appellate Division decision in issue conflicts with other decisions of the same court.

Our Appellate Division has recognized that a person's right to self-determination does not end upon incapacity. In re Labis, 314 N.J. Super. 140, 147 (App. Div. 1998). See In re Trott, 118 N.J. Super. 436, 442 (Ch. Div. 1972) (citing Strange v. Powers, 260 N.E.2d 702, 709 (Mass. 1970)). It has recognized the view of some that Medicaid spend-down planning as a concept may be contrary to public policy. Labis, 314 N.J. Super. at 336. Nevertheless, our Appellate Division has candidly recognized that, given the current state of the law, Medicaid planning is a sound option in a range of estate-planning options that should not be foreclosed simply because a now-incapacitated person failed to understand and reflect upon them. Labis, 314 N.J.

Super. at 145-146, 147 (quoting In re Guardianship of F.E.H., 154 Wis. 2d 576, 453 N.W.2d 882, 888 (1990)).

In Trott, supra, the Chancery Division articulated a standard by which to evaluate a guardian's estate-planning application for the *inter vivos* gifting of the ward's assets to her heirs to minimize estate taxes. The court reasoned that an incapacitated person should not be denied the privilege of effective estate planning:

> Under the doctrine of *parens patriae* the court… may intervene in the management and administration of an incompetent's estate in a given case for the benefit of the incompetent **or of his estate**.

118 N.J. Super. at 436, 440 (emphasis supplied).

Notably, the Trott court did not require an affirmative showing that the incapacitated person would have taken the particular steps proposed with regard to her estate; instead, the court found that "'the guardian should be authorized to act as a reasonable and prudent man would act (in the management of his own estate) under the same circumstances, **unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary.'"** Id. at 441-442 (quoting In re Christiansen, 248 Cal App. 2d 398 (Dist. Ct. App. 1967) (emphasis supplied)). The Trott court went on to identify the following criteria with which to consider a guardian's proposal to make gifts:

> (1) the mental and physical condition of the incompetent are such that the possibility of her

> restoration to competency is virtually nonexistent; (2) the assets of the estate … are more than adequate to meet all of her needs…; (3) the donees constitute the natural objects of the bounty of the incompetent…; (4) the transfer will benefit and advantage the estate of the incompetent…; (5) there is no substantial evidence that the incompetent, as a reasonably prudent person, would, if competent, not make the gifts proposed….

118 N.J. Super. at 442-443.

In Labis, supra, the court permitted the interspousal transfer of the ward's interest in the marital home to the guardian/spouse in order to qualify the ward for Medicaid. 314 N.J. Super. at 148. The Labis court reasoned that, since the proposed Medicaid plan was authorized by state and federal Medicaid laws, and the proposed transfer satisfied the Trott criteria, the application should be granted. Id. at 146, 148.

By carving out an exception for Medicaid planning applications by guardian/children and rejecting the best interest approach for that class of guardians, the court below ignored the Labis reasoning that "a guardian may effectuate a [Medicaid spend-down] transfer provided that it complies with the best interest of the ward **inclusive of his desire to benefit the natural objects of his bounty**." Id. at 147. The court below failed to give proper consideration to the fact that the Medicaid plan proposed would benefit Mrs. Keri by carrying out her "probable actions if [s]he were competent to address the situation." Labis, supra, 314 N.J. Super. at 144.

The criteria articulated in Trott remain the standard by which courts in New Jersey analyze applications of a guardian to

make gifts. See Labis, supra, 314 N.J. Super. at 147 (quoting the aforecited five factors); In re Cohen, 335 N.J. Super. 13 (App. Div. 2000), certif. denied, 167 N.J. 632 (2001) (reversing the lower court's authorization of a settlement agreement revising the incapacitated person's testamentary plan, and remanding the case for consideration of an alternate plan consistent with the Trott criteria); In re Kringle, Docket No. A-2896-95T1 (App. Div. Dec. 16, 1996) (SCA25). In fact, the Trott criteria was held to be the standard by which to judge such applications as recently as the 2001 Appellate Division case of In re Swett, No. A-4116-99T1 (App. Div. Jan. 18, 2001) (Pa84 to Pa88).

However, the Appellate Division decision below erroneously shifted the burden articulated by the Trott court: instead of permitting the guardian to act in the management of the ward's estate absent evidence of contrary intent by the ward during competency, the court below in the instant action banned guardian/children from so acting in the absence of affirmative evidence of positive intent by the ward during competency.

As the court aptly recognized in In re Kringle, supra, Docket No. A-2896-95T1, the fact that the incapacitated person did not make *inter vivos* gifts or expressly state an intention to make *inter vivos* gifts is "not proof that she would not have done so given further reflection and a clear understanding of the significant tax consequences." (SCA18 (emphasis supplied)). The Kringle court went on to state that,

> [a]s we read Trott, … it is not the obligation of the proponent of the gift to adduce proof that the incompetent had demonstrated an affirmative intent to make the gift. This is so because of the presumption recognized by Trott that ordinarily persons of means will choose the more financially prudent course of action. That presumption discharges the proponent's burden of coming forward with evidence of the incompetent's affirmative intent and imposes on the objector the burden of adducing evidence to disprove the presumed fact of intent…. What Trott does is to give the proponent the benefit of a presumption that the incompetent, if able to manage her own affairs, would do so with estate-planning prudence.

(SCA28 to SCA29).

To require an elderly, now-incapacitated person to have had the foresight and the legal understanding to have expressly indicated a preference to utilize a sound Medicaid/estate planning option in order to have a substituted decision-maker carry out such a plan on her behalf is contrary to the above-cited case law and contrary to the interests of justice.

C. AFTER ANNOUNCING A NEW STANDARD BY WHICH TO EVALUATE MEDICAID PLANNING APPLICATIONS BY GUARDIAN/CHILDREN OF THE WARD, THE COURT ERRED IN FAILING TO REMAND THE MEDICAID PLANNING APPLICATION TO GIVE THE PETITIONER AN OPPORTUNITY TO SATISFY THAT NEW STANDARD.

Even assuming, arguendo, that the court below did not err in subjecting Medicaid planning applications by guardian/children to a "purely subjective standard," (SCA13), it erred in failing to remand the instant case in order to permit the petitioner the opportunity to satisfy that newly articulated standard. See Perna v. Pirozzi, 92 N.J. 446, 465-466 (1983) (remanding to allow the parties the opportunity to amend their pleadings in order to conform to the opinion).

To articulate a new, more stringent standard for Medicaid planning applications by a guardian/child, but to deny the petitioner/guardian the right to present additional evidence at the trial level to meet that new standard, is contrary to a litigant’s right to due process and contrary to the interests of justice.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

Certification is being sought in this matter to address an issue of general public importance: the applicable standards guiding a guardian's right to make decisions on behalf of an incapacitated person.

Subsumed within this issue is the more particular question of an incapacitated person's right, through a guardian, to engage in Medicaid planning.

By acknowledging that Medicaid planning is a permissible estate-planning tool for competent persons, but opining that the practice is "troubling" because of the resulting strain on the public treasury, the Appellate Division in the matter herein attempted to justify the use of a more stringent standard for Medicaid planning by a guardian/child on behalf of a ward/parent than the standards applied to competent persons. On these same bases, the Appellate Division also attempted to justify the use of a more stringent standard for substituted decision-making by a guardian in the area of gifting for Medicaid planning than gifting for other estate planning purposes.

Gifting strategies are a lawful Medicaid planning technique addressed by Congress and the legislature. See 42 U.S.C. §1396p. The legislature struck a balance with respect to this Medicaid planning technique by allowing gifting but imposing a penalty period for such non-exempt transfers. By imposing additional

standards when Medicaid planning is attempted by a guardian on behalf of an incapacitated person, the court below frustrated the legislative provisions and violated public policy.

Until the decision below, Appellate Division decisions have generally permitted Medicaid planning by guardians under the same analysis as other estate planning applications by guardians. See In re Labis, supra, 314 N.J. Super. 140; In re Kringle, supra, No. A-2896-95T1 (SCA28). The conflicting decision in the instant case, however, has thrown the outcome of future Medicaid planning applications into question.

The matter in issue herein has far-reaching policy implications. Not only is the decision troubling in terms of an incapacitated person's equal protection rights to self-determination; it is also troubling on a more practical level. With an aging population and escalating costs of care for that population, this precise issue will arise again and again in the future. Unless this Court provides guidance on this issue to lower courts of this state, those courts, as well as practitioners and citizens of New Jersey, will be unable to address the issue of Medicaid planning in the context of guardianships. Moreover, if the Appellate Division decision below is left intact, a great majority of persons who have failed to expressly articulate an intent to conduct Medicaid planning shall be foreclosed from so doing upon incapacitation.

Although this is a matter of public importance, the precise issue of Medicaid planning by a guardian/child on behalf of a ward/parent has not been fully addressed by the New Jersey Supreme Court. As a result, decisions of the Appellate Division have ostensibly relied upon Supreme Court decisions such as Conroy and L.M. to render decisions that are in conflict at the appellate level. This matter of great significance must be settled by this Court, in the interest of justice.

It is for these reasons that the instant matter is worthy of consideration by this Court.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

As set forth herein, in the decision below, the Appellate Division announced a new, more stringent standard for evaluating applications for Medicaid planning by a guardian/child on behalf of a ward/parent.

However, as a practical matter, an incapacitated person for whom a Medicaid plan would be an option is generally elderly; that person's spouse is often also aged, if not deceased. Consequently, it is commonplace for the best interests of the incapacitated person to be advanced by the appointment of an adult child as guardian.

Our legislature has created a strong bias in favor of the appointment of the next-of-kin as guardian of an incapacitated person.

> The Superior Court may … appoint a guardian for [an incompetent's] person, guardian for his estate or a guardian for his person and estate. **Letters of guardianship shall be granted** to the spouse, … or **to his heirs, or if** none of them will accept the letters or **it is proven to the court that no appointment from among them will be to the best interest of the incompetent or his estate, then to any other proper person** as will accept the same.

N.J.S.A. 3B:12-25 (emphasis supplied). This is undoubtedly because the legislature has recognized that such an appointment is presumptively in the best interests of the incapacitated person.

It cannot be disputed that the object of the incapacitated person's bounty is often his or her adult child. Therefore, in

order to effectuate that person's intent, appropriate Medicaid planning commonly involves a gifting plan that benefits the adult child.

However, by combining these realities into a presumption against Medicaid planning applications by a guardian/child when the guardian/child is a beneficiary of that plan, the court below flatly rejected the above-referenced legislative preference in favor of the next-of-kin, and effectively rendered the guardian/child powerless to engage in Medicaid planning on behalf of a ward/parent. Moreover, by stating that competent and reasonable adults "might or might not" choose to gift their assets to their children, when the alternative is to spend their entire hard-earned estate on nursing home care, the Appellate Division ignored the reality of most people's motivation and overriding desire to benefit their heirs and loved ones. The presumption against Medicaid planning applications by a guardian/child is contrary to the ward/parent's right to self-determination, and therefore is against the interests of justice.

The decision below is particularly perplexing because it justifies the more stringent standard by presuming a likelihood of an impermissible conflict of interest between the guardian/child and the ward/parent where the gifting in issue will result in Medicaid eligibility, while similar gifting plans by a guardian/child for other estate-planning purposes have received the approval of the courts.

CONCLUSION

To require the average potential Medicaid applicant to have had the foresight and legal resources to have actually understood and reflected upon current Medicaid laws to the extent that he or she articulates a preference for Medicaid planning is to effectively ban that segment of the population from availing itself of this sound estate planning option which has been approved by the Supreme Court and appellate courts of this and other states.

For these reasons, petitioner asks that Certification be granted and that the decision of the Appellate Division be reversed.

Respectfully Submitted,
LAW OFFICES OF DONALD D. VANARELLI
Attorneys for Petitioner,
Richard Keri

Dated: January 14, 2003

By: _____
Donald D. Vanarelli

CERTIFICATION

I hereby certify that this petition presents a substantial question and is filed in good faith and not for purposes of delay.

Dated: January 14, 2003

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Donald D. Vanarelli