2. ESTATE PLANNING DEVICES

A. Lifetime Planning: An Introduction
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2A. Lifetime Planning: An Introduction

New York Power of Attorney Legislation

NEW YORK STATE BAR ASSOCIATION

RONALD J. WEISS, ESQ.

Skadden, Arps, Slate, Meagher & Flom LLP

I. INTRODUCTION

New York State has amended the General Obligations Law provisions governing Powers of Attorney ("POA") by enacting Chapter 644 of the Laws of 2008 entitled "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning." In August 2010, technical corrections were enacted by Chapter 340 of the Laws of 2010. The technical corrections became effective September 12, 2010, but apply retroactively to September 1, 2009. (Unless otherwise noted, all citations are to the General Obligations Law ("GOL")).

The new law establishes a new Statutory Short Form POA effective September 1, 2009. The new law also establishes new requirements for all POAs, including "non-statutory forms" executed on or after September 1, 2009.

POAs executed prior to September 1, 2009 remain valid. However, some provisions of the new law apply to those Powers of Attorney as well.

II. STATUTORY SHORT FORM POWER OF ATTORNEY

A. APPLICATION AND DEFINITIONS

1. Title 15 of Article 5 of the GOL applies to all powers of attorney <u>expect</u> those given for commercial, business, governmental and purposes other than financial and estate planning for individuals; these routine commercial and governmental exclusions are listed in 5-1501-C.

2. A "principal" is defined as an individual who is 18 years of age or older acting for himself or herself, and not as a fiduciary or as an official or any legal, governmental or commercial entity, who executes a power of attorney. 5-1501(2)(k).

3. An "agent" is defined as a person (defined in 5-1501(2)(i) as an "individual" granted authority to act as attorney-in-fact for the principal under a power of attorney) and includes the original agent, and any co-agent or successor agent. 5-1501(2)(a).

B. REQUIREMENTS (5-1501B).

In order to qualify as a Statutory Short Form or a non-statutory POA, the form must:

1. Contain the "exact wording" as set forth in the statute except for permitted modifications or additions; all POA must contain verbatim the language in 5-1513.1(a) ("Caution to Principal") and 5-1513.1(n) ("Important Information for the Agent"). 5-1501B.2(d).

2. Be typed or printed in legible letters or clear type no less than 12 point in size or reasonable equivalent. 5-1501B.1(a).

3. However, pursuant to the 2010 technical corrections, a mistake in wording (such as spelling, punctuation or formatting) or the use of bold or italic type will not prevent a power of attorney or a statutory gifts rider (a "SGR") from being considered a statutory short form POA (or SGR); but the wording of the form in 5-1513/5-1514 will govern.

4. Be signed and dated by the principal and the principal's signature must be acknowledged before a notary public. 5-1501B.1(b).

5. Be signed and dated by the agent and the agent's (or successor agent's) signature must be acknowledged before a notary public in order for the POA to be effective as to the agent. The agent (or successor agent) need not sign at the same time as the principal, but must sign the same document. 5-1501B.1(c); 5-1501B.3(a).

6. Signed means actually signed; an electronic signature is not sufficient. See section 307(1) of the N.Y. State Technology Law.

7. The principal's loss of capacity between the time principal executes the POA and the time the agent executes the POA does not invalidate the POA. 5-1501B.1(c).

8. Is a POA executed by the principal after August 31, 2009 but not executed by the agent prior to the 2010 technical amendments valid? Proposed changes would clarify that the it would be (i.e., that the execution by the principal after August 31, 2009 is the controlling date). See New York State Law Revision Commission, Report on Powers of Attorney, at 28-29 (1/1/12).

ISSUE: What is the capacity needed to execute a POA? It is defined in 5-1501.(2)(c) as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a [POA], any provision in a [POA], or the authority of any person to act under a [POA]". How does the capacity to execute a POA compare to capacity necessary to execute a Will? A contract? A revocable trust? An irrevocable trust? To make a gift? Does the capacity need to be greater if authorizing gift giving?

9. The 2010 technical amendments clarify that:

    - A POA that complies with the requirements of a statutory short form POA or a non-statutory POA (as set forth in GOL § 5-1501B) and is executed

outside of New York by a New York domiciliary is valid in New York; and

- A POA that is executed in New York by a non-domiciliary of New York in compliance with the law of that principal's domicile is valid in New York. 5-1512.

C. APPOINTMENT OF AGENTS

1. The term attorney-in-fact is no longer used. The holder of the power is simply called the agent. 5-1501.(2)(a).

2. <u>Co-Agents and Successor Agents</u>:

A principal may designate one or more persons to act as agent or co-agents under a POA. Unless the document specifies otherwise, the co-agents must act jointly. 5-1513.1(b).

A principal may designate one or more successor agents to serve if any initial or predecessor agent ceases to act, and may provide for specific succession rules. (The 2008 amendment to the GOL had required that "every" initial/predecessor agent had to cease to act before a designated successor could act; this was changed by the 2010 technical correction.) The 2010 technical corrections clarify that a successor agent can not act unless and until the predecessor agent is unable/unwilling to serve. 5-1513(p). If a later executed POA grants the same authority as was granted to an agent in a previously executed POA, each agent can act separately unless the principal indicates in the modifications section of the later executed POA that agents with the same authority act jointly. 5-1511(e).

3. <u>Effective Date</u>

If two or more agents are designated to act together, the power is not effective until all of the designated agents have signed and dated the form and have had their signatures acknowledged. 5-1501B.3(a). However, under 5-1508.1 if prompt action is required to accomplish a purpose of the POA and to avoid irreparable injury to the principal's interest and if a co-agent is unavailable due to absence, illness or other temporary incapacity, the other co-agent(s) may act for the principal. ISSUE: This may cause a problem with acceptance.

Commentators generally agree that successor agents do not need to sign until they are to begin to serve as agent.

It is still possible to create a springing power of attorney to take effect upon a contingency, 1501B.3(b). As an alternative to a springing power of attorney, consider having the agent sign the power in the office of the lawyer for the principal (so that the agent cannot make a copy of the executed power) and then have the principal's lawyer hold the executed power along with a letter of direction from the principal directing the lawyer to release the power to the agent upon the stated contingency (<u>e.g.</u>, the incapacity of the principal).

D. DURABILITY (5-1501A).

The new POA form is durable (i.e., the power continues in effect following the subsequent disability of the principal). 5-1501A. A non-durable POA may still be created.

E. TERMINATION AND REVOCATION (5-1511).

The POA terminates upon the death of the principal, upon the incapacity of the principal if the POA was not durable, upon the death, resignation or incapacity of the agent if there is no co-agent or successor agent who is willing and able to serve or upon revocation by a court pursuant to 5-1510 or Mental Hygiene Law Section 81.29. An agent has no authority to discontinue a civil action after the principal dies. See McIntosh v. Crown Nursing & Rehabilitation Center, 33 Misc. 3d 1229 (Sup. Ct. Kings Co. 11/16/2011) (stipulation of discontinuance executed by agent following death of the principal held to be a nullity); CPLR § 1015(a) (Parties, substitution upon death).

A principal may revoke a POA by delivering in person, or sending by mail, courier, electronic transmission or facsimile, a signed and dated revocation of the POA to the agent who must comply unless the principal is subject to a Guardianship. 5-1511.3. If the POA was recorded, the principal must record the revocation. 5-1511.4.

An agent's authority terminates when the principal revokes the agent's authority, the agent dies, becomes incapacitated or resigns. 5-1511.2. However, termination of the agent's authority is not effective as to the agent until the agent has received such revocation. 5-1511(5)(b).

Divorce annulment or declaration of nullity of the marriage revokes the appointment of a spouse as an agent (unless the principal in the modification section of the POA provides otherwise). 5-1511.2(c).

If an agent resigns, is incapacitated or dies, the agent's authority ceases, but not the underlying POA if a co-agent or a successor agent is willing and able to serve.

If the POA was granted for a specific purpose, then the authority of the agent terminates when that purpose is accomplished.

The execution of a POA does not revoke a prior POA unless the new POA specifically provides otherwise. 5-1511.6. (The 2008 amendment had provided that the execution of a POA revoked all prior POAs unless the new POA expressly provided otherwise; the 2010 technical corrections reversed this.)

Termination of an agent's authority or termination of the power of attorney is not effective as to a third party who has not received actual notice of such termination and acts in good faith under the power of attorney. Any action so taken is binding on the principal and the principal's successors in interest. 5-1511(5)(a).

F. GRANTS OF AUTHORITY

1. Under the old law, 5-1502A real estate transactions, 5-1502B chattel and goods transactions, and 5-1502C bonds share and commodity transactions authorized an attorney-in-fact to revoke, create, declare or modify a trust and 5-1502L authorized the attorney-in-fact to prepare trust agreements to be named as beneficiaries of retirement benefits. These provisions relating to trusts are not present in the new legislation. If the principal wants to grant this authority, the principal would have to authorize it in a SGR – see below.

2. The old construction provisions in 5-1502 (D), banking transactions, had provisions authorizing an attorney-in-fact to use his/her authority to create testamentary substitutes. Under the new statute, any action which would result in a testamentary substitute requires authority in the SGR. This provision also applies to insurance contracts as provided in 5-1502F.

3. In the old statute, 5-1502M contained authority for the attorney-in-fact to make gifts of no more than $10,000 to certain members of the principal's family. This provision has been repealed and the authority of an agent to make gifts under the Statutory Short Form is limited to gifts to individuals and charities customarily made by the principal up to a total of $500 per year, in the aggregate (under the 2008 Law, the limit was $500/donee/year; this was changed by the 2010 technical corrections.) In order to make the gifts previously authorized under 5-1502M, or larger gifts, the principal would have to authorize such gifts in a SGR.

4. A new section, Health Care Billing and Payment, 5-1502K, is intended to comply with HIPAA and authorize the agent to handle health care billing and payment matters. Proposed changes would clarify the scope of the agent's access to the principal's health care records. See New York State Law Revision Commission, Report on Powers of Attorney, at 18-20 (1/1/2012). Section 5-1502K does NOT, however, authorize the agent to make health care decisions. That is governed by the Health Care Proxy Statute at Public Health Law Section 2981.

G. MODIFICATIONS

The new form allows for modifications of the Power of Attorney and the SGR to eliminate a power, supplement a power or add a power not inconsistent with the statute. 5-1503. All changes to the forms must be in the "Modifications" section. If the modifications are set out in a separate rider, the rider should be typed in 12 point size or a reasonable equivalent (the same as a POA).

H. GIFTING AND THE STATUTORY GIFTS RIDER ("SGR")

Under "personal and family maintenance," an agent may continue to make de minimis gifts to individuals and charities customarily made by the principal up to a total of $500 annually IN THE AGGREGATE. 5-1502I.14. These gifts can be made without the need for a SGR.

In order to grant additional gifting authority, the principal must initial a special box on the Statutory Short Form POA and simultaneously execute the SGR. See below.

I. MONITOR

The Statutory Short Form POA allows the principal the option to appoint a monitor, i.e. a person who has the authority to request, receive and seek to compel the agent to provide records of all transactions entered into by the agent on behalf of the principal. 5-1509. See definition of Monitor in 5-1501.8.

ISSUE: Is there any obligation upon the monitor to act? Is the monitor a fiduciary?

J. REIMBURSEMENT AND COMPENSATION

1. An agent is entitled to reimbursement from the principal's assets for reasonable expenses incurred in carrying out the agent's responsibilities. 5-1506.2.

2. An agent is not entitled to compensation unless the principal specifically provides for compensation in the POA. The form has a specific provision for the principal to provide for compensation to the agent. 5-1506. That provision provides for reasonable compensation. Reasonable compensation may be defined in the modifications.

PRACTICE TIP: If the principal wishes to provide compensation to the agent, the terms of the compensation should be specified in the modifications section of the POA.

K. ISSUES FOR AGENTS

1. Standard of Care and Fiduciary Duty to Principal

The new statute states that the agent has a fiduciary duty to the principal (5-1505.2), defined as conduct "by a prudent person in dealing with the property of another." 5-1505.1.

The agent is to follow the principal's instructions where known, or if not known, to act in the best interests of the principal. 5-1505.2(a)(1).

If there are instructions, how are these to be manifested to the agent? The 2010 technical corrections clarify that instructions are to be set forth in the SGR or "in any other writing provided by the principal regarding the exercise of any authority…." 5-1514.5.

The principal's instructions are to be exercised for purposes which the agent reasonably deems to be in the principal's best interest (consistent with the Court of Appeal's 2006 decision in Ferrara, 7 N.Y.3d 244 (2006)). Purposes which may reasonably be in the principal's best interests include financial, estate and tax planning (including minimization of income, estate, inheritance, gift or GST taxes). See Matter of Garrasi, 2011 NY Slip Op 52096(U) (Surr. Ct. Schenectady Co. 11/10/2011) (agent's withdrawal of one-half of funds on deposit in joint bank account in name of principal and principal's spouse and the transfer of the withdrawn amount to a revocable trust previously created by principal in which principal was life income beneficiary and held a power of appointment, deemed to be in principal's best interest, even though trust had been created prior to principal's marriage to his spouse and agent -- but not spouse -- was a beneficiary of the trust).

Definition does not expressly include planning for public benefits eligibility (i.e., Medicaid planning). 5-1514.5.

The form now includes a notice to the agent which explains the agent's role, obligations and the limits of the agent's authority. The agent must sign the form acknowledging the agent's fiduciary obligation to the principal. 5-1505.

The agent must avoid conflicts of interest.

Since the GOL does not match the Prudent Investor Act (EPTL 11-2.3), what is the difference, if any, for investing? The Prudent Investor Act applies to identifiable property

(e.g., assets within a Trust). Does a POA fiduciary duty apply to all of the principal's property? All of the Principal's property known to the agent? All of the principal's property over which the agent has taken action?

2. Liability of Agent

The agent may be liable for a breach of fiduciary duty to the principal. 5-1505.2(b).

QUERY: What is the standard for liability?

Does a failure to act violate the agent's fiduciary duty?

Is the agent liable for non-action?

3. Disclosure of agency relationship

The new statute requires that the agent execute documents by signing either a "X as agent for principal A," or "principal A by agent X." 5-1507.

4. Record Keeping

The new statute requires the agent to maintain written records with receipts and to produce such records at the request of the principal. The agent shall also make the records and a copy of the POA available within fifteen (15) days upon the written request of the principal, a monitor, a co-agent, a government entity, a Guardian, a representative of the principal's estate and others, including a court evaluator appointed pursuant to section 81.09 of the Mental Hygiene Law. 5-1505.3.

5. Accountings

Agent can be compelled to account for agent's actions following the death of the principal. Statute of limitations is six-years and will begin to run not later than the death of the principal (i.e., at the time the fiduciary relationship comes to an end). See Matter of Application of Kathy Liosis, 2011 NY Slip Op 51924(U) (Surr. Ct. Queens Co. 9/26/2011).

III. PROVISIONS GOVERNING THIRD PARTY ACCEPTANCE OF POA (5-1504).

A third party, defined as a financial institution or person, located in the state or doing business in the state, must honor a Statutory Short Form POA unless the third party has "reasonable cause" to refuse to honor it. There is a list of "reasonable causes," but other reasons may also qualify. It is unreasonable for a third party to refuse to honor a statutory short form POA solely because:

A. It is not on a form required by the third party;

B. There has been a lapse of time since the execution of the POA; or,

C. There has been a lapse of time between the acknowledgement of the signature of the principal and the acknowledgement of the signature of the agent. 5-1504.1(b).

It is not unreasonable for a third party to require the agent to execute an acknowledged affidavit that the POA is still in full force and effect. 5-1504.5.

The remedy to enforce a third party to honor a statutory short form POA is a special proceeding to compel acceptance of the POA. The statute does not provide for damages. 5-1504.2

D. Section 5-1504(i)(a)(1) effectively provides that an attorney-certified copy of a POA is the same as the original for purpose of acceptance by a third party, CPLR section 2105 provides

> § 2105 Certification by attorney.
>
> Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk.

IV. SPECIAL PROCEEDINGS (5-1510).

The new statute authorizes a special proceeding to be brought in court to resolve the following issues:

A. To compel an agent to make available a copy of the POA and records of transactions;

B. To determine the validity of the POA;

C. To determine whether the principal had capacity to execute the POA (see In the Matter of the Application of IMRE B.R., 2013 NY Slip Opinion 51466(U) (Sup. Ct. Dutchess Co. 9/5/2013));

D. To determine whether the POA was obtained through duress, fraud or undue influence;

E. To determine the compensation of the agent;

F. To approve of the agent’s transactions on behalf of the principal;

G. To remove the agent for violation of the terms of the POA, for being unfit, unable or unwilling to perform fiduciary duties;

H. To determine how multiple agents must act;

I. To construe a provision of the POA; and

J. To compel acceptance of the POA by a third party.

Under 5-1510(i) and 5-1510(3), a person who has the right to request records of the agent's transactions pursuant to 5-1505(a)(3) (i.e., the monitor, a co-agent or successor agent acting under the POA, a governmental entity or official investigating a report that the principal

may be in need of protection or investigating a report of abuse or neglect, a court evaluator appointed under the Mental Hygiene Law, a guardian, the personal representation of a deceased principal), the spouse, child or parent of the principal, the principal's successor in interest and any third party who may be required to accept the POA may commence a special proceeding.

V. STATUTORY GIFTS RIDER (5-1514).

A. In order for an agent to be authorized to make gifts (beyond de minimis gifts), or to take certain actions with regard to joint bank accounts or accounts with designated beneficiaries, the principal must initial a special box on the Statutory Short Form POA and at he same time (the statute uses the term "simultaneously") execute a Statutory Gifts Rider (SGR) to the Statutory Short Form POA. (Prior to the 2010 technical corrections, the rider was denominated a SMGR - - a Statutory Major Gifts Rider; the 2010 legislation eliminated the word "Major.") The SGR is, as its name implies, is a separate "Rider" to either a Statutory Short Form POA or a non-statutory form of POA. If the dates on the Statutory Short Form POA (or non-statutory form of POA) and the SGR are different the SGR is not effective. 5-1514.

B. The idea behind the SGR was to make it more thoughtful - - in effect to make it harder - - for the principal to grant to an agent the authority to make gifts or to take similar actions with respect to the principal's property. This was especially so where the agent was a potential recipient of such a transfer. <u>See</u> The New York State Law Revision Commission <u>Report on the Statutory Gifts Rider to Powers of Attorney</u> (September 1, 2010).

C. Without a SGR the agent's authority to make gifts or other transfers is <u>very</u> limited; under section "I" of the grant of authority section of the Statutory Short Form ("personal and family maintenance") the agent's authority is limited to making

1. Gifts customarily made by the principal to:

   (i) Individuals, and

   (ii) Charity

   (iii) Up to a maximum of $500 per year, in the aggregate.

2. Under the former Section "M" Short Form Power, gifts could be made to the principal's spouse, children, more remote descendants and parents (including to the attorney-in-fact if the attorney-in-fact came within that class) up to $10,000/donee per year.

3. Also, other similar types of transactions related to trusts, life insurance and retirement benefits formerly authorized under the "Grant of Authority" section of the Short Form now require a SGR to be executed.

D. Does a defective SGR invalidate an otherwise properly executed short form power of attorney?

1. GOL does not directly address the question of whether a defective SGR will invalidate an otherwise properly executed POA.

2. SGR is a supplement to a POA and, as such, cannot stand alone as an independent document. See 5-1501(2)(n). On the other hand, a POA is valid without the existence of an SGR, 5-1501(2)(o).

3. Proposed changes to GOL would clarify that a properly executed POA accompanied by an improperly executed SGR would remain valid as to all other purposes that could be accomplished by the POA (other than gift transactions for which a SGR would be required). See New York State Law Revision Commission, Report on Powers of Attorney, at 25-27 (1/1/2012).

E. Basics of Execution

1. At a minimum, execution of the SGR is a two step process:

   (i) First – the principal must initial the "box" under section "(h)" of the Statutory Short Form; and

   (ii) At the "same time" (the GOL uses the term "simultaneously") the principal must execute a Statutory Gifts Rider.

   (iii) As the Statutory Short Form states "Initialing the statement below does not authorize your agent to make gifts and other transfers (emphasis added)."

   (iv) Initializing means just that. Where the principal is physically capable of signing his or her name and does routinely sign his or her name or initials with an "x", merely placing and "x" in the box will not be sufficient. See Matter of Marriott, 2011 NY Slip Op 05885 (4th Dept 7/8/2011); Matter of Hoerter, 2007 NY Slip Op 50448(U) (Surr. Ct. Nassau Co 3/8/07)

F. Execution of the SGR (In General):

1. SGR must be typed/printed in not less than 12 point type or equivalent (same requirement as the Statutory Short Form POA).

2. Must be signed and dated by a principal "with capacity" (same requirement as Statutory Short Form POA).

3. Signature of principal must be witnessed by two disinterested persons (persons not named in the SGR as permissible recipients of gifts/transfers) <u>and</u> acknowledged before a notary public.

4. However, <u>unlike</u> the Statutory Short Form, the agent is not required to sign the SGR.

5. The 2010 technical corrections makes clear that the notary who takes the acknowledgment of the principal on the Statutory Short Form may act as one of the witnesses to the SGR?

G. <u>SGR (like Gaul) is divided into three parts; Part One Limited Authority</u>:

1. <u>Grant of "Limited Authority" to make gifts and take other actions with respect to respect to the principal's property</u>:

    1. This "Limited Authority" is limited both as to the class of donees and the amount that can be transferred to any donee.

2. <u>Limited Class of Donees</u>.

    1. Spouse;

    2. Children and more remote descendants;

    3. Parents (but not grand parents or in-laws of the principal)

    4. If principal and the spouse divorce, then the authority to make gifts to the spouse is revoked, unless the SGR expressly provides otherwise (5-1514.8). The "otherwise provided" would have to be made in the Modifications subdivision of the SGR.

3. <u>Limited as to Amount of the Gift</u>.

    1. Gifts limited to the amount of Federal gift tax annual exclusion (currently $13,000 per donee).

    2. Where principal is married and the spouse of the principal consents to "split" the gifts, gifts to children, more remote descendants and parents can be twice the gift tax annual exclusion.

4. <u>Standard for exercise of this Limited Authority (and for authority under the other subdivisions of the SGR)</u>

    1. Exercised pursuant to instructions received by the agent from the principal; or

    2. Exercised for purposes which the agent reasonably deems to be in the principal's best interest. (Consistent with the Court of Appeal's 2006 decision in <u>Ferrara</u>.)

3. These include financial, estate and tax planning (including minimization of income, estate, inheritance, gift and GST taxes).

4. If there are instructions, how are these to be manifested to the agent? Technical corrections clarify that instructions are to be set forth in the SGR or in another writing provided by the principal regarding the exercise of such authority. 5-1514.5.

H. **Part Two: Modifications:**

1. If, as will many times be the case, especially for more wealthy clients, the principal wants to grant the agent more expansive powers - - that is expand the class of donees or the amount of type of transfers authorized, then the principal would:

   (i) Initial subdivision "(b)" - - the Modifications subdivision of the SGR and add a rider to the SGR (the Blumberg form really does not provide sufficient room) setting forth these modifications.

   (ii) If the principal decides to grant the agent authority to make gifts in excess of the Federal gift tax annual exclusion, but limited to the class of donees covered by subdivision "(a)", should the principal initial both subdivisions "(a)" and "(b)", or only subdivision "(b)"? The GOL is unclear, but proposed changes would clarity that in this circumstance the principal should use subdivision "(b)" and not subdivision "(a)". See New York Law Revision Commission, Report on Powers of Attorney, at 15-16 (1/1/2012).

2. What are these modifications for types of gifts? Section 5-1514.3 sets forth a number of permitted modifications, including:

   (i) Make gifts up to a specified dollar amount or unlimited in amount.

   (ii) Take certain actions with regard to joint bank accounts, POD accounts, TOD accounts, including; opening/closing/changing the beneficiary on such accounts

      (a) But without a SGR, an agent can make deposits to an existing joint account where the agent is the sole joint tenant. (See
      5-1502D.1(a)).

      (b) Similarly, agent without a SGR can make withdrawals from a joint or similar account where a third party is the beneficiary (and where the agent is

the beneficiary on another account). Query: would this be a breach of the agent's fiduciary duty to the principal?

(iii) Change the beneficiary on existing life insurance on the life of the principal or change the beneficiary (to take effect after the principal's death) on an annuity contract f/b/o the principal.

(iv) Procure new or different insurance on the life of the principal or annuity contract f/b/o the principal.

(v) These were powers that under Insurance Transactions (5-1502F) previously could have been undertaken under the Short Form; the GOL now requires a SGR that expressly grants this power.

(vi) Created/amend/revoke/terminate an intervivos trust. See In re Perosi, 98 A.D.3d 230 (2d Dep't. 2012), reversing Perosi v. Ligreci, 31 Misc. 3d594, 918 N.Y.S. 2d 294, (Sup. Ct. Richmond Co. 2/14/2011). Note that some not-for-profit pooled trusts still require a provision in the SGR modification section allowing both the creation and funding of trusts;

(vii) Designate or change the beneficiary or beneficiaries on any type of retirement benefit or plan; and

(viii) Create/change/terminate other property interests or rights of survivorship.

(ix) It has been held that an agent had the power to consent to the revocation (pursuant to EPTL §7-1.9) of a trust created by the principal prior to the execution of the power of attorney where the power was silent as to restructuring past estate planning devices executed by the principal. In re Perosi, supra.

3. Is this list all inclusive?

(i) Unclear.

(ii) For example, where the principal owns a policy of life insurance on the life of a third party, can the agent change the beneficiary on that policy? (Statute says "on the life of the principal".)

4. Execution of a Rider adding these Modifications, how is this to be done:

(i) Unclear.

(ii) Unsigned - - not good practice.

(iii) Principal sign (or initial) and date?

(iv) Principal and witnesses sign (or initial) and date?

(v) Rider should be in 12 point or larger type.

I. <u>Part Three of the SGR: Grant of Authority for the Agent to Make Gifts or Other Transfers to Himself/Herself</u>.

1. To make gifts to the agent (who will often times be a member of the class the principal desires to benefit), the principal must:

   (i) Initial the box under subdivision "(c)" of the SGR, and

   (ii) Set out the specific authority the agent is to have to make gifts/transfers to himself/herself.

2. Query: Must you repeat (in the space provided or in a rider) the authority to be granted to the agent if that authority is the same as that under "Modifications", or can you simply cross reference to the authority granted under Modifications?

   (i) Unclear.

   (ii) Better practice, therefore would be to repeat the grant of authority.

J. <u>Rules of Construction</u>:

1. Whether a gift or other transfer is made under the limited authority of subdivision (a) to the SGR, the Modifications of subdivision "(b)" or the transfers to agent (subdivision "(c)"), the statute (§5-1514.6(a)(1) provides that any such gift/transfer can be made:

   (i) Outright;

   (ii) By exercise or release of a presently exercisable GPA held by the principal;

   (iii) To a trust established or created for such donee (BUT only if gifts to that trust qualify for the gift tax annual exclusion under IRC section 2503(b) or 2503(c));

   (iv) To a UTMA account (without regard to who is the custodian of the account); or

(v) To a 529 Plan or prepaid tuition plan (without regard to who is the owner of the account)

2. Pledges The Statute (§ 5-1514.6(a)(4)) also provides that the agent may satisfy a pledge to charity made by the agent under the authority of the SGR.

3. The statute also gives the agent under a SGR the authority:

(i) File gift tax or similar returns reporting gifts made under authority of the SGR;

(ii) Consent to split gifts made by the spouse of the principal.

4. The instructions from principal/otherwise "for purposes which the agent reasonably deems in the best interest of the principal" also apply to gifts/transfers made under the modifications and gifts/transfers to the agent subdivisions of the SGR.

K. Other issues/consideration

1. Agent as Donee Where agent is included in the class of donees, you should consider limiting the amount and type of the transfer.

(i) Limit to annual exclusion or specified dollar amount, and to

(ii) So-called "Qualified Transfers" under IRC §2503(e):

(a) Tuition

(b) Medical expenses

(iii) Otherwise, does the agent possess a power of appointment that is a general power of appointment under IRC § 2041(a)(2) over the principal's assets, such that if the agent were to predecease the principal some portion (or all) of the principal's assets could be included in the agent's gross estate? See below.

2. Transfers of Real Property (§ 5-1513.1)(g)): "Modifications" subdivision of the Statutory Short Form POA provides that a principal cannot use the Modification subdivision of the Statutory Short Form to make "gifts" or "changes to interests in your property". If a principal wants to grant the agent such authority, need to use SGR.

(i) This language was intended to deal with gratuitous transfers. However, some title insurance companies have been interpreting this to apply to all real estate transfers; that is, no real estate transfer (even those made without

gratuitous intent) can be made by an agent unless the POA has a SGR.

(ii) Appears to be a strained reading.

3. Amendment of the SGR

(i) If want to change (amend the SGR), would need to re-execute both:

(ii) Statutory Short-Form POA (or a non-statutory form of POA), and

(iii) A new SGR.

VI. ESTATE AND GIFT TAX ISSUES; FBAR

A. **Tax Consequences to Principal.** Unless a gift made by an agent is validly made pursuant to a SGR, the gift would be includible in the principal's gross estate under IRC §2038 (revocable transfers). See Estate of Goldman v. Commissioner, T.C. Memo 1996-29; but see Estate of Neff v. Commissioner, T.C. Memo 1997-186; PLR 8144006.

B. **Tax Consequences to Agent.**

1. If the SGR gives the agent the power to make gifts to the agent or otherwise allows the agent to use the principal's assets to discharge the agent's duty of support (assuming the latter would be permitted), the IRS could argue that the agent possessed a general power of appointment over the principal's assets.

(i) Possible inclusion of the principal's assets in the agent's gross estate if the agent predeceases the principal. IRC §2041.

(ii) Possible gift by the agent when the agent makes gifts of the principal's property to persons other than the agent. IRC §2514. Such a gift, however, would likely qualify for the gift tax annual exclusion under IRC §2503(b).

2. An argument could be made, however, that the principal could revoke the power at any time and, hence, that the power would be exercisable only with the "consent or joinder" of the principal - - the creator of the power. As such, it would not be a general power of appointment. IRC §§2041(b)(1)(C)(i); 2514(c)(3)(A); Treas. Reg. §§20.2041-3(c)(1); 25.2514-3(b)(1). This should be true even if, as is likely to be the fact pattern, the principal lacks capacity at the time. Estate of Gilchrist v. Commissioner, 630 F.2d 340 (5th Cir. 1980) (decedent's gross estate included property over which

she had a GPA even though decedent was incompetent and, hence, incapable of exercising the power at her death).

3. Where agent is a potential donee under the SGR, consider making gifts to the agent subject to an ascertainable standard, thus making the power not a general power (but could severely limit the ability to make gifts to an agent. IRC §§2041(b)(1)(A); 2514(c)(1).

C. Foreign Bank and Financial Accounting Reporting ("FBAR")

1. A U.S. person that has a financial interest in or signatory authority over a foreign financial account must file an FBAR - - Report of Foreign Bank and Financial Accounts - - if the aggregate value of the foreign financial account exceeds $10,000 at any time during the calendar year.

   (i) A foreign financial account is an account located outside of the U.S., and includes an account with a non-U.S. branch of a U.S. bank (but would not include an account with a U.S. branch of a non-U.S. bank).

   (ii) The FBAR Report is made on Treasury Form TDF 90-22.1, which is due on June 30 of the following calendar year.

2. Multiple persons may be responsible for filing an FBAR to report the existence of the same financial account. Thus, an agent with signatory authority over a foreign financial account would need to file an FBAR reporting the existence of that account even if the principal also filed his own FBAR reporting that account.

   (i) Consider whether part of your client in-take process should be to determine whether the principal has any foreign financial accounts; but what if principal, after signing the POA, opens such an account?

   (ii) Consider specifically excluding (under modifications) the agent's authority with respect to any foreign financial accounts; but then who would have the ability to deal with such accounts in the event of the principal's incapacity? Even if the POA did not exclude such accounts, would the POA be valid in the foreign country?

3. IRS Notice 2011-54 extends the filing deadline on 2009 and earlier FBAR Reports (but not the deadline for 2010 Reports) until November 1, 2011 where the reporting person (e.g., an agent under a POA) had signatory authority but no financial interest in a foreign financial account.

VII. STATUTORY SHORT FORM POWERS OF ATTORNEY EXECUTED PRIOR TO SEPTEMBER 1, 2009

A. Valid Statutory Short Form POA executed prior to September 1, 2009 remain valid.

B. Certain provisions of the new statute apply to Statutory Short Form POA executed prior to September 1, 2009. These include the prohibition on third parties refusing to accept the statutory short form without reasonable cause. 5-1504.2.

VIII. PROBLEMS AND POSSIBLE STATUTORY CHANGES

Commentators have raised a number of problems with the new statute. Here are some, but certainly not all, of the issues:

A. The Statutory Short Form is overly complex to draft, to explain to a client and to execute.

B. Attorneys for principals and agents do not like the fact that the sole remedy against a third party who unreasonably refuses to honor a POA (Statutory Short Form, Non-Statutory POA, or Pre September 1, 2009 POA) is a special proceeding for declaratory relief.

C. The threshold for gifting authority without an SGR should be increased.

This is only a partial list.

It is possible that these and other issues will be addressed in future legislation.

* * *

September 27, 2013

ATTORNEY CERTIFICATION
PURSUANT TO
NEW YORK
CIVIL PRACTICE LAW AND RULES
<u>SECTION 2105</u>

I, [NAME], an attorney admitted to practice before the courts of the State of New York, hereby certify pursuant to CPLR 2105 that the [DOCUMENT DESCRIPTION] attached hereto has previously been compared by me with the originals on file with the law firm [NAME], of which I am a [INSERT ATTORNEY'S POSITION WITH FIRM], and that I have found them to be true and complete copies of those originals.

Dated: September 28, 2013

____
[NAME OF ATTORNEY]

POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, ______________________________ ______________________________________
(name of principal) *(address of principal)*

hereby appoint:

______________________________ ______________________________________
(name of agent) *(address of agent)*

______________________________ ______________________________________
(name of second agent) *(address of second agent)*

as my agent(s).

SAMPLE

If you designate more than one agent above, they must act together unless you initial the statement below.

(____) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)
If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):

________________________ ____________________________________
(*name of successor agent*) (*address of successor agent*)

________________________ ____________________________________
(*name of second successor agent*), (*address of second successor agent*)

Successor agents designated above must act together unless you initial the statement below.

(____) My successor agents may act SEPARATELY.

You may provide for specific succession rules in this section. Insert specific succession provisions here:

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under "Modifications".

If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Power of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under "Modifications" that the agents with the same authority are to act together.

(f) GRANT OF AUTHORITY:
To grant your agent some or all of the authority below, either
(1) Initial the bracket at each authority you grant, or
(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(_____) (A) real estate transactions;

(_____) (B) chattel and goods transactions;

(_____) (C) bond, share, and commodity transactions;

(_____) (D) banking transactions;

(_____) (E) business operating transactions;

(_____) (F) insurance transactions;

SAMPLE

(____) (G) estate transactions;

(____) (H) claims and litigation;

(____) (I) personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;

(____) (J) benefits from governmental programs or civil or military service;

(____) (K) health care billing and payment matters; records, reports, and statements;

(____) (L) retirement benefit transactions;

(____) (M) tax matters;

(____) (N) all other matters;

(____) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;

(____) (P) EACH of the matters identified by the following letters: ______________________________.

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider.

(h) CERTAIN GIFT TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

(____) (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

If you wish to appoint monitor(s), initial and fill in the section below:

(____) I wish to designate _____________________, whose address(es) is (are) _______________________, as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your

SAMPLE

behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications".

(____) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION:

This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on the ____ day of ____________, 20__

PRINCIPAL signs here: ====> ______________________________________

STATE OF NEW YORK)
) ss:
COUNTY OF ____________)

On the ____ day of _________, 20__, before me, the undersigned, personally appeared __________________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

____
Notary Public

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record or all receipts, payments, and transactions conducted for the principal; and

SAMPLE

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest.

You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, ________________________, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

Agent(s) sign(s) here: ==> ____

==> ____

STATE OF NEW YORK)
) ss:
COUNTY OF ___________)

On the _____ day of ___________, 20__, before me, the undersigned, personally appeared ____________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

____
Notary Public

SAMPLE

(p) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, _________________________, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

Successor Agent(s) sign(s) here: ==> ____

==> ____

STATE OF NEW YORK)
) ss:
COUNTY OF ____________)

On the _____ day of __________, 20___, before me, the undersigned, personally appeared ___________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

____
Notary Public

SAMPLE

Suggested Modifications (g) to the New York Statutory Short Form

Monitor:

Unless reasonable cause exists to require otherwise, the agent shall not be obligated by the monitor to provide financial details or accountings more frequently than annually.

Compensation of Agent:

1. The agent shall be compensated for services in handling my financial affairs at the same rate as that of an executor or administrator of an estate, and may pay said compensation from the funds in his/her hands following the close of each calendar year or more frequently. The commission shall be calculated upon the amount of money received by him/her as income and upon income paid out, whether such income is derived from the corpus of the estate or from any other source, and also a commission for receiving and paying out corpus of the estate paid out during the period. The commissions on income and principal shall commence each year at the initial bracket. If agent is an attorney and performs any legal services for me, agent shall be entitled to reasonable attorney's fees apart from and in addition to the compensation provided for herein.

2. The agent(s) shall be compensated at a rate of $_____/hr. for services rendered pursuant to this power of attorney.

SAMPLE

POWER OF ATTORNEY
NEW YORK STATUTORY GIFTS RIDER
AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS

CAUTION TO THE PRINCIPAL: **This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance), or certain other gift transactions during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain gift transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.**

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(______) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries, or other gift transactions. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

SAMPLE

(______) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(______) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES:

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Statutory Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on __________, 20__.

PRINCIPAL signs here: ====> ______________________________________

STATE OF NEW YORK)
) ss:
COUNTY OF _________)

On the ____ day of __________, 20__, before me, the undersigned, personally appeared ____________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in her/his capacity, and that by her/his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

____
Notary Public

SAMPLE

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Statutory Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

____________________________	____________________________
Signature of witness 1	Signature of witness 2
____________________________	____________________________
Date	Date
____________________________	____________________________
Print Name	Print Name
____________________________	____________________________
Address	Address
____________________________	____________________________
City, State, Zip code	City, State, Zip code

(g) This document prepared by:

SAMPLE

Suggested Modifications to New York Statutory Gifts Rider

Please review these carefully to ensure these modifications are applicable to/desired by the Principal.

Exclusionary Gifting Modifications

(b) to make gifts to my parents, spouse, children and other descendants, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. The maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

(c) my agent(s), *and* , may make gifts to him, her or themselves, as the case may be, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. The maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

Full Gifting Modifications

(b) Modifications

1) to transfer, gift or convey any and all property that I may own as I may do under all circumstances for purposes of gift, estate or tax planning, Medicaid planning or for whatever purposes my agent(s) deems appropriate.

2) to make or change all beneficiary designations, withdrawals, rollovers, transfers, elections and waivers under law regarding all life insurance contracts, annuity contracts, qualified plans, employee benefit plans and individual retirement accounts, whether as plan participant, as beneficiary, IRA owner or as spouse of a participant, including, without limitation, the waiver of qualified joint and survivor annuity and qualified pre-retirement survivor annuity benefits as provided in I.R.C. § 417; to authorize any distribution, transfer or rollover from all qualified plans and IRAs.

3) to create trusts, whether revocable or irrevocable, on my behalf; to fund such trusts on my behalf or to make transfers and additions to any trusts already in existence; to withdraw income or principal on my behalf from any trust; to exercise whatever trust powers or elections which I may exercise; to open, modify or terminate deposit accounts and any other joint accounts, in my name and the name of other joint tenants, bank accounts in trust form and transfer on death accounts, and to designate or change the beneficiary(ies) of such accounts.

(c) My agent(s), , may:

SAMPLE

1) Transfer, gift or convey any and all property that I may own as I may do under all circumstances for purposes of gift, estate or tax planning, Medicaid planning or for whatever purposes my agent(s) deems appropriate. This grant of authority shall include the ability of my agent(s) to transfer, gift or convey any and all property to himself, herself, or themselves, as the case may be.

2) Make or change all beneficiary designations, withdrawals, rollovers, transfers, elections and waivers under law regarding all life insurance contracts, annuity contracts, qualified plans, employee benefit plans and individual retirement accounts, whether as plan participant, as beneficiary, IRA owner or as spouse of a participant, including, without limitation, the waiver of qualified joint and survivor annuity and qualified pre-retirement survivor annuity benefits as provided in I.R.C § 417; authorize any distribution, transfer or rollover from all qualified plans and IRAs. This grant of authority shall include the ability of my agent(s) to make or change said beneficiary designations, withdrawals, rollovers, transfers, elections and waivers to name himself, herself, or themselves, as the case may be, as the beneficiary(ies) thereof.

3) Create trusts, whether revocable or irrevocable, on my behalf; fund such trusts on my behalf or make transfers and additions to any trusts already in existence; withdraw income or principal on my behalf from any trust; exercise whatever trust powers or elections which I may exercise; open, modify or terminate deposit accounts and any other joint accounts, in my name and the name of other joint tenants, bank accounts in trust form and transfer on death accounts, and designate or change the beneficiary(ies) of such accounts. This grant of authority shall include the ability of my agent(s) to create trusts or accounts naming himself, herself, or themselves, as the case may be, as the beneficiary(ies) or joint tenant(s) of such trusts or accounts.

Other Possible Modifications

(Please review these carefully to ensure these modifications are applicable to/desired by the Principal. Some of the modifications are mutually exclusive.) Modifications may be made under paragraph (b) and/or (c) as indicated below.

<u>Paragraph (b)</u>

1. Any gift of my property may be transferred in cash or in kind, and may pass outright to the recipient or may be transferred to a custodian under the Uniform Transfer to Minors Act, which may be established by my agent.

2. Any gift made of my property may be transferred to a trust for the benefit of the recipient. Such trust may be an existing trust or a trust which can be created by my agent for the benefit of the recipient.

3. In making gifts of my property, my "best interest" shall include gifts which would be likely to cause a reduction in estate tax due or which would carry out a plan for the protection of my assets against the costs of nursing home care in the foreseeable future.

SAMPLE

4. My agent shall be authorized to make gifts to charities or individuals so long as such gifts are consistent with a gifting pattern I have established previously. For example, charitable pledges, regular gifts to my church or other charities may be carried out or continued at the levels at which I have previously given.

Paragraph (b and c)

5. My wife/husband shall be entitled to give herself/himself any amount of my property. She/he shall also be entitled to give any amount of my property to any descendant of mine without regard to equality or proportionality.

6. When a child of mine acts as agent hereunder, the agent/child shall be prohibited from making any gift to himself/herself that exceeds the least amount, which is gifted to a sibling of the agent or to the descendants, collectively, of any deceased sibling.

7. Any agent who is not my spouse or descendant shall not be eligible to receive any gift of my property hereunder.

SAMPLE

THE NEW YORK STATE LAW REVISION COMMISSION

REPORT

on

POWERS OF ATTORNEY

January 1, 2012

* * * * * *

New York State Law Revision Commission
80 New Scotland Avenue
Albany, New York 12208
518 - 472 - 5858
nylrc@albanylaw.edu
http://www.lawrevision.state.ny.us

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John A. Cirando, Esq.
Professor Jay C. Carlisle, II

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Joseph R. Lentol, Chairman, Assembly Codes Committee

Commission Staff

Rose Mary Bailly, Esq., Executive Director
Barbara S. Hancock, Esq., Counsel

I. Introduction

Based on the recommendation of the Law Revision Commission,[1] the Legislature enacted and the Governor signed into law a new statute governing powers of attorney for financial and estate planning which became effective on September 1, 2009.[2] Subsequently, in 2010, technical amendments were made to the new law. As part of those technical amendments, the Commission was directed to submit a preliminary report on the statutory Gifts Rider component of powers of attorney by September 1, 2010 and a final report on all aspects of powers of attorney by January 1, 2012.[3] The Commission's preliminary report was submitted as required.[4] Presented here is the Commission's final report.

II. Background

A power of attorney is a written instrument whereby an individual (the "principal") appoints another person (the "agent") to act on his or her behalf. This relationship is governed by the law of agency.[5] A common law general power of attorney spells out in detail each power given to the agent. In 1948, the Legislature created a statutory short form as an alternative to the typically lengthy common law power of attorney. The statutory short form simply listed an abbreviated statement for each of the powers an agent could be granted. A full description of each power was set out in the statute rather than on the form.[6] Like a common law power of

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[1] The Law Revision Commission was created by Chapter 597 of the Laws of 1934, which enacted Article 4-A of the Legislative Law. Additional background information about the Commission can be viewed at its website: http://www.lawrevision.state.ny.us.

[2] Laws of 2008, c. 644.

[3] Laws of 2010, c. 340.

[4] A copy of the Commission's Preliminary Report is available at the Commission's website, http://www.lawrevision.state.ny.us/poa.php.

[5] *See, e.g., Semmler v. Naples,* 166 A.D. 2d 751, 752 (3rd Dept.1990) ("The relationship between an attorney-in-fact and his principal has been characterized as agent and principal (*see Cymbol v. Cymbol*, 122 A.D. 2d 771, 772; *Matter of De Belardino*, 77 Misc. 2d 253, 256, *aff'd* 47 A.D. 2d 589)"). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency §1.01. *See also* Restatement (Third) of Agency §§3.07 and 3.08; N.Y. Jur. Agency §63.

[6] 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501. ("An Act to amend the General Business Law in relation to a statutory short form of general power of attorney."). This approach was modeled after New York's statutory short form deeds and mortgages. Report of the Law Revision Commission for 1946, 37, Legislative Document No. 65 (1946). *See also* N.Y. Real Prop. Law §258.

attorney, the 1948 statutory short form power of attorney terminated when the principal revoked it, or when the principal died or became incapacitated.

In 1975, the General Obligations Law was amended to create a "durable" power of attorney.[7] This instrument permitted the agent to continue to act when a principal became incapacitated, provided the power of attorney contained language of "durability."[8] Over the past 36 years, the durable power of attorney has been widely used for financial and estate planning for older adults primarily because it obviates the need for a court appointed guardian if the principal becomes mentally incapacitated.

In 1996, further amendments to the General Obligations Law permitted the principal to authorize the agent to make gifts from the principal's property and change beneficiaries of retirement benefit plans.[9] These amendments, coupled with the already existing statutory authority of an agent to create trusts, change beneficiaries to a life insurance policy, and establish joint bank accounts and totten trusts, made it possible to tailor a power of attorney which permitted an agent to alter the principal's estate through gifts of the principal's assets to others or to the agent.[10] Such assets could include securities and tangible personal property (assets that are subject to probate), jointly owned real property and jointly owned bank accounts (assets that pass by operation of law), property held in trust (assets that pass by contract) and proceeds from employee benefit plans and individual retirement accounts, life insurance policies, and annuity contracts (assets that pass by beneficiary designation).

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[7] Laws of 1975, c. 195, as codified at N.Y. Gen. Oblig. Law §5-1601, as amended and renumbered by 1994 Laws of New York, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1501.

[8] Prior to 1975 in New York, the alternatives for persons concerned about mental incapacity included a social security representative payee, joint bank accounts, creation of a trust, or a judicially appointed committee, N.Y. Men. Hyg. L. §§78.1 et seq., as repealed by 1992 Laws of New York, c. 698, or conservator, N.Y. Men. Hyg. L. §§77.1 et seq., as repealed by 1992 Laws of New York, c. 698. These alternatives had their own limitations. A representative payee and a joint bank account are confined to certain assets. Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 5 (2001). The creation of a trust or the involuntary appointment of a third party were viewed as expensive and time consuming. *Id.* Judicial appointments were considered stigmatizing. *See generally,* 1992 New York State Law Revision Commission Report On Conservators and Committees. In 1988, the General Obligations Law again was amended to allow creation of a springing power of attorney, an instrument which did not become effective until the occurrence of an event defined in the document. Laws of 1988, c. 210, as codified at N.Y. Gen. Oblig. Law §5-1602, as amended and renumbered by Laws of 1994, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1506. The springing power of attorney has not proved as useful as originally thought, largely because of questions as to whether the triggering event (such as incapacity) has, in fact, occurred.

[9] Laws of 1996, c. 499. The 1996 amendments allowed the principal to authorize the agent to make gifts to the principal's parents, spouse, children and other descendants in amounts not to exceed $10,000, the federal annual gift tax exclusion amount then in effect (which could be modified pursuant to section 5-1503 to change the statutory gifting class and amount). The statute was also amended at that time to include powers for tax matters which allowed the agent to prepare, sign and file tax returns on behalf of the principal, and for retirement benefit transactions, which allowed contributions to and withdrawals from retirement plans, change of investments and change of beneficiary designations.

[10] *Id.*

As a result, the breadth of the authority granted under a power of attorney has evolved over the years far beyond those originally envisioned by the 1948 or even the 1975 law. These gift-giving powers can be used to: minimize the principal's income, estate, generation-skipping transfer or gift taxes; make the principal eligible for Medicaid; and continue a principal's past practice of making gifts. They can also be used to permit the agent to self-gift. The agent's gifting and self-gifting powers may deplete a principal's assets and leave him or her with little if any assets or income on which to live.[11]

Notably, the breadth of the agent's authority was not evident on the statutory form and thus there was no reason for the principal to know he or she was granting such expansive gifting authority upon signing the document.[12] Indeed, given the general nature of the authority listed on the form, the principal probably would have been thinking of only more routine matters, such as the withdrawal of funds to pay bills, the need for more insurance or a different type of insurance, and communicating with personnel of a retirement plan. Unless someone explained the consequences, he or she could very well have been unaware that the agent automatically was empowered to alter his or her estate.

The power of attorney under prior law was deceptively simple to create. It could be obtained from any number of websites on the Internet or in a stationery store. The execution requirement – notarization of the principal's signature, disparagingly referred to as a "drive-through" signing by some attorneys – had remained unchanged for 60 years despite the fact that this simple execution, like the provisions of the form itself, did little if anything to convey to the principal that he or she was authorizing the agent to handle his or her money and property in a way that could significantly affect his or her financial well-being.

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[11] *See, e.g., Semmler v. Naples*, 166 A.D. 2d 751 (3rd Dep't 1990)(joint brokerage accounts with right of survivorship); *Mantella v. Mantella*, 268 A.D. 2d 852 (3rd Dep't 2000)(transfer of real property); *Moglia v. Moglia*, 144 A.D. 2d 347 (2d Dep't 1988)(conveyance of real property); *Matter of Francis*, 19 Misc.3d 536 (Surr. Ct., Westchester Co., 2008)(bank accounts, certificates of deposit, life tenancy with right of survivorship in real property); *Seeley v. Wisniewski*, Index No. 2286-03 (Sup. Ct., Suffolk Co., 2006)(real property as joint tenants with right of survivorship, changed the beneficiary on the IRA, cashed checks); *In re Rice*, 8 Misc.3d 1001(A) (Surr. Ct., Nassau Co., 2005)(gifts totaling $483,500, some of which were in excess of amount authorized in the power of attorney, and to persons outside the statutory gifting class); *Matter of Clinton*, 1 Misc.3d 913(A) (Surr. Ct., NY Co., 2004)(totten trust); *Mandala v. Mandala*, Index: 003329/04 (Sup. Ct., Nassau Co., 2004)(beneficiary designation on life insurance policy); *In re Griffin*, 160 Misc. 2d 871 (Surr. Ct., Bronx Co., 1994)(beneficiary designation on retirement benefits); *In re Iannone*, 104 Misc. 2d 5 (Surr. Ct., Monroe Co., 1980)(joint bank account). *See also In re Ferrara*, 7 N.Y. 3d 244, 249, 819 N.Y.S. 2d 215, 217 (2006)(decedent died shortly after nephew had used power of attorney to self-gift approximately $800,000).

[12] The only statement on the form about gifting appeared at section M, the authority to make gifts in an annual amount of $10,000. The terms "(D) banking transactions," "(F) insurance transactions," and "(L) retirement benefit transactions" listed on the statutory form gave no hint that by initialing those terms, the principal was authorizing the agent to open joint bank accounts and totten trust accounts, and change beneficiary designations of insurance and retirement plans. Rather, the authority for those transactions was spelled out in separate statutory construction sections 5-1502D, 5-1502F, and 5-1502L.

Despite the broad authority associated with this important legal tool, monitoring the agent's exercise of authority could be difficult. The agent can act immediately and without notice to the principal, even a principal with capacity.[13] With a durable power of attorney, the agent can continue to act without oversight even though the incapacitated principal is no longer able to control or review the agent's actions, an arrangement that was not permitted by common law.

Not only was the lack of any oversight troubling, the General Obligations Law, which governs the use of powers of attorney, was silent on several salient elements of the use of powers of attorney:

- the agent's fiduciary obligations and accountability,
- the disclosure of the agency relationship when the agent's handwritten signature is required,
- the events which terminate the power of attorney,
- the circumstances when refusing to accept a power of attorney is reasonable, and
- the use of powers of attorney to obtain medical records which are protected by the HIPAA Privacy Rule of 2003[14] regarding confidentiality of an individual's health information.

Ambiguities in the General Obligations Law and the statutory short form power of attorney surrounding an agent's authority to make gifts and other property transfers also could create problems about whether the exercise of such authority was permissible, particularly when an incapacitated principal can no longer clarify his or her intent.

III. The 2009 Power of Attorney Law

A. The Role of the Commission

After a lengthy study begun in 2000 and consultation with diverse groups and individuals,[15] the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and its easy creation, statutory silence about an agent's responsibilities, and statutory ambiguities about the authority to transfer assets can frustrate the

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[13] If the instrument is a springing power of attorney it becomes effective upon the occurrence of a specified event such as the principal's incapacity. Despite this potential safeguard, springing durable powers of attorney are not as popular as durable ones that become effective immediately.

[14] Health Insurance Portability and Accountability Act of 1996, Public Law 104 -191. *See* Privacy Rule at 45 C.F.R. Parts 160, 164.

[15] Throughout the course of its review, the Commission met with or heard from representatives from the State Office for Aging, the Office of Children and Family Services, the Office for the Prevention of Domestic Violence, the Attorney General's office, county district attorneys, the New York City Department for Aging, local area agencies on aging, hospitals, nursing homes, legal service providers, not-for-profit service providers, the land title insurance industry, the banking industry, attorneys representing various bar associations across the state, including the New York State Bar Association, and social workers and other attorneys in private practice.

proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use.

B. The Commission's recommendation led to the following changes in the law:

i. Gifts:

Section 5-1514 requires that a grant of authority to make gifts must be set out in a Gifts Rider, which is executed by the principal and signed by two witnesses, one of whom may be a notary public. The Gifts Rider allows the principal to make an informed decision as to whether the agent may make gifts of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a Gifts Rider must act in accordance with the instructions of the principal, and in the absence of such instructions, in the principal's best interests.[16]

Authority to make gifts can also be created using a non-statutory form power of attorney which is signed by the principal, contains an acknowledgment of the principal's signature and is executed in the same manner as a will.

Section 5-1514 codifies the annual exclusion amount under the Internal Revenue Code. It adds a provision allowing gifting to a "529" account up to the annual gift tax exclusion amount. "529" accounts, popular tax-advantaged savings accounts for education expenses, are authorized in the Internal Revenue Code at section 529. It also amends former provisions regarding gift splitting to allow the principal to authorize the agent to make gifts to a defined list of relatives from the principal's assets, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.

ii. Agent:

Section 5-1505 explains the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.[17] A "Notice to the Agent" is added to the statutory short form power of attorney set out in section 5-1513 explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority. If the agent intends to accept the appointment, pursuant to section 5-1501B, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.

Pursuant to section 5-1507, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required. Also pursuant to section 5-1507, in all transactions (including electronic transactions) where the agent

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16 *See Matter of Ferrara*, 7 N.Y.3d 244, 819 N.Y.S. 2d 215 (2006).

17 *See, e.g., Mantella v. Mantella*, 268 A.D. 2d 852 (3rd Dep't 2000); *Moglia v. Moglia*, 144 A.D. 2d 347, 348 (2nd Dep't 1988); *Musacchio v. Romagnoli*, 235 N.Y.L.J. 116 (Sup. Ct. Westchester Co., 2006).

purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument. The principal may provide in the power of attorney that the agent receive reasonable compensation if the principal so desires, in accordance with section 5-1506. Without this designation, the agent is not entitled to compensation.

iii. **Principal**:

Section 5-1501B expands the "Caution to the Principal" so that the principal will be better informed about the serious nature of the document.

Section 5-1509 authorizes the principal to appoint someone to monitor the agent's actions on behalf of the principal, and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal. This accountability of the agent is consistent with the common law requirement that where one assumes to act for another, he or she should willingly account for such stewardship.[18]

Section 5-1511 explains how the power of attorney can be revoked.

iv. **Third Parties**:

The definition of "financial institution" subject to the provisions of the General Obligations Law, now includes securities brokers, securities dealers, securities firms, and insurance companies at section 5-1501. Section 5-1504 provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.

Section 5-1504 also provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause. The basis for a reasonable refusal includes the agent's refusal to provide an original or certified copy of the power of attorney, and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when she executed the document or when acceptance of a nondurable power of attorney is sought on his or her behalf.

When a third party unreasonably refuses to accept a power of attorney, section 5-1510 authorizes the agent to seek a court order compelling acceptance of the power of attorney.[19]

Section 5-1504 provides that a third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise

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[18] *See, e.g., In re Garson*, 17 A.D. 3d 243 (1st Dep't 2005); *Matter of Kent*, 188 Misc. 2d 509, 511 (Sup. Ct. Dutchess Co., 2001). *See also* 2A NY Jur 2d Agents & Indep. Contractors §239.

[19] *See Security Trust Co. of Rochester v. Magar Homes*, 92 A.D. 2d 714 (4th Dep't 1983); *Mazzuka v. Bank of North America*, 53 Misc. 2d 1053 (N.Y. City Civ. Ct., 1967). *See also* N.Y. Gen. Oblig. Law §5-1510.

terminated. A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.

v. HIPAA Privacy Rule:

Section 5-1502K, the construction section for "records, reports and statements," now includes the term "health care billing and payment matters" so that an agent can examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports and statements, without fear that the HIPAA Privacy Rule would prevent his or her access to the records.[20]

C. The 2010 Technical Amendments

After the enactment of the 2009 statute, the Commission, the sponsors of the bill, and numerous interested parties, including attorneys who practice in the field, developed a technical amendments bill that passed both houses of the Legislature and was signed by the Governor on August 13, 2010 as Chapter 340. This legislation clarified, among other things, that:

- certain powers of attorney used for business and commercial purposes are excluded from the statute, section 5-1501C;
- the Gifts Rider is unnecessary to authorize transactions that are not gifts, e.g., regular sales of real property, section 5-1501;
- executing a new power of attorney does not automatically revoke a prior power of attorney unless the principal expressly revokes it, section 5-1511; and
- a notary who takes the acknowledgment of the signature on the power of attorney can also act as a witness to a Gifts Rider or non-statutory power of attorney with gifting authority, section 5-1514.

As noted earlier, Chapter 340 also directed the Commission to study the Gifts Rider and the implementation of the 2009 and 2010 amendments in their entirety.

IV. 2010-2011 Study

In the course of studying the implementation of the statute, the Commission spoke or met with, or heard from, attorneys, social services providers, and other individuals and organizations concerned about powers of attorney, including many of the same groups and individuals consulted prior to the statute's enactment. We surveyed legal service providers and area agencies on aging about their experience with the new law and the desirability of educating the public and service providers about the new law. We spoke with the chair of the State Bar's working group on powers of attorney. We monitored the listservs of the Elder Law and Trust and Estates Sections of the New York State Bar Association. Finally, as we were preparing this Final

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[20] *See* 45 C.F.R. Parts 160, 164.

Report, we wrote to the President of the State Bar to inquire if the association had any additional comments that reflected the bar's experience with the statute during the past year.[21] In his response, the President noted that notwithstanding the improvements to the statute achieved by the 2010 technical amendments, the association, as a result of its studies, still favors repeal of the Gifts Rider because the Gifts Rider makes execution of a power of attorney more complex, confusing, and expensive.

A. Gifts Rider

The goal of the 2009 statute – to better inform individuals about the power of attorney and the gifting authority of the agent – seems to be universally acknowledged as laudable.[22]

The Gifts Rider was central to that goal. The Honorable C. Raymond Radigan explains the role of the Gifts Rider in his article, *Making Gifts and Property Transfers under New Power of Attorney Law*, 3/9/2009 N.Y.L.J. 3 (col. 1)(co-author David R. Schoenhaar):

> To understand the amendments affecting gifts . . . it is helpful to first review the issues sought to be remedied. The commission's study concluded that the following deficiencies existed: (1) the statutory form was ambiguous and did not capture the principal's informed decision-making with respect to gifts . . . , (2) case law and the POA statute were inconsistent with respect to the type of authority required to allow the agent to make certain [gratuitous] property transfers, and most notably, (3) the procedure for granting authority to make substantial gifts or transfer property was not commensurate with such an important delegation and thus, was subject to inadvertent actions by the principal. Given the gravity of the issues, the commission deemed it appropriate to completely restructure the procedures for granting authority to make substantial gifts . . . .

The concept of a Gifts Rider as a way to emphasize the significance of an agent's gifting authority was developed through collaborative discussions throughout 2004, 2005 and 2006 with the leadership of the Trusts and Estates and Elder Law sections of the New York State Bar Association, representatives of the American Bar Association and the Association of the Bar of the City of New York, and other attorneys. On October 6, 2006, the Commission hosted a roundtable meeting at Brooklyn Law School on the proposed Gifts Rider, among other topics. Further refinements to the Gifts Rider occurred during the drafting process, and the Commission's Recommendation was adopted by the Legislature and signed by the Governor as Chapter 644, on January 27, 2009.

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21 The State Bar working group's survey and report, which we were told would be ready at some time after September 1, 2010, have not yet been made available to us.

22 *See, e.g.*, Stephen C. F. Diamond, *With a Name Like SmuGeR It Has to be Good*, 42 NYSBA Trusts and Estates Law Section Newsletter 4 (Winter 2009).

i. Highlighting an Agent's Gifting Authority

Section 5-1514 provides that the principal using a statutory short form power of attorney must use the statutory Gifts Rider to authorize the agent to:

- make gifts up to a specified dollar amount, or unlimited in amount, and to any person or persons;[23]
- open, modify or terminate a deposit account in the name of the principal and other joint tenants;
- open, modify or terminate any other joint account in the name of the principal and other joint tenants;
- open, modify or terminate a bank account in trust form and designate or change the beneficiary or beneficiaries of such account;
- open, modify or terminate a transfer on death account and designate or change the beneficiary or beneficiaries of such account;
- change the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;
- procure new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract;
- designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan;
- create, amend, revoke, or terminate an inter vivos trust;[24] and
- create, change or terminate other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

Consolidating this expansive list of an agent's potential gifting authority provisions reduces, if not eliminates altogether, the ambiguity and confusion about the gifting authority inherent in the prior law and the prior statutory form.[25] It also highlights the importance of

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[23] A gift or other transfer to an individual authorized by this subdivision may be made outright, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian), or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account). *See* N.Y. Gen. Oblig. Law § 5-1514(3).

[24] The trust powers, like the others moved to section 5-1514, may allow the agent to make significant changes to the principal's estate plan. Whether alone or coordinated with gifting and analogous powers, a trust can be an important vehicle for asset protection, tax planning, or planning for the long term benefit of family, among other goals.

[25] The former statutory form did nothing to direct a layperson's attention to gifting powers. As explained above, the numerous default gifting provisions were mostly contained in the separate construction sections. Custom-drafted powers, including any additional or tailored gifting powers, typically began somewhere in the middle of the second page of a three page form, below the list of statutory powers (A) through (P). If the drafter had organized the execution so that the principal needed to initial only an omnibus list of powers at (Q) (between the statutory and custom-drafted powers), the custom powers might not stand out, as they did not have to be initialed separately.

bringing this information to the principal's attention, permits the principal to give informed consent to any gifting authority, and advises the agent and third parties of the agent's authority.

As the comment to a similar gifting provision in the Uniform Power of Attorney Act (UPOAA) notes,

> [t]he rationale for requiring a grant of specific authority to perform [these acts] is the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives. Ideally, these are matters about which the principal will seek advice before granting authority to an agent.[26]

Notably, this is not the first time that the statute governing powers of attorney has been amended to call the principal's attention to the significance of his or her decisions. A 1994 amendment that required the principal to initial each power granted to the agent was intended to assure the principal's participation in the choice of powers rather than, as the Memorandum of the Assembly Rules Committee noted, "passive acceptance of what was on the form."[27]

Spotlighting an important decision through the use of a separate document is similar to the New York requirement for attorney-executors. Under the Surrogate's Court Procedure Act, an attorney who is also designated as executor under a will must disclose to the testator in a separate document the commissions to which the attorney-executor is entitled.[28] That document must be signed by the testator and one witness. Requiring the testator to sign a second document is designed to educate the testator about the additional fees from the estate to which the attorney would be entitled.

Focusing the principal's attention on an agent's authority to self-gift is similar to what New York already requires for self-gifting by trustees. Before 2003, the law prohibited a settlor from creating any self-gifting provisions for the trustee, for fear that doing so would create a "general power of appointment," which would lead to the trust property being included in the estate of the trustee. Section 10-10.1 of the Estates, Powers and Trusts Law permits a trust to authorize a trustee to make gifts to himself or herself, provided the gifts are for the trustee's health, education, maintenance or support (collectively known as an "ascertainable standard" under the Internal Revenue Code). The settlor can override the ascertainable standard only by express reference to the language of section 10-10.1.[29]

Requiring express authorization for specific gifts reflects a national trend "among states to require express specific authority for such actions as making a gift, creating or revoking a trust, and using other non-probate estate planning devices such as survivorship interests and

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26 UPOAA §201(a), Comment, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36.

27 1994 Memorandum of the Assembly Rules Committee, c. 694 of the Laws of 1994.

28 N.Y. Surr. Ct. Proc. Act § 2307-a, as amended by the Laws of 2003, c. 633.

29 Laws of 2004, c. 82.

beneficiary designations."[30] This specificity is required by section 201 and the model form of the UPOAA, adopted in 2006 by the National Conference of Commissioners on Uniform State Laws. The catalyst for this approach came from the results of a national survey conducted by the joint Editorial Board for Uniform Trust and Estate Acts.[31] The survey results "demonstrated a consensus of opinion in excess of seventy percent that a power of attorney statute should [among other things] require gift making authority to be expressly stated in the grant of authority . . . ."[32]

Alabama,[33] Arkansas,[34] and Virginia[35] are among the most recent states to adopt the UPOAA approach.[36] Maryland's 2010 statute[37] significantly expands on the UPOAA approach, "contain[ing] provisions unique to Maryland law,"[38] and adopts two long form statutory powers of attorney: an 8-page "personal financial power of attorney" without gifting authority, and which cannot be modified,[39] and a 19-page "limited power of attorney" with optional gifting authority, which can be modified.[40] Florida's 2011 statute,[41] likewise influenced by the UPOAA approach, and which does not include a statutory form, requires the principal's signature or initials next to

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30 Uniform Power of Attorney Act §201(a), Comment (citations omitted), available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2006final.htm#TOC1_36.

31 UPOAA, Prefatory Note, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

32 *Id.*

33 2011 Ala. Acts 683, eff. January 1, 2012.

34 2011 Ark. Acts 805, eff. January 1, 2012.

35 2010 Va. Acts chs. 455 and 632.

36 The UPOAA has also been adopted by Colorado (Colo. Rev. Stat. 15-14-701), Delaware (2010 Del. ALS 467), Idaho (Idaho Code § 15-12-101), Maine (18-A Me. Rev. Stat. § 5-901), Nevada (Nev. Rev. Stat. Ann. § 162A.200), New Mexico (N.M. Stat. Ann. § 45-5B-101), Wisconsin (Wis. Stat. § 244.01), and the US Virgin Islands (15 V.I.C. §1-201).

37 2010 Md. Laws chs. 689 and 690, eff. October 1, 2010.

38 Yale M. Ginsburg and Robert M. Horne, *2010 Maryland General and Limited Power of Attorney Act*, Md. Bar J., Oct. 2010, available at http://www.msba.org/departments/commpubl/publications/bar_bult/2010/october/et_2010.asp.

39 Md. Code Ann. Est. & Trusts §17-202.

40 Md. Code Ann. Est. & Trusts §17-203.

41 2011 Fla. Laws ch. 210, effective October 1, 2011.

each specific enumeration of gifting authority.[42] Maryland's new law also requires two witnesses for each of the two statutory forms,[43] as does Florida's, for its non-statutory power of attorney.[44]

New Jersey's Law Revision Commission recently issued a report on proposed amendments to the state's power of attorney law.[45] It recommended that if the principal intends to authorize the agent to make gifts, gratuitous transfers, and self-gifts, that the power of attorney expressly list those gifting powers.[46] The New Jersey proposal incorporated elements of New York's 2009 law as well as the UPOAA.[47]

Critics of the Gifts Rider claim that it is not user-friendly, urging instead the adoption of the model form of the UPOAA (section 301) which specifically lists all the potential gifts that an agent might be authorized to make. Indeed, at one time during the development of the Gifts Rider, it was suggested that all the powers listed under 5-1514 appear on the face of the Gifts Rider, as is the case with the UPOAA. This suggestion was not adopted because it raised concerns on the one hand, that such a list would not be helpful to a principal who would be unlikely to understand the meaning and scope of such authority without legal advice, and on the other hand, that a detailed list of gifting powers on the Gifts Rider would be a road map for larceny by an agent intent on exploiting a principal. It was thought that the best course was for a principal to have the assistance of an attorney when contemplating gifting authority.

B. The Formalities of Execution

The heightened execution requirements of the Gifts Rider, or a non-statutory power of attorney granting gifting authority, is designed to draw the principal's attention to the importance of the document and its potential effect on his or her estate.

This level of formality is consistent with similar requirements under New York law for wills, trusts and health care proxies. Thus, section 3-2.1 of the Estates, Powers and Trusts Law requires that a will be signed by the testator in the presence of at least two witnesses. Until 1977, the creation of a trust could be implied from the conduct of the settlor without the formalities

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42 Fla. Stat. § 709.2202(1).

43 Md. Code Ann. Est. & Trusts §§17-202 and 17-203.

44 Fla. Stat. § 709.2106(2).

45 New Jersey Law Revision Commission, Final Report Relating to General Durable Power of Attorney Act (May 13, 2010) (NJLRC Final Report).

46 NJLRC Final Report at 21.

47 NJLRC Final Report at 21, Comment to proposed section 46:2B-20.22. New Jersey does not have a statutory form power of attorney and it did not adopt the concept of a gifts rider. It opted to "permit authority to make gifts and other gratuitous transfers by express and specific provision in the power of attorney itself . . ." *Id.*

associated with a will.[48] Section 7-1.17(a) of the Estates, Powers and Trusts Law changed the execution rules for a trust to be more consistent with those for a will, requiring the signatures of the settlor and the trustee, and either notarization or the signatures of two witnesses. As the Sponsor's Memorandum to section 7-1.17(a) noted, "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play."[49] Health care proxies currently require the principal's signature as well as the signatures of two witnesses.[50] A 2010 legislative effort to reduce this number to one was vetoed by the Governor based on concerns that having a single witness increased the potential for forged health care proxies.[51] The veto message concludes that in light of "the relative ease of finding a second person to witness the execution of a health care proxy in most cases," two witnesses should be required because of "the potential for significant and irreparable harm resulting from a person wrongfully exercising control over another's personal health care decisions."[52]

A formal execution requirement for a power of attorney is not unique to New York. Maryland, which also requires two witnesses for each of its two statutory forms, is among the states that have recently adopted heightened execution requirements.[53] Other states that have heightened execution requirements include Wisconsin (two witnesses and a notary),[54] Oklahoma (two witnesses and a notary),[55] Florida (two witnesses),[56] South Carolina (two witnesses),[57] Arizona (one witness and a notary),[58] Delaware (one witness and a notary)[59] and Illinois (one

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48 *See Matter of Marcus*, 2 A.D.3d 640, 769 N.Y.S.2d 56 (2d Dep't 2003).

49 Memorandum in Support, 1997 S.B. 4223.

50 *See* N.Y. Pub. Health Law §2981(5)(d).

51 Veto No. 6788 of 2010.

52 Veto No. 6788 of 2010.

53 Md. Code Ann. Est. & Trusts §§17-202 and 17-203.

54 Wis. Stat. Ann. §§243.07; 243.10(2).

55 Ok. Stat. Ann. §58-1072.2.

56 Fla. Stat. Ann §§709.2106(2); 689.01.

57 S. C. Code Ann. §§62-5-501(c); 62-2-502.

58 Ariz. Stat. Ann. §14-5502.

59 12 Del. Code Ann. § 49A-105.

witness and a notary).[60] Pennsylvania requires two witnesses if the power of attorney is signed by a third party on behalf of the principal.[61]

A formal execution requirement is seen as providing a number of protections. First, it alerts the principal to the significance of the instrument he or she is executing. Second, it "may lessen the chance that a dishonest agent will obtain a durable power of attorney from a vulnerable principal without the knowledge of third persons."[62] Third, it certifies that it is the principal who is executing the document and that he or she is competent and free from undue influence.[63] Finally, it makes the document acceptable in states such as Florida, which have, as noted earlier, a requirement that one or more witnesses attest to the principal's signing of the power of attorney.[64]

Not only were leaders of the State Bar involved in the development of the Gifts Rider, but many of the Bar's members appreciate its usefulness.[65]

The Gifts Rider also enjoys the support of social workers and prosecutors who recognize that the Gifts Rider alerts the principal to proceed cautiously in executing such a document.

New York's statutory Gifts Rider (as it appears on the NYSBA website) is a straightforward 3-page document with three parts relating to gifts that the principal may authorize the agent to make.[66] Many Gifts Riders may be that brief, others quite lengthy – the document's ultimate length will depend on the breadth and complexity of the authority that the principal has chosen for the agent.

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60 755 Ill. Comp. Stat. §45/3-3.

61 20 Pa.C.S.A. § 5601(b). *See also Powers of Attorney: Proposed Amendments to the Probate, Estates and Fiduciaries Code* 16-17 (Report of the Advisory Committee on Decedents' Estates March 2010), available at http://jsg.legis.state.pa.us/POWERS%20OF%20ATTORNEY%20March%2023%202010.pdf.

62 Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 195-96 (2009).

63 *Id. See also* Kelly Dedel Johnson, *Financial Crimes Against the Elderly* 24 (U.S. Department of Justice Office of Community Oriented Policing Services (2004)(noting the lack of oversight of legal documents granting such enormous decision-making authority over financial matters, and criticizing the lack of two key requirements: the involvement of a lawyer in drafting the document, and the presence of witnesses to assure that the Principal's signature is voluntary.); Margaret Z. Reed and Jonathan Federman, *Abuse and the Durable Power of Attorney: Options for Reform* 48-49 (Albany Law School Government Law Center 1994).

64 Howard S. Krooks, *Should They Stay or Should They Go? A Primer for New York Attorneys Advising Their Florida Snowbird Clients*, 83 N.Y. St. B.J. 48 (July/August 2011).

65 *See, e.g.*, Stephen C. F. Diamond, *With a Name Like SmuGeR It Has to be Good*, 42 NYSBA Trusts and Estates Law Section Newsletter 4 (Winter 2009).

66 http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=53341.

Paragraph (a) allows the principal to authorize gifts by the agent up to the annual federal gift tax exclusion, to a defined class of close relatives. The language in paragraph (a) is virtually identical to that in the former power of attorney form.

Paragraph (b) allows the principal to authorize all other types of gifts by the agent including:

1) gifts in amounts lesser than or in excess of the federal gift tax exclusion,

2) gifts to persons other than the class of beneficiaries covered by the federal gift tax exclusion in paragraph (a), and

3) gifts in forms other than cash.

Paragraph (c) allows the principal to authorize the agent to give gifts to himself or herself.

The Gifts Rider also contains a warning to the principal that authorizing gifts can radically alter the principal's estate. The Gifts Rider must be signed by the principal before two witnesses, one of whom may be the notary who has taken the acknowledgment.

Other than initialing paragraph (a) to authorize gifting in the amount of the federal gift tax exclusion, if the principal intends to authorize further gifting by the agent, such authority must be expressed in the Gifts Rider in language chosen by the principal, hopefully in consultation with his or her attorney. The description of the gifting authority added by the principal to the Gifts Rider may mirror the former default gifting provisions contained within the construction sections, and otherwise is no different than language that could be included in the Modifications provision of the former statutory short form power of attorney. The significant difference is that the gifting authority is not buried among other diverse modifications to a statutory short form power of attorney.

Certain members of the State Bar have repeatedly made claims regarding the confusion, complexity and expense associated with the Gifts Rider. We propose certain technical amendments to the statutory language of the Gifts Rider in this Final Report. We are unpersuaded, however, that the Gifts Rider should be repealed in favor of returning to the former ways of addressing an agent's gifting authority.

C. Technical Amendments to the Statutory Gifts Rider

i. Eliminate confusion about the relationship between paragraph (a) and paragraph (b) of the statutory Gifts Rider.

Paragraph (a) of the statutory Gifts Rider authorizes only federal annual gift tax exclusion gifts (currently $13,000) to a defined class of donees – the principal's spouse, parents, children and more remote descendants. Paragraph (b), which authorizes other gifts, may include authority for the agent to make gifts larger than the gift tax exclusion to the same class as defined in paragraph (a). So, for example, taking advantage of the permissible gifting under paragraph (b), the principal may authorize the agent to make annual gifts of $25,000 to each of the principal's three children.

Confusion has arisen as to whether a principal wishing to authorize an agent to make gifts in excess of the gift tax exclusion amount ($25,000 in the example) to the principal's three children, must execute both paragraphs (a) and (b) or may execute only paragraph (b).

The Commission recommends a clarification to reduce confusion and also recommends elimination of some repetitive language.

5-1514(10)

(a) ~~GRANT OF LIMITED AUTHORITY TO MAKE GIFTS~~ **ANNUAL GIFT TAX EXCLUSION GIFTS**

~~Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.~~ **If you wish to grant your agent authority to make gifts in excess of the annual federal gift tax exclusion amount to the class of beneficiaries identified in this section, use section (b) below and not this section.**

If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

( ) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) ~~MODIFICATIONS~~ **OTHER GIFTS**:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries, or other gift transactions.

~~Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death.~~

If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

( ) I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

( ) I grant specific authority for the following agent(s) to make the following gifts to himself or herself:
This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

ii. De Minimis Gifts

Some confusion persists about whether the authority to engage in de minimis gifting pursuant to "personal and family maintenance" on the statutory short form power of attorney, 5-1513(1)(f)(I) requires the execution of a statutory Gifts Rider. The intent behind the de minimis provision is to avoid the need for the statutory Gifts Rider to authorize very small gifts.

The Commission recommends the following amendments to sections 5-1502I, 5-1513(I) and 5-1514(I) to avoid the confusion.

Section 5-1502I(14)
. . . to continue gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five hundred dollars in the aggregate**; de minimis gifting granted pursuant to this subdivision may be exercised without an express grant under section 5-1514.**

Section 5-1513(1)(f)(I)
personal and family maintenance. If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars~~;~~**. If you grant your agent this authority, it may be exercised without executing a statutory gifts rider or an express grant under section 5-1514;**

Section 15-1514(6)(c)
The authority explicitly authorized in this section shall be construed to include any like authority authorized in any other section of this title. Accordingly, such like authorities as are authorized in any other section of this title may not be exercised by the agent unless they are expressly granted to the agent in the statutory gifts rider or in a non-statutory power of attorney executed pursuant to the requirements of paragraph (b) of subdivision nine of this section. **Notwithstanding the foregoing, de minimis gifting granted pursuant to section 5-1513 (1)(f)(I) may be exercised without an express grant under this section.**

D. Amendments to Other Provisions of the Statute

i. Agent's Access to Health Care Records Pursuant to Section 5-1502K.

Section 5-1502K was amended in 2009 to extend an agent's authority over the records and reports relating to the principal to include authority to access records regarding the provision of health care, in order to make decisions relating to payment for health care services. Thus, an agent given authority at "K" would be able to verify the accuracy of billing statements related to the principal's health care. The intent was to remove any ambiguity about whether an agent acting under an existing or future power of attorney can access health care records in connection with the payment of health care bills. The names of the construction section and the corresponding power at (K) in the statutory form were renamed to comport with the authority conveyed by the amended section.

It has been suggested that construction section (K) contains limitations on the agent's authority that frustrate the intent of 5-1402K:[67]

1. By limiting the agent's access to records of health care to which the principal has consented, the current provision does not include access to information regarding emergency health care provided to the principal.

2. The current provision is silent about the agent's authority to determine or obtain any health benefit payments to which the principal may be entitled through insurance coverage, employer health plans or government programs (other construction sections regarding insurance and government programs likewise do not explicitly grant this authority).

3. The current provision is silent about the agent's authority to discuss the principal's health care information with providers in order to determine and pay the principal's health care payment obligations, to determine and obtain the principal's health care benefit entitlements, to represent the principal in any dispute with respect to the principal's health care payment obligations or health care benefit entitlements, and to pay for appropriate care for the principal as determined by the principal or his or her authorized representative.

4. While 5-1502K provides the appropriate federal statutory reference to the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[68] health care providers may nevertheless be deterred from allowing the agent access to health care information because neither 5-1502K nor the statutory short form paragraph (K) expressly references the term "HIPAA" or state law, which in some instances may be more stringent than HIPAA.

It has also been suggested that 5-1501C, which excludes other types of powers of attorney from the coverage of the General Obligations Law, should explicitly exclude HIPAA authorizations.

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[67] *See* Albert Feuer, *Common Sense Suggestions to Reduce Legal Barriers Facing New Yorkers who Wish to Choose an Agent to Help Them in Obtaining and Paying for their Health Care*, 16 NYSBA Health Law J. 41 (Summer/Fall 2011).

[68] HIPAA creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative."

The Commission finds merit in these suggestions, and thus recommends changes to section 5-1501C, 5-1502K, and the statutory short form power of attorney at section 5-1513.

Section 5-1501C. Powers of attorney excluded from this title

The provisions of this title shall not apply to the following powers of attorney:
11. a power created pursuant to authorization provided by a federal or state statute, other than this title, that specifically contemplates creation of the power, including without limitation a power to make health care decisions, ~~or~~ decisions involving the disposition of remains**, or HIPAA authorizations pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations**.

Section 5-1502K.

Construction – ~~health care billing and payment matters;~~ records, reports and statements**; health information relating to health care payment and benefit matters under HIPAA and state law**
In a statutory short form power of attorney, the language conferring general authority with respect to "~~health care billing and payment matters;~~ records, reports and statements**; health information relating to health care payment and benefit matters under HIPAA and state law,**" or in a statutory short form power of attorney properly executed in accordance with the laws in effect at the time of its execution, the language conferring authority with respect to "records, reports and statements," must be construed to mean that the principal authorizes the agent:

1. ~~To access records relating to the provision of health care and to make decisions relating to the past, present or future payment for the provision of health care consented to by or on behalf of the principal or the principal's health care agent authorized under state law. In so doing the agent is acting as the principal's personal representative pursuant to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations.~~
To determine and pay the principal's health care payment obligations, to determine and obtain the principal's health care benefit entitlements, to represent the principal in any dispute with respect to the principal's health care payment obligations or health care benefit entitlements, and to obtain appropriate care for the principal as determined by the principal or the person with authority to make such decisions. To access all of the principal's health care information relevant to the representation described in this section. To discuss with the principal's past, present or future health care providers, employers, and health care plans any of the principal's health care information relevant to the authority described in this section.
Notwithstanding any law to the contrary, the agent shall have the right to receive and discuss the principal's health care information relevant to the authority described in this section. In so doing the agent is acting as the principal's personal representative pursuant

to sections 1171 through 1179 of the Social Security Act, as added by sections 262 and 264 of Public Law 104-191, and applicable regulations. This authority shall not include authorization for the agent to make other medical or health care decisions for the principal;

Section 5-1513(f) GRANT OF AUTHORITY:
To grant your agent some or all of the authority below, either
(1) Initial the bracket at each authority you grant, or
(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.
I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:
( ) (A) real estate transactions;
( ) (B) chattel and goods transactions;
( ) (C) bond, share, and commodity transactions;
( ) (D) banking transactions;
( ) (E) business operating transactions;
( ) (F) insurance transactions;
( ) (G) estate transactions;
( ) (H) claims and litigation;
( ) (I) personal and family maintenance. If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;[69]
( ) (J) benefits from governmental programs or civil or military service;
( ) (K) ~~health care billing and payment matters;~~ records, reports and statements**;** **health information relating to health care payment and benefit matters under HIPAA and state law**;
( ) (L) retirement benefit transactions;
( ) (M) tax matters;
( ) (N) all other matters;
( ) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
( ) (P) EACH of the matters identified by the following letters.......
You need not initial the other lines if you initial line (P).

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[69] Additional language proposed for this provision is set forth above in the section labeled "De Minimis Gifts."

ii. Permitting a Third Party to Sign the Power of Attorney and Statutory Gifts Rider on Behalf of a Principal.

The General Obligations Law is silent as to whether a third party can sign a power of attorney for a principal who has the requisite mental capacity but is physically unable to sign his or her name. Adding a provision to allow for execution of the power of attorney by a third party under these circumstances is consistent with current law for wills and health care proxies. Section 3-2.1 of the Estates, Powers and Trusts Law permits another individual to sign a will on behalf of the testator, provided the signing takes place in the testator's presence.[70] Section 2981 of the public health law permits another individual to sign a health care proxy on behalf of the principal.[71]

The Commission recommends changes to sections 5-1501B and 5-1514 to allow a third party to sign a power of attorney and a statutory Gifts Rider on the principal's behalf.

Section 5-1501B. Creation of a valid power of attorney; when effective

1. To be valid, except as otherwise provided in section 5-1512 of this title, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, **or in the name of the principal, if the principal is unable to sign, by another person in the principal's presence and at the principal's direction** with the signature ~~of the principal~~ duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. **In the event the power of attorney is signed by a third party pursuant to this section, the third party shall affix the principal's initials on the power of attorney, at the principal's direction and in the principal's presence.**
(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely because

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[70] N.Y. Est. Powers & Trusts Law §3-2.1(a)(1)("Except for nuncupative and holographic wills authorized by 3-2.2, every will must be in writing, and executed and attested in the following manner: (1) It shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction . . . .").

[71] N.Y. Pub. Health Law §2981(2)(a)("A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. *Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress.* The person appointed as agent shall not act as witness to execution of the health care proxy.")(emphasis added).

there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date or dates of acknowledgment of the signature or signatures of any agent or agents or successor agent or successor agents authorized to act on behalf of the principal or because the principal became incapacitated during any such lapse of time.

Section 5-1514. Certain gift transactions; formal requirements; statutory form

(9)To be valid, a statutory gifts rider to a statutory short form power of attorney must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property, and witnessed by two persons who are not named in the instrument as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the estates, powers and trusts law. The person who takes the acknowledgment, under this paragraph, may also serve as one of the witnesses. **Another person may sign and date the statutory gifts rider for the principal if the principal is unable to do so, in the principal's presence and at the principal's direction, and in the presence of two adult witnesses who sign the statutory gifts rider. A witness shall not be the individual who signed the power of attorney for the principal. In the event the statutory gifts rider is signed by a third party pursuant to this section, the third party shall affix the principal's initials on the statutory gifts rider, at the principal's direction and in the principal's presence.**
(c) Be accompanied by a statutory short form power of attorney in which the authority (SGR) is initialed by the principal.
(d) Be executed simultaneously with the statutory short form power of attorney and in the manner provided in this section.

iii. Exact Language

One persistent concern is the requirement that the statutory forms for a power of attorney and Gifts Rider be in the "exact wording" of the statutory forms at sections 5-1513 and 5-1514.[72] This requirement has been part of the rules governing statutory form powers of attorney since 1948.[73] The goal of the exact language requirement has been and continues to be one of facilitating acceptance of statutory powers of attorney by third parties, most notably financial institutions. While the requirement of exact language has been somewhat relaxed by the new

72 *See* N.Y. Gen Oblig. Law §5-1501(n) and (o).

73 *See* 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501.

law,[74] the continuation of the requirement in general serves to promote the acceptance of statutory short form powers of attorney and statutory Gifts Riders by financial institutions.

Another concern related to the acceptance of statutory forms by financial institutions is the limited remedy available when a financial institution refuses to accept a statutory short form power of attorney/statutory Gifts Rider. Currently, section 5-1510(2)(I) provides that the remedy for unreasonably refusing to accept a properly executed power of attorney is limited to injunctive relief compelling acceptance. Critics suggest that the remedy against a financial institution should include compensatory and consequential damages as well as attorneys' fees.

In 2007, legislation was proposed that would have amended the General Obligations Law to address this issue.[75] The legislation contained several bases upon which a financial institution could refuse to accept a statutory form power of attorney without incurring a penalty. However, if the refusal were unreasonable, the legislation proposed that the financial institution would be charged with damages and attorneys' fees. The Commission supported the 2007 legislation.[76] The legislation was vetoed, however, on the grounds that its provisions were too vague and punitive.[77]

Although the Commission weighed the merits of including compensatory damages and attorneys' fees in addition to injunctive relief in the 2009 legislation, it concluded that substantial anecdotal evidence of unreasonable refusals would be necessary to avoid another veto.

It is likely too soon to tell whether the combination of the availability of reasonable grounds for refusing to accept a statutory form power of attorney under 5-1504 and the potential of injunctive relief in 5-1510 have defused the problem. There has been no further suggestion that 5-1510 be amended regarding compensatory damages and attorneys' fees, nor has substantial evidence been offered which would support such an amendment.

In view of its intention to retain the "exact wording" requirement, the Commission recommends the correction of certain typographical errors in the statutory forms.

Section 5-1513(d).

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications."~~:~~

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74 N.Y. Gen. Oblig. Law §§5-1501(2)(n)(A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a statutory gifts rider from being deemed a statutory gifts rider, but the wording of the form set forth in subdivision ten of section 5-1514 of this title shall govern.); (o)(A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent a power of attorney from being deemed a statutory short form power of attorney, but the wording of the form set forth in section 5-1513 of this title shall govern.).

75 S. 2602./A.2692 (2007)

76 *See* June 13, 2007 Letter to David Nocenti, Counsel to the Governor from Professor Robert M. Pitler, Chairman of the Commission, and Rose Mary Bailly, Executive Director of the Commission, Bill Jacket for Veto No. 23 of 2007, available at http://image.iarchives.nysed.gov/images/images/95429.pdf.

77 *See* Veto No. 23 of 2007.

Section 5-1513(j).

(j) COMPENSATION OF AGENT(S): (OPTIONAL)
Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation,"; you may do so above, under "Modifications."

Section 5-1513(1)(n)(4) (important information for the agent).

keep a record ~~or~~ **of** all receipts, payments, and transactions conducted for the principal; and

Section 5-1513(n)(5).

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).
You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in ~~this document, which is either~~ a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.
Liability of agent:
The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

Section 5-1513(1)(o):

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:
It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.
I/we,-------------, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.
I/we acknowledge my/our legal responsibilities.
In Witness Whereof I/we have hereunto signed my/our names on ------,20----.
Agent(s) sign(s) here: = = >---------

(acknowledgment(s))

Section 5-1513(1)(p):

(p) SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, ---------------, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

In Witness Whereof I/we have hereunto signed my/our name(s) on ------,20----.

Successor Agent(s) sign(s) here: = = >-------------

(acknowledgment(s))

iv. Severability of a Properly Executed Statutory Short Form Power of Attorney from a Defective Statutory Gifts Rider

Subparagraphs (n) and (o) of section 5-1501(2) provide that a statutory short form power of attorney and a statutory Gifts Rider must be read together as a single instrument. A statutory Gifts Rider, even if properly executed, cannot stand alone as a separate document independent of a statutory short form power of attorney because the statutory Gifts Rider supplements a statutory short form power of attorney.[78] On the other hand, a properly executed statutory short form power of attorney is valid, even if no statutory Gifts Rider is executed.[79] In other words, a statutory short form power of attorney can exist by itself, whereas a statutory Gifts Rider cannot.

The statute does not directly address the question of the viability of a power of attorney – either the statutory short form or a non-statutory power of attorney – when the execution requirements under section 5-1514 to authorize gifting have not been met.

Permitting the continued validity of a properly executed statutory form power of attorney accompanied by a defective Gifts Rider is consistent with section 5-1501B. The prerequisites for a valid statutory power of attorney contained in section 5-1501B do not include a requirement that, if accompanied by a statutory Gifts Rider, the statutory Gifts Rider must also be validly executed in order for the statutory short form power of attorney to be valid. Rather, the language of 5-1501B (2) provides that a statutory short form power of attorney must contain the authority (SGR) initialed by the principal and be accompanied by a valid statutory Gifts Rider *"to be valid for the purpose of authorizing the agent to make certain gift transactions described in section*

[78] N.Y. Gen. Oblig. Law §5-1501(2)(n).

[79] N.Y. Gen. Oblig. Law §5-1501(2)(o).

5-1514 of this title . . . ."[80] Thus, any infirmity in the statutory Gifts Rider should not disturb the validity of the statutory short form power of attorney and the authority of the agent conveyed therein, if that document has been properly executed in accordance with the requirements of subdivision one of section 5-1501B and otherwise satisfies all of the other conditions of that subdivision for a statutory short form power of attorney.

The same result holds true for a non-statutory power of attorney. In such a document, the gift giving provisions are part of the same document as the agent's other authorities. A non-statutory power of attorney must be executed in accordance with the provisions of 5-1501B(2); if it purports to authorize the agent to make gift transactions described in section 5-1514, it must also satisfy the execution requirements of paragraph (b) of subdivision nine of section 5-1514 (namely, contain the signatures of two witnesses). The execution of a non-statutory power of attorney in the manner as prescribed by section 5-1514 (9)(b) only goes to the validity of the non-statutory power of attorney's conveyance of authority to make those gift giving transactions described in section 5-1514 and not to the validity of the entirety of the power of attorney. If, apart from a defect in the execution requirements of 5-1514, a non-statutory power of attorney satisfies all of the conditions of subdivision one of section 5-1501B, including the execution requirements, the power of attorney should be treated as valid for all intents and purposes, other than for conveying any gift giving authority provided for in section 5 -1514.

To clarify the severability of a defective statutory Gifts Rider accompanying a statutory Gifts Rider and the severability of gifting provisions of a non-statutory power of attorney that does not meet the execution requirements of section 5-1514(9)(b), the Commission recommends the following changes to section 5-1501B.

Section 5-1501B. Creation of a valid power of attorney; when effective

1. To be valid, except as otherwise provided in section 5-1512 of this title, a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must:
(a) Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
(b) Be signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.
(c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. A power of attorney executed pursuant to this section is not invalid solely because there has been a lapse of time between the date of acknowledgment of the signature of the principal and the date or dates of acknowledgment of the signature or signatures of any agent or agents or successor agent or successor agents authorized to act on behalf of the principal or because the principal became incapacitated during any such lapse of time.
(d) Contain the exact wording of the:

---

[80] N.Y. Gen. Oblig. Law §5-1501B (emphasis added).

(1) "Caution to the Principal" in paragraph (a) of subdivision one of section 5-1513 of this title; and
(2) "Important Information for the Agent" in paragraph (n) of subdivision one of section 5-1513 of this title.
2. In addition to the requirements of subdivision one of this section, to be valid for the purpose of authorizing the agent to make certain gift transactions described in section 5-1514 of this title:
(a) a statutory short form power of attorney must contain the authority (SGR) initialed by the principal and be accompanied by a valid statutory gifts rider; and
(b) a non-statutory power of attorney must be executed pursuant to the requirements of paragraph (b) of subdivision nine of section 5-1514 of this title.
If a statutory short form power of attorney properly executed in accordance with subdivision (1) of this section is accompanied by a statutory gifts rider that does not meet the requirements of subdivision (2)(a) of this section, the statutory short form power of attorney remains valid for all other purposes which can be accomplished by a properly executed short form power of attorney other than the gift transactions described in section 5-1514 of this title. If a non-statutory power of attorney properly executed in accordance with subdivision (1) of this section does not meet the requirements of subdivision (2)(b) of this section, the non-statutory power of attorney remains valid for all other purposes which can be accomplished by a properly executed non-statutory power of attorney other than the gift transactions described in section 5-1514 of this title.

v. Capacity to Execute a Power of Attorney

Concerns have been raised that the new forms are too complex for a client with diminished capacity. "Capacity" is defined under the 2009 statute as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney."[81] Whether the principal has the mental capacity to appreciate all the elements of the power of attorney is likely to emerge during the discussions about the power of attorney between the lawyer and the principal[82] – counseling for which the statutory form is no substitute.[83]

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81 N.Y. Gen. Oblig. Law § 5-1501(2)(c).

82 Apparently, there are circumstances where the drafting attorney is in communication with the agent, but not the principal. *See, e.g. In re Ferrara*, 7 N.Y.3d 244, 249, 819 N.Y.S.2d 215, 217 (2006).

83 "To function as an alternative to an attorney-prepared document, the statutory form must, somehow, fulfill the attorney's counseling function." David M. English, *The UPC and The New Durable Powers*, 27 Real Prop. Prob. & Trust J. 333, 352 (1992-93). For this very reason, Florida declined to adopt a statutory form in its recent revision of the laws governing powers of attorney. The "laundry list" of powers included in early drafts of the statute was removed in the final version, to avoid "an undesirable risk that principals will execute instruments containing less than obvious terms which they either do not intend or that they do not fully appreciate and understand. The Act cannot guarantee that all principals will carefully consider the terms of the instruments they execute. It can, however, facilitate awareness and understanding for those who do." *Chapter 709 White Paper* at 1.65, available at floridaprobatelitigation.com/uploads/file/ACT11_Conetta.pdf. *See also* Laurie Menzies, *What's*

New York's Standards of Professional Conduct do not hold any clear-cut answers for drafting attorneys faced with questions about a client's capacity.[84] However, the consequences of a lack of capacity are addressed in the General Obligations Law. If a person cannot meet the statutory standard of capacity, described by one leading treatise as "functional,"[85] he or she cannot legally create a valid power of attorney[86] or Gifts Rider.[87] A third party may refuse to accept a power of attorney if it has actual knowledge or a reasonable basis for believing that the principal was incapacitated at the time the power of attorney was executed.[88] Various parties may bring a special proceeding to ask a court to determine if the person had capacity at the time the power of attorney was executed.[89]

Many advocates have urged an educational campaign that promotes the importance of pre-crisis planning to avoid situations where execution of a power of attorney is made difficult if not impossible by an individual's diminished mental capacity. Certainly no one can disagree that both clients and their lawyers would be better served if planning were done in advance of a crisis.

vi. Validity of Powers of Attorney Created under Prior Law

Concerns have been raised as to whether a power of attorney executed by the principal after August 31, 2009 but not signed and dated by the agent prior to the technical amendments of 2010, is valid. The statute otherwise makes clear the intent of the legislature that a power of attorney is not invalid solely because there was a lapse of time between execution by the principal and acknowledgment by the agent.[90] The Commission recommends that the effective date of chapter 340 of the laws of 2010 be amended to clarify that intention with respect to powers of attorney created under the 2009 law.

Wrong with Most Estate Plans? NYSBA Elder Law Attorney, Summer 2008, at 8; Mark B. Edwards, Through the Looking Glass: the Future of Estate and Financial Planning, SM003 ALI-ABA 1289 (July 19-21, 2006) noting that "[t]he durable power of attorney is like the hub of a wheel, the piece around which everything else turns. We must treat this document with the care it deserves, taking the extra time (and charging the extra fees) to do the job well."

84 *See* N.Y. Rules of Professional Conduct § 1.14.

85 2-17 Klipstein, Drafting New York Wills § 17.03 (3rd ed. Lexis Nexis Matthew Bender).

86 N.Y. Gen. Oblig. Law § 5-1501B(1)(b).

87 N.Y. Gen. Oblig. Law § 5-1514(9)(b).

88 N.Y. Gen. Oblig. Law § 5-1504(1)(a)(6).

89 N.Y. Gen. Oblig. Law §§ 5-1505(2)(a), 5-1510(2)(b), and 5-1510(3).

90 N.Y. Gen. Oblig. Law §§ 5-1501B(1)(3) and 5-1513(1)(o).

Effective date:

This act shall take effect on the thirtieth day after it shall have become a law. Provided, that any statutory short form power of attorney and any statutory gifts rider executed **by the principal** after August 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act.

V. Conclusion

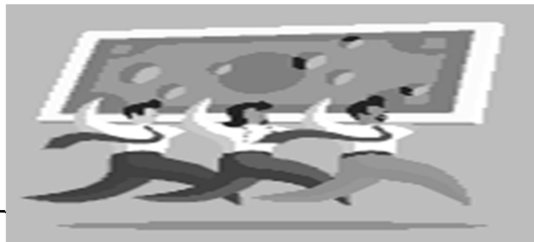
The goal of the 2009 statute – to better inform individuals about the power of attorney and the gifting authority of the agent – seems to be universally acknowledged as laudable. The Commission believes that the amendments proposed herein will further that goal.

Estate Planning Devices: An Overview

Patricia J. Shevy, Esq., The Shevy Law Firm
patriciashevy@shevylaw.com

Planning for Prospective Disability or Incapacity of a Client

- Powers of Attorney
- Health Care Proxies & Living Wills
- Revocable Trusts
- Medicaid Planning and Asset Transfers



Powers of Attorney

- A Power of Attorney permits another person (an agent) to complete financial transactions on a principal's behalf.
- NEW POWER OF ATTORNEY law effective September 1, 2009.
- NEW NEW POWER OF ATTORNEY- Technical corrections effective as of September 13, 2010.

Agent now has fiduciary relationship:

- Fiduciary relationship with principal, including:
  - Act according to principal's instructions, of if no instructions, in principal's best interest
  - Avoid conflicts of interest
  - Keep principal's property separate and distinct from other property controlled by agent.
  - May NOT make gifts to self without SGR.
  - Keep record of receipts, disbursements, transactions.

Fiduciary Duties

- Agent may be liable for conduct or omissions which violate ANY fiduciary duty.
- Agent not liable to third party if act was authorized at the time and act did not violate General Obligations Law.

Statutory Short Form POA

- POA that meets the requirements of § 5-1501B(1)(a), (b) & (c), and that contains the exact wording of the form set forth in § 5-1513.
- Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1513 governs.
- Use of the form set forth in § 5-1513 is lawful and when used shall be construed as a statutory short form POA.
- May be used to grant authority provided in § 5-1502A through § 5-1502N.

Statutory Short Form POA

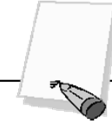
- May contain modifications or additions as provided in § 5-1503, but in no event may it be modified to grant any authority provided in § 5-1514 (SGR provisions).
- If the authority (SGR) on statutory short form is initialed by the principal, the statutory short form POA must be executed in the manner provided in § 5-1501B **simultaneously** with SGR
- Statutory short form POA and SGR which supplements it **must be read together** as a single instrument.

Statutory Gifts Rider (SGR)

- Document supplementing statutory short form POA to authorize certain major gift transactions other than those authorized by § 5-1520I meeting requirements of Gen. Obligations Law § 5-1514.
- Must contain the exact wording of the form set forth in § 5-1514.
- Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1514 governs.

Statutory Gifts Rider

- SGR may contain modifications or additions as provided in § 5-1503 as they relate to ALL gift transactions.
- SGR must be executed in the manner provided in § 5-1514 simultaneously with the statutory short form POA in which the authority (SGR) is initialed by the principal.
- SGR & POA it supplements must be read together as a single instrument.



Modifications

- Modifications to statutory short form POA and SGR permitted, including provision revoking a prior POA, as long as following requirements are met:
  - 12 point font or equivalent writing
  - Signed, dated and acknowledged by principal with capacity
  - Signed, dated and acknowledged by agent.

Sample Modifications

- Nomination of Guardian, if necessary
- Medicaid Planning, including use of promissory notes and gifting
- Estate Tax Planning
- Specifics for payment to agent (hourly rate)
- See materials for sample language, starting at page 69.

Executing a Power of Attorney

- Statutory short form must be written, typed or printed in at least 12 point font
- POA is valid only when it has been signed, dated and acknowledged by the principal **AND THE AGENT**
- The agent can sign later; still valid if lapse of time between principal's signature and agent's signature.

Revoking the Power of Attorney

- Execution of a POA **DOES NOT** AUTOMATICALLY REVOKE any POA previously executed.
- Principal may voluntarily revoke the power of attorney by delivering a revocation to the agent in person or by sending a signed & dated revocation by mail, courier, electronic transmission or fax to agent's last known address.
- A recorded POA is not deemed revoked unless a written revocation is also filed in the same office.

Revoking the Power of Attorney

- Actual notice to agent no longer required.
- Termination effective when agent has received the revocation.
- Agent deemed to receive revocation when delivered in person or within a **reasonable time** after revocation sent by mail, courier, electronically or fax.
- **No definition of reasonable time!**

Revoking the Power of Attorney

- PRACTICALLY: Notify all financial institutions of the revocation.
- Not sure? Did you give a copy of the power of attorney to your agent? ADVISE ALL FINANCIAL INSTITUTIONS WITH WHOM YOU HAVE AN ACCOUNT OF THE REVOCATION **IN WRITING certified mail return receipt requested**.

Revoking the Power of Attorney

- NY GOL §5-1511(1): POA terminates when:
  - principal dies
  - principal becomes incapacitated (when non-durable POA)
  - principal revokes the POA
  - principal revokes the agent's authority and there is no co-agent or successor agent willing or able to serve
  - agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent willing or able to serve
  - authority of the agent terminates and there is no co-agent or successor agent willing or able to serve
  - purpose of the power of attorney is accomplished
  - court order revokes the POA
  - DIVORCE OR ANNULMENT

Revoking the Power of Attorney

- NY GOL § 5-1511(2): Agent's authority terminates when:
  - principal revokes authority
  - agent dies, becomes incapacitated or resigns
  - agent's marriage to the principal is terminated by divorce, annulment or declaration of nullity unless POA expressly provides otherwise
  - POA terminates.

Health Care Proxies

- A Health Care Proxy appoints an agent to make health care decisions for the principal if the principal cannot make the decision for him/herself.

Health Care Proxy Statutory Requirements

- Name of Principal and Agent.
- Statement of intent that agent has health care authority.
- Signature and date by the Principal or other acting on the principal's behalf.
- Two witnesses who observe the execution and who sign below a statement indicating that the Principal acted willingly and free from duress.

Health Care Proxy Mistakes

- Putting Proxy on same form as Power of Attorney.
- Picking a medical professional (unless related).
- Multiple appointments (never pick 2 people at the same time).
- Choosing the right person- pick someone who will be able to stand up to the rest of the family.

What is a Living Will?

- A Living Will provides specific instructions regarding health care to the agent appointed under the principal's Health Care Proxy.
- Includes directions as to wanted medical treatments and unwanted medical treatments.
- Works in conjunction with a Health Care Proxy.

What a Living Will CANNOT Accomplish

- There is no statutory authority in New York for a Living Will.
- A Living Will may be subject to challenge by medical professionals or family members.

What happens if there is not a Health Care Proxy?

- Article 81 Guardianship OR Family Health Care Decision Act (Public Health Law Art 29-CC)
  - "Decision-making capacity" means the "ability to understand and appreciate the nature and consequences of proposed health care, including the benefits and risks of and alternatives to proposed health care, and to reach an informed decision."
  - "Surrogate" means the "person selected to make a health care decision on behalf of a patient" pursuant to the FHCD Act.

Family Health Care Decision Act

- Empowers a Surrogate to make health care decisions for a person who is in a hospital or nursing home if the patient lacks decisional capacity and did not leave instructions or sign a health care proxy.
- Only applies to patients in hospitals and nursing homes who have lost the capacity to make medical decisions.

Family Health Care Decision Act

- Public Health Law Section 2994-d(1) lists the Surrogate priority as follows
  - a guardian authorized under the Mental Hygiene Law
  - a spouse (if not legally separated or domestic partner
  - a child 18 years old or older
  - a parent
  - a sibling 18 years old or older
  - a close friend.

What is a Revocable Trust?

- A Revocable Trust is a written, formal agreement between:
  - The Grantor (settlor, creator)- the person who makes the contribution to the Trust.
  - The Trustee- the person who takes over control of the Trust.
  - The Beneficiary- the person who is going to receive benefits (income and/or principal from the Trust).
  - Must specifically state it is REVOCABLE.

Revocable Trusts

- **Avoiding Probate**
  - Many misconceptions exist about the probate process.
  - Waivers of citation can make the process easier.
- **Privacy**
  - Private contract.
  - Pour-over Will may effect this.

Revocable Trusts

- **No Ancillary Probate**
  - Example … if the grantor's primary residence is New York, but the grantor also owns a home in Florida, the grantor may transfer the Florida real estate to a New York Revocable Trust, thereby avoiding probate in both states.
- **Avoid Contests**
  - More difficult to challenge agreements that were made during a person's lifetime.

Revocable Trusts

- **Quick Disposition**
  - Can save months of time
  - Complexity of estate may alter this
- **Asset Management**
  - Grantor and Trustee
  - Control assets to meet goals.

Revocable Trusts

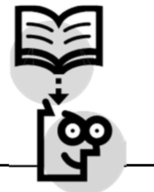
- **Incapacity**
  - Powers of Attorney are sometimes not honored by financial institutions (even when the law requires it!)
  - Revocable Trust may provide a Trustee greater flexibility, control and authority than a POA.

When to use a Revocable Trust

- Client owns real estate in a foreign jurisdiction
- Client has a domestic partner – who the clients want to inherit his/her estate.
- The client is involved in a non-traditional marriage (second marriage, no marriage).
- Client wishes to keep something private.
- Client may move to a state that is more complex.
- Client may acquire vacation/retirement home in another state.

Medicaid Planning

- An attorney also needs knowledge of elder law topics, such as Medicaid planning (planning to protect the client's assets from nursing home costs).
- **Schneider v. Finmann Reminder:** Attorney draftsperson's duty extends past Testator's death.
- Numbers in the written materials for Medicaid eligibility rules are old. Be sure to keep a copy of this power point with the written materials.



Medicaid
Resource and Income Rules

- **Single Person** may retain (and qualify for Medicaid Nursing Home Benefits):
  - Personal and Household Effects
  - $14,400 in bank accounts and investments
  - Term Life Insurance (no cash value)
  - Prepaid, irrevocable burial expenses (reasonable)
  - $50 monthly income.

Medicaid
Resource and Income Rules

- **Married Couple.** Spouse in Nursing Home- same rules as single person. Community Spouse can keep:
  - House
  - Automobile
  - $74,820 or spousal share (½ of couple's resources as of the date of institutionalization, up to $115,920)
  - Prepaid, irrevocable burial expenses (reasonable)
  - Monthly income of $2,898.

Medicaid Rules

- **5 Year Look Back:**
  - DSS looks at 5 years of all financial transactions prior to application for benefits.
- **Penalty Period:**
  - Any gift during look back period results in period of ineligibility for benefits.
  - Based on value of gift and regional cost of nursing home (per Dept of Health).
  - Starts when applying for Medicaid and otherwise eligible (meet financial requirements).

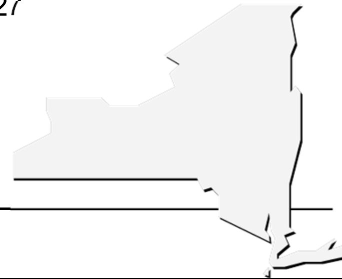
How is the penalty period calculated?

$$\text{Penalty Period} = \frac{\text{Value of Transfer}}{\text{Regional NH Rate}}$$

Regional NH Rate is set by the Department of Health annually. DOH assumes a nursing home costs this amount per month.

Regional Rates

Long Island	$12,034
NYC	$11,359
Central	$8,432
Northeastern	$8,950
Rochester	$9,782
Western	$8,682
Northern Metropolitan	$10,727



Penalty Period Example

- Gift of $100,000 in assets in the Capital Region (upstate NYS) . . .
- Penalty Period = $100,000 / $8,950
- Penalty Period = 11.2 months
- The donor will NOT be eligible for Medicaid nursing home benefits for 11.2 months and must privately pay for care during the 11.2 months; **BUT penalty does not begin until otherwise eligible for Medicaid.**

What is the spousal share?

- One-half the couple's assets up to $115,920 as of the date Medicaid spouse admitted to NH.
  - Couple has $300,000 in assets (excluding home) on day husband is admitted to NH. Wife can keep $115,920 in assets.
  - Couple has $150,000 in assets (excluding home) on day husband is admitted to NH. Wife can keep $75,000 in assets.

What about IRAs?

- **IRAs in Periodic Payment Status**
  - Unearned monthly income (not a resource)
  - Matter of Kern (# 3873663J) – IRS tables (see Publication 590) for over age 70 ½
  - Community Spouse – special rules apply (GIS 06 MA/004, SSL 360-4.6(b)(2)(iii)).

More about the Community Spouse

- CS with less than $2,898 monthly income is entitled to a portion of the Medicaid spouse's income to bring CS up to $2,898 per month in income
  - Example: H's income (in NH) = $3,000. CS W's income = $500. W takes $2,398 from H. H keeps $50. NH gets $552.

Back to the Community Spouse

- **CS Spouse must voluntarily contribute 25% excess income toward NH Spouse's care.**
- $50 to recipient-spouse deducted first.
- Example: CS H's income = $3,000. NH W's income = $500. W keeps $50. NH gets $450 from W. H keeps $2,974 ($2,898 + 76). NH gets $25 from H ($3,000 - $2,898 x .25).

How does CSRA Increase work?

- NH H's income = $1,000 /mo
- CS W's income = $500/mo
- Couple's assets = $150,000
- CS W is 78 years old.
  - CSRA = $75,000
  - BUT. . . $2,898 - $1,450 = $1,448/mo shortfall.
  - Go to www.immediateannuities.com.
  - Investment in immediate annuity of $178,448 to generate $1,448/mo shortfall.

How does CSRA Increase work?

- Submit Medicaid application.
- Application will be denied with spend down.
- Request fair hearing for increase in CSRA.
- Submit facts, calculations and law to ALJ for decision (bring CS as witness).

Permitted Gifts/Transfers

- Non-exempt assets may be transferred without affecting Medicaid eligibility:
  - To Spouse (or for Sole Benefit of Spouse)
  - To Disabled or Blind Child
  - To Trust for Sole Benefit of Disabled or Blind Child
  - To Trust for Sole Benefit of Disabled Individual under Age 65.

Homestead Exemption

- Homestead: primary residence occupied by the Medicaid applicant, the applicant's spouse, or the applicant's minor, disabled or blind child.
  - One, two or three family home
  - Condominium
  - Cooperative
  - Mobile Home

Homestead Exemption

- May be income producing (income not exempt)
- May contain a business and 2 apartments, 1 of which is primary residence
- Contiguous property
- NOT Exempt:
  - Second Home
  - Summer or Vacation Home
  - Not a primary residence

Exempt Home Transfers

- Home may be transferred (and remained exempt) without affecting Medicaid eligibility:
  - To Spouse
  - To Minor Child
  - To Disabled or Blind Child of Any Age
  - To Caretaker Child- lived in home at least 2 years prior to parent's NH and a caregiver to parent
  - To Sibling with Equity Interest- lived in home at least 1 year prior to NH & has an equity interest

Outright Transfer of Home

- No right to lifetime use.
- Carryover Basis.
- Use of $1Million Lifetime Gift Tax Exemption.
- Penalty Period starts when person enters NH or after 5 year look back.
- Loss of §121 Exclusion.
- Veterans, STAR and Senior exemptions lost.

Life Estate Transfer

- Better than outright transfer but not as good as a Medicaid Trust:
  - Lifetime use.
  - Step Up in Basis.
  - §121 Exclusion for Grantor's portion
  - Veterans, STAR and Senior exemptions maintained.
- BUT. . . . Penalty Period starts when person enters NH or after 5 year look back, and proceeds not protected if sold during Grantor's lifetime.

Terms of Medicaid Trust

- Irrevocable.
- All income is payable to Grantor.
- Principal cannot be used for Grantor.
- No Power to Invade Principal under EPTL §7-1.6.
- No Power to Adjust principal to income under EPTL §11-2.3(b)(5).
- No Power of Trustee to Elect Unitrust Status under EPTL §11-2.4.

Terms of Medicaid Trust

- Principal can be used for children/others subject to ascertainable standard (health, support, maintenance, education).
- Principal can be used to continue lifetime gifting plan.
- Lifetime Limited Power of Appointment.
- Testamentary Limited Power of Appointment.

Medicaid Trust and Home

- Right to lifetime use.
- Step-up in Basis.
- No Gift Tax.
- §121 Exclusion.
- Veterans, STAR and Senior exemptions.
- Penalty Period starts when person enters NH or after 5 year look back.

Revoke a Medicaid Trust?

- If properly drafted,. . . . ., YES.
- EPTL 7-1.9: Irrevocable trust can be **AMENDED OR REVOKED** in whole or in part upon the written consent, acknowledged by all persons beneficially interested (Grantor and Beneficiaries).
- Be careful- will not work if minor or incompetent beneficiaries.
- Properly drafted POA can consent.

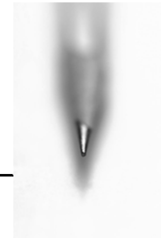
Promissory Note Planning

Promissory Notes

- DRA provides that purchase of a promissory note on or after February 8, 2006 is an uncompensated transfer of assets unless the note meets specific criteria.

Promissory Note Requirements

- Repayment term actuarially sound.
- Payments in equal amounts over loan term.
- No deferred or balloon payments.
- Balance cannot be cancelled on death of Applicant/Payee.



Note/Gift Plan: Crisis Planning

- Applicant must be 'otherwise eligible' for Medicaid to trigger penalty.
- Applicant transfers ½ non-exempt assets to an individual (gifted amount).
- Applicant loans and takes back a DRA compliant promissory note for other ½ non-exempt assets (loan amount).
- Applicant immediately applies for Medicaid to establish a penalty period for gifted amount.

Note/Gift Plan: Crisis Planning

- Note Payments and Applicant's other income used to pay NH at a rate lower than the private pay rate for the duration of the penalty period.
- Shortfall paid by a non-legally responsible person during the penalty period or using $14,400 permitted.

Note/Gift Plan: Crisis Planning

- Applicant re-applies to Medicaid at end of penalty period. Local counties do not require a second application.
- Note does not have to name the State as remainder beneficiary.
- If Applicant dies before note payments complete, note is an asset of the estate.

Note /Gift Plan: Drafting

- Reasonable Interest Rate – Applicable Short Term Federal Rate
- Non-Assignable
- Non-Cancelable
- Non-Transferable
- Actuarially Sound
- SPELL IT OUT IN THE NOTE: DRA TELLS YOU EVERYTHING YOU NEED TO KNOW.

Note/Gift Example

- George (age 86) has $114,400.
- George's monthly income (gross) is $1,000 (disregard $50).
- George's NH cost is $300 per day.
- George wants to use note/gift plan.

Note/Gift Plan Example

- Step 1: Is the note actuarially sound?
  - See Social Security Life Expectancy Tables.
  - At age 86, life expectancy is 5.08 years (61 months).
  - Term of loan must be less than 61 months.

Note/Gift Plan Example

- Step 2: What is the maximum monthly loan payment?
  - George’s NH cost is $320 per day.
  - George’s monthly income is $1,000.
  - Maximum monthly note payment is $8,599 in a 30 day month.
    - $320 per day x 30 days = $9,600.
    - NH expense > Income + Note Repayment.
    - $9,600 > $1,000 + $8,599

Note/Gift Plan Example

- Step 3: If $50,000 is gifted, what is the penalty period?
  - Regional rate is $8,950
  - Penalty period is 5.6 months.
    - $50,000 / $8,950 = 5.6 months.
    - Round up to 6 months for note calculation.

Note/Gift Plan Example

- Step 4: What is monthly payment on $50,000 loan at 0.32% over 6 months (keeping just under private pay rate)?
  - Use amortization schedule to calculate monthly payments.
  - If $50,000 is loaned for 6 month term, monthly payment is $8,341.11.

Note/Gift Plan Example

- Step 5: Is loan payment + income less than monthly private pay rate?
  - YES.
  - $8,341.11 + $1,000 = $9,341.11
  - $9,341.11 < $9,600

Dealing with Disabled or Incapacitated Clients or Minors

Article 81 Guardianship

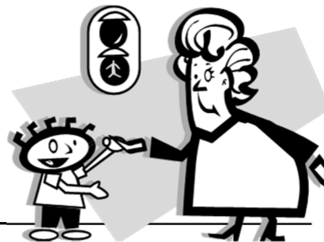
- Go to page 242 of materials.
- Proceeding brought in Supreme or County Court.
- **Clear and convincing evidence** that person alleged to be incapacitated (AIP) is likely to suffer harm because AIP is unable to provide AIP or cannot adequately appreciate and understand consequences of AIP's actions.

Article 81 Players

- Petitioner
- AIP
- Court Evaluator
- Attorney for AIP
- Guardian

Article 81 Guardianship

- Least Restrictive Intervention
  - Guardian of the Person
  - Guardian of the Property



Article 17 Guardianship

- Go to page 265 of materials.
- Guardian of an Infant (under 18)
- Proceeding brought in Surrogate's Court
- www.nycourts.gov/forms/surrogates.index.shtml
  - Guardian of the Person
  - Guardian of the Property
    - If infant is to receive funds more than $10,000, petition required.

Article 17-A Guardianships

- Go to page 265 of written materials.
- Guardianship of a mentally retarded and/or developmentally disabled person
- Proceeding brought in Surrogate's Court
- Certification by 1 licensed physician and 1 licensed psychologist or 2 licensed physicians, 1 of whom has cared for person
- www.nycourts.gov/forms/surrogates.index.shtml

THE END.
Questions?

Patricia J. Shevy, Esq.
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203

HEALTH CARE PROXIES AND LIVING WILLS

A Living Will (also known as a "medical directive" or an "advanced directive") is a written statement providing an individual's specific instructions regarding medical treatment in certain circumstances where he or she cannot competently make such decisions for himself or herself. Under a properly drafted Living Will, the individual may include specific instructions regarding what medical treatments the person may want or refuse. A Living Will can provide guidance to agents appointed under a health care proxy and medical professionals regarding a person's desires with respect to medical treatment in the event he or she cannot make such decisions. Unlike health care proxies, there is no statutory authority in New York for Living Wills. As such, without an accompanying health care proxy, the Living Will has no legal effect in New York.

Although there are no formal requirements for a Living Will in New York, it still must be drafted carefully. A Living Will that does not accurately reflect a person's intentions with respect to medical treatments is not automatically legally enforceable and may be subject to challenge by medical professionals or family members opposed to termination of life support.

In states other than New York, there may be a requirement that the execution of the Living Will be analogous to that of a Will, i.e. that the Living Will be in writing, signed, dated and have two qualified witnesses. Some states do not require witnesses to a Living Will if the document is notarized. Other states include the Living Will on the driver's license. Furthermore, a state has no duty to obey a Living Will executed in another state that does not meet its requirements. In cases where a client travels frequently, it may be prudent practice to execute a Living Will with the same formality of a Will execution ceremony.

It is imperative in New York to include a health care proxy as part of the planning when drafting a Living Will so that the agent appointed under the health care proxy has the principal's instructions with respect to medical treatments desired and treatments or procedures that the

principal does not want. It may be more practical to include the health care proxy and Living Will into one document so that the instructions are clearly provided within the same document as the designation of the health care agent.

Copies of the Living Will should be provided to the treating physician and those family or friends who would likely be involved. The Patient Self-Determination Act requires medical facilities to ask a patient at the time of admission if he or she has an advance directive, and if so, to make it a part of the patient's medical record.

Living Will Example:

LIVING WILL

OF

___

I, ___, residing at ___, (phone ___), being of sound mind and health hereby willfully and voluntarily make known my directions to my family, all physicians, hospitals and other health care providers and any Court or Judge:

In the event I become comatose, incompetent, unable to make my own health care or health related decisions, including, but not limited to, the lack of capacity to provide informed consent, or otherwise mentally or physically incapable of communicating my health care decisions, after thoughtful consideration, I have decided to forgo all life-sustaining treatment including, without limitation, artificial nutrition and hydration, if I shall sustain substantial and irreversible loss of mental capacity or I shall be physically incapable of communicating my health care decisions and (a) I have an incurable or irreversible injury, illness, disease or condition that is likely to cause my death within a relatively short time, or (b) I am in a state of permanent unconsciousness or a persistent vegetative state, or (c) it is likely that I will never again live without the aid of mechanical respiration or without the delivery of nourishment or liquids by artificial means. Whether I am in any of the conditions described above shall be determined by my attending physician and any necessary confirming determinations.

I shall be conclusively presumed to have sustained substantial and irreversible loss of mental capacity or to be physically incapable of communicating my health care decisions upon a determination to such effect by my attending physician or when a court determines that I have sustained such loss of mental capacity or that I am physically incapable, whichever shall first occur.

"Health care decision" shall be defined as any decision to consent or refuse to consent to health care, including, but not limited to, providing informed consent.

"Health care" shall be defined as any treatment, service or procedure to diagnose or treat my physical or mental condition, to the extent not prohibited by law, including, but not limited to, decisions about:

[1] withdrawing or withholding life-sustaining treatment;
[2] artificial respiration;
[3] artificial nutrition and hydration (nourishment provided by feeding tube);
[4] cardiopulmonary resuscitation (CPR);
[5] antibiotics and other medications;
[6] dialysis;
[7] transplantation;
[8] blood transfusions;
[9] antipsychotic medication;
[10] diagnostic tests;
[11] surgery;
[12] electroconvulsive therapy;
[13] psychosurgery;
[14] chemotherapy and radiation; and
[15] all other treatments and therapies.

As used herein the term "an incurable or irreversible injury, illness, disease or condition that is likely to cause my death within a relatively short time" is a condition which, without the administration of medical procedures would serve only to prolong the process of dying and will in my attending physician's opinion, result in my death within a relatively short period of time.

The determination as to whether my death would occur in a relatively short period of time is to be made by my attending physician without considering the possibilities of extending my life with life-sustaining treatment.

I direct that this health care decision shall be carried into effect without seeking judicial approval or authority. Accordingly, if and when it is so determined that I am in any of the conditions described above, all life-sustaining treatment including, without limitation, administration of nourishment and liquids intravenously or by tubes connected to my digestive tract, shall thereupon be withheld or withdrawn forthwith, whether or not I am conscious, alert or free from pain, and no cardiopulmonary resuscitation shall thereafter be administered to me if I sustain cardiac or pulmonary arrest. In such circumstances I consent to an order not to resuscitate, as that term is defined in Section 2961 of Article 29-C of the New York Public Health Law, or any successor statute of like import, and direct that such an order thereupon be placed in my medical record. I recognize that when life-sustaining treatment is withheld or withdrawn from me, I will surely die of dehydration and malnutrition within days or weeks. All available medication for the relief of pain and for my comfort shall be administered to me after life-sustaining treatment is withheld or withdrawn even if I am rendered unconscious and my life is shortened thereby.

I wish to die at home and not in a hospital and I do not want to be transferred to a hospital unless my condition makes it impractical for me to be treated at home, as may be the case during severe hemorrhage, or extreme restlessness, convulsions or unmanageable pain; in which case, then as soon as possible, I want to be sent back home.

I recognize that there may be many instances besides those described above in which the compassionate practice of good medicine dictates that life-sustaining treatment be withheld or withdrawn and I do not intend that this document be construed as an exclusive enumeration of the circumstances in which I have decided to forgo life-sustaining treatment. To the contrary, it is my express direction that whenever the compassionate practice of good medicine dictates that life-sustaining treatment should not be administered, such treatment shall be withheld or withdrawn from me. I similarly direct that in the event I am able to personally communicate a decision to forgo life-sustaining treatment in other circumstances than those described herein,

such instructions shall be followed to the same extent as if originally included in this Living Will.

I am in full command of my faculties. I make this Living Will in order to furnish clear and convincing proof of the strength and durability of my determination to forgo life-sustaining treatment in the circumstances described above. I emphasize my firm and settled conviction that I am entitled to forgo such treatment in the exercise of my right to determine the course of my medical treatment. My right to forgo such treatment is paramount to any responsibility of any health care provider or the authority of any court or judge to attempt to force unwanted medical care upon me.

I direct that my family, all physicians, hospitals and other health care providers and any court or judge honor my decision that my life not be artificially extended by mechanical means and that if there is any doubt as to whether or not life-sustaining treatment is to be administered to me after I have sustained substantial and irreversible loss of mental capacity or shall be physically incapable of communicating my health care decisions, such doubt is to be resolved in favor of withholding or withdrawing such treatment.

This Living Will and the directions herein contained may be revoked by me at any time and in any manner. However, no physician, hospital or other health care provider who withholds or withdraws life-sustaining treatment or acts or fails to act with respect to any treatment, service or procedure to diagnose or treat my physical or mental condition in good faith reliance upon this Living Will or upon my personally communicated instructions without actual knowledge that I have countermanded these instructions shall have any liability or responsibility to me, my estate or any other person for having withheld or withdrawn such treatment, or acted or failed to act with respect to any treatment, service or procedure.

I understand that, unless revoked, this Living Will shall remain in effect indefinitely. I revoke any prior Living Will(s) executed by me.

In the event of any conflict between the terms of a Health Care Proxy of mine and this my Living Will, the terms of my Health Care Proxy shall be controlling.

This Living Will shall not in any way limit the powers or authority given to any health care agent, alternate or successor health care agent.

I have discussed this Living Will with ___, residing at ___ (phone ___), and if any interpretation of this Living Will is ever necessary, said person is authorized to interpret it. If ___ shall be or become unable, unwilling or unavailable to interpret this Living Will, I have also discussed this Living Will with ___, residing at ____ (phone ____), and if any interpretation of this Living Will is ever necessary, said person is authorized to interpret it.

This Living Will is intended to be valid in any jurisdiction in which it is presented.

If any provision contained in this Living Will is determined to be invalid or unenforceable, such invalid or unenforceable provision shall not affect the validity or enforceability of the other provisions contained in this Living Will.

BY SIGNING THIS DOCUMENT I INDICATE THAT I AM EMOTIONALLY AND MENTALLY COMPETENT TO EXECUTE THIS LIVING WILL, THAT I UNDERSTAND ITS CONTENTS AND ITS EFFECT AND SIGN IT AFTER CAREFUL DELIBERATION.

Signature: ____________________________________
Name:
Address:
Date:

DECLARATION OF WITNESSES

I declare that the person who signed the within Living Will dated the 1st day of June, 2004, did so in my presence and is personally known to me, is 18 years of age or older, appears to be of sound mind and executed this Living Will willingly and free from duress, fraud and undue influence.

I am 18 years of age or older and to the best of my knowledge have not been appointed as the interpreter or alternate interpreter of this Living Will, as health care agent or alternate health care agent by the person who signed this Living Will, nor am I the person's health care physician,

provider or an operator, administrator or employee of said person's health care provider or health care facility in which said person is a patient. I further declare that I am not the guardian, committee or conservator of said person and I am not related to the person who signed this Living Will by blood, marriage or adoption, and, to the best of my knowledge, I am not a creditor of said person nor entitled to any part of said person's estate under a Will now existing or by operation of law, nor do I have a claim against any portion of the estate of said person. To the best of my knowledge, I am not a beneficiary of a life insurance policy of said person and I am not financially responsible for the medical care or any other care of said person.

WITNESSES:

Signature: ____

Printed Name: ____

Address: ____

Signature: ____

Printed Name: ____

Address: ____

The Health Care Proxy differs materially from a Living Will in that a Health Care Proxy appoints an agent to evaluate and render medical decisions on behalf of the principal in the event that the principal cannot do so competently. Unlike the Living Will, a Proxy has been created through statutory provisions of New York Public Health Law Article 29-C.

A Health Care Proxy should contain specific and clear instructions concerning health care decisions. It should also include any limitations on the agent's authority as well when or under what conditions the agent's authority expires.

Under Public Health Law §2981(3)(a), operators, administrators or employees of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital. These limitations are subject to §2981(B) which provides exceptions in the event the prohibited agents (noted in §2981(3)(a)) are "related to the principal by blood, marriage or adoption."

Under the Public Health Law, a competent adult may appoint a health care agent by a health care proxy, signed and dated by such person in the presence of two adult witnesses who shall also sign the proxy. Section 2981(2)(a) also provides that the appointed health care agent will not qualify as an "adult witness". The Health Care Proxy form must include a statement by the witnesses that the principal appeared to execute the proxy willingly and free from duress. If the principal resides in a mental health facility (within the meaning of New York Mental Hygiene Law § 1.03(10)), at least one of the witnesses must not be affiliated with the facility and, if the facility is a hospital, at least one of the witnesses must be a qualified psychiatrist.

The principal may revoke the Health Care Proxy by notifying the agent or health care provider orally or in writing, or by taking another action that evidences a specific intent to revoke the proxy. A Health Care Proxy is also revoked upon execution by the principal of a subsequent health care proxy. The appointment of a spouse as agent is revoked by a divorce or legal separation unless the principal directs otherwise.

New York State has adopted § 2990 of the Public Health Law which simplifies some of the complexity in determining when an individual's Health Care Proxy that is created in a state other than New York will be recognized. Section 2990 provides, that "a health care proxy or

similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered valid" under New York State Law.

Article 29 of the Public Health Law enumerates the definitions of the specific terms used through Article 29 when discussing the applicability and enforceability of a Health Care Proxy. Public Health Law §2981 provides as follows:

"1. Authority to appoint agent; presumption of competence.

(a) A competent adult may appoint a health care agent in accordance with the terms of this article.

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law or article seventeen-A of the surrogate's court procedure act.

2. Health care proxy; execution; witnesses.

(a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

(b) For persons who reside in a mental hygiene facility operated or licensed by the office of mental health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law, at least one witness shall be a qualified psychiatrist.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office of mental retardation and developmental disabilities, at least one witness shall be an

individual who is not affiliated with the facility and at least one witness shall be a physician or clinical psychologist who either is employed by a school named in section 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office of mental retardation and developmental disabilities, or who has been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent.

(a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician is appointed agent, the physician shall not act as the patient's attending physician after the authority under the health care proxy commences, unless the physician declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions.

5. Contents and form of health care proxy.

(a) The health care proxy shall:

(i) identify the principal and agent; and

(ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.

(b) The health care proxy may include the principal's wishes or instructions about health care decisions, and limitations upon the agent's authority.

(c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy shall not expire while the principal lacks capacity.

(d) A health care proxy may, but need not, be in the following form:

Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about

artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

____

____

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely):

This proxy shall expire: (Specify date or condition)

Signature: ____

Address: ____

Date: ____

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness: ____

Address: ____

Witness: ____

Address: ____

(e) The health care proxy shall not be executed on a form or other writing that also includes the execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a delegation of the authority to make health care decisions executed prior to the enactment of this article.

(f) A health care proxy may include the principal's wishes or instructions regarding organ and tissue donation. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

6. Alternate agent.

(a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending physician has determined in a writing signed by the physician (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending physician shall record the change in agent and the reasons therefor in the principal's medical record."

HEALTH CARE PROXY EXAMPLE

I, ____, residing at ___, hereby appoint ___, residing at ___, as my health care agent, to make any and all health care decisions for me, except to the extent I state otherwise. This Health Care Proxy shall take effect in the event I become unable to make my own health care decisions.

I make the following written declaration as a set of instructions to my health care agent, and, furthermore, as a statement of my wishes and intentions regarding future care:

In the event that I sustain substantial and irreversible loss of mental capacity, and there is doubt as to whether or not life sustaining treatment is to be administered to me, I direct that my health care agent, and all physicians, hospitals and other health care providers, abide by my decision that my life not be artificially extended by mechanical means, and to resolve any such doubt in favor of withholding or withdrawing life sustaining treatment.

Without limiting the generality of the unrestricted authority conferred by my health care proxy, I affirm that I do not draw a distinction between nutrition and hydration and any other kind of life-sustaining treatment, and I expressly authorize my health care agent, in his or her unrestricted discretion, to direct that nutrition and hydration be withdrawn or withheld from me when my agent believes that it is in my best interest to do so. Furthermore, I hereby state my instructions, and direct that my health care agent communicate said instructions, that if there is no reasonable hope that I will regain mental capacity all life sustaining treatment (including, without limitation, administration of nourishment and liquids intravenously or by tubes connected to my digestive tract) shall be withheld or withdrawn, whether or not I am conscious or free from pain, and that no cardiopulmonary resuscitation shall thereafter be administered to me if I sustain cardiac or pulmonary arrest. I recognize that when life sustaining treatment is withheld or withdrawn from me, I will surely die of dehydration and malnutrition within days or weeks. I further state and direct my said health care agent to communicate my

instructions that all available medication for the relief of pain and for my comfort shall be administered to me after life sustaining treatment is withheld or withdrawn even if I am rendered unconscious and my life is shortened thereby.

I have made this instrument while in full command of my faculties in order to state my intentions, and to furnish my health care agent with written instructions, in clear and convincing language, of the strength and durability of my determination to forego life sustaining treatment in the circumstances described herein, and in any circumstances whereby my health care agent determines that I would wish to do so. It is my firm and settled conviction that I am entitled to forego such treatment in the exercise of my right to determine the course of my medical treatment, and my belief that my right to forego such treatment is paramount to any responsibility of any health care provider or the authority of any Court or judge to attempt to force unwanted medical care upon me.

I do not wish to be maintained on mechanical life support if my prognosis is deemed persistently negative. However, if I have donated any organ or organ system which can be used to save or enhance the life of another person, then my body may be maintained on artificial or mechanical life support if I have progressed to a brain death, so that I may become an organ donor.

I direct my agent to make health care decisions in accordance with my wishes as stated above, or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

I intend for my agent to be treated as I would be with respect to my rights regarding the use and disclosure of in individually identifiable health information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPPA), 42 USC 1320d and 45 CFR 160-164. I authorize any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company and the Medical Information Bureau Inc. or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services to give, disclose and release to my agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical

or mental health condition, to include all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness and drug or alcohol abuse.

The authority given my agent shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given my agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint as my health care agent ____, residing at ____ (phone ___).

I understand that, unless I revoke it, this proxy shall remain in effect indefinitely.

Signed this ______________, 2009.

____

I declare that the person who signed or asked another to sign this document is personally known to me, that he or she signed or asked another to sign this document in my presence, and that he or she appears to be of sound mind and under no duress, fraud, or undue influence. I am not the person appointed as agent by this document.

First Witness: _____________________________________

Address: _____________________________________

Second Witness:____________________________________

Address: _____________________________________

DISPOSITION OF REMAINS

On June 7, 2006, Governor Pataki signed into law (New York Laws, 2006, Chapter 76) a bill which amends Public Health Law § 4201 to provide for the disposition of one's remains by designating a person in a written instrument to act as an agent for such purpose. The amendment is likely to reduce or eliminate disputes concerning the disposition of a decedent's remains. The new law goes into effect August 2, 2006.

The statute now provides an order of priority of those individuals who shall have control over the disposition of a decedent's remains. It also sets forth the mechanism for making a designation and provides a model form for such purpose.

A domestic partner is included among the persons who shall have control over the disposition of the decedent's remains. This is a significant change in our law as it is one of few areas of New York Law to recognize domestic partners.

The new statute, however, is not without flaws. For example, certain provisions in subdivision four could be misinterpreted to mean that a subsequently written instrument may revoke dispositions in non-New York wills and in New York wills that predate the statute, but not in New York wills that postdate the statute. Also, a reference in subdivision five to "directions . . . in a will made pursuant to subdivision three" is confusing because subdivision three does not address wills. Practitioners should also be aware that the cross-reference in paragraph (b) of subdivision four to subdivision five is an error. This cross-reference should be to subdivision six.

Sample Form:

APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS

I, ______________________________being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be controlled by ______________________________________.

With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

SPECIAL DIRECTIONS: Set forth below are any special directions limiting the power granted to my agent as well as any instructions or wishes desired to be followed in the disposition of my remains:

____

____

Indicate below if you have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law for funeral merchandise or service in advance of need:

_____ No, I have not entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

_____ Yes, I have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

____

(Name of funeral firm with which you entered into a pre-funded pre-need funeral agreement to provide merchandise and/or services)

AGENT:

Name: ____

Address: ____

Telephone Number: ____

SUCCESSORS:

If my agent dies, resigns, or is unable to act, I hereby appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

1. First Successor

Name: ____

Address: ____

Telephone Number: ____

2. Second Successor

Name: ____

Address: ____

Telephone Number: ____

DURATION: This appointment becomes effective upon my death.

PRIOR APPOINTMENT REVOKED: I hereby revoke any prior appointment of any person to control the disposition of my remains.

Signed this _______ day of ___________2009.

____

Name

Statement by Witness: I declare that the person who executed this document is personally known to me and appears to be of sound mind and acting of his or her free will. He or she signed (or asked another to sign for him or her) this document in my presence.

____

Witness Name
Witness Address

____

Witness Name
Witness Address

ACCEPTANCE AND ASSUMPTION BY AGENT:

1. I have no reason to believe there has been a revocation of this appointment to control disposition of remains.

2. I hereby accept this appointment signed this ____ day of __________, 2009.

____
Agent's Name

REVOCABLE TRUSTS

Refer to outline by David Reid in Section 2B

NEW YORK STATE BAR ASSOCIATION

NEW YORK MEDICAID

Bernard A. Krooks, J.D., CPA, LL.M., CELA

Littman Krooks LLP

655 Third Avenue
New York, New York 10017
212.490.2020

399 Knollwood Road
White Plains, New York 10603
914.684.2100

300 Westage Business Center Drive
Fishkill, New York 12524
845.896.1106

www.littmankrooks.com

I. OVERVIEW OF THE MEDICAID PROGRAM

Medicaid is a joint Federal-state program established by Federal law in 1965.[1] In 1966, New York State adopted the Medicaid program by statute.[2]

New York State elected to implement a joint state-county Medicaid program that is supervised by the New York State Department of Health and administered by each of the counties in the State, including New York City, for a total of 58 social services districts in the state.

II. ELIGIBILITY REQUIREMENTS

Medicaid may be authorized for individuals who are:

A. Medically Needy

B. Categorically Needy

C. Residents/U.S. Citizens

D. Financially Needy

Medicaid is a means-tested program with limitations on income and resources established by the State. The income and resource levels are adjusted annually.

1. Income

The current monthly income limit for a family of one is $767 per month. Income is broadly interpreted and includes earned and unearned income and most government benefits.[3]

2. Resources and Prepaid Funeral Contracts

A family of one is entitled to a "luxury" account of $13,800. In addition, an individual may prepay funeral arrangements, provided that such funds are placed into an irrevocable trust arrangement by the funeral home. Exempt

[1] 42 U.S.C. § 1396 et seq., 42 C.F.R. § 430 et seq.

[2] Soc.Serv.L. § 363 et seq., 18 NYCRR §§ 360.1 et seq.

[3] 18 NYCRR § 360-4.2.

from the resource limit are the homestead (subject to the Deficit Reduction Act of 2005 limitations discussed on page 27), certain pre-paid funeral expenses, personal and household property, and one automobile.

3. "Spend-down" State

New York State is a spend-down state. If a person has income in excess of $767 per month, but has medical bills that are greater than the excess, Medicaid will pay the amount beyond the excess or overage up to the Medicaid rate. If the Medicaid recipient is a resident of a nursing home, all of his/her income must be spent on the cost of the care, except for $50, which will be deposited into a personal incidental account at the nursing facility (certain other deductions may apply).

III. ASSET TRANSFERS

Any transfers of assets made by an individual or his/her spouse for less than fair market value ("FMV") within the sixty (60) months immediately preceding the date the person applies for Medicaid are subject to the penalty period rules for nursing home care.[4]

A. Definition of Assets

The transfer of assets rules apply to both the income and assets of the individual and the individual's spouse. "Assets," for purposes of the transfer penalty rules, includes income or resources that the individual or the individual's spouse is entitled to, but does not receive because of any action or inaction by the following:

1. The individual or the individual's spouse;

2. A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or

3. Any person, including a court or administrative body, acting at the direction of or upon the request of the individual or the individual's spouse.[5]

Examples of actions that would cause income or resources not to be received are:

a. Irrevocably waiving pension income;

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4 Social Security Act § 1917, 42 U.S.C. § 1396p, Soc.Serv.L. § 366.5., N.Y.S. Department of Social Services Administrative Directive: 06 OMM/ADM-5.

5 N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

b. Renouncing an inheritance or refusing to assert one's right of election against an inheritance;

c. Not accepting or accessing personal injury settlements (although individuals are not required to initiate litigation);

d. Settling a tort (personal injury) action so as to have the defendant place settlement funds directly into a trust or similar device to be held for the benefit of the individual; or

e. Refusing without good cause to take action to obtain a court-ordered payment that is not being paid, such as an alimony award or other judgment against an individual.

B. Jointly-Held Property

Jointly-held property is generally deemed available to the individual to the extent of his/her interest in the property. Absent documentary evidence indicating the contrary, it is presumed that all joint owners possess equal shares. Certain accounts such as brokerage accounts which traditionally require two signatures for withdrawals, are presumed to be valid joint accounts with the Medicaid applicant only owning one-half of the account.

1. Financial Institution Account Owned by Individual

Ownership of financial institution accounts (including savings, checking, and time deposit or certificates of deposit accounts) must be determined as indicated below.

a. Individual is the Sole Owner

As long as the individual is designated as the sole owner by the account title and can withdraw funds and use them for his or her support and maintenance, the individual is presumed to own all of the funds in the account, regardless of their source.

b. Individual is the Joint Owner

Absent evidence to the contrary, if an individual is a joint account holder, it is presumed that all of the funds in the account belong to the individual. This presumption can be rebutted.

2. Conversion of Individual's Assets to Jointly Held Assets

When an asset belonging to an individual is jointly held in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset is considered to be transferred and causing a penalty period when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset. Merely placing another person's name on an account or asset as a joint owner does not necessarily constitute a transfer of assets. Merely adding another person's name to the account when s/he has never made any deposits into the account will not be deemed a transfer of assets for eligibility purposes. However, this account will not be considered a valid joint account either. The individual may still possess ownership rights to the account or asset and have the right to withdraw all of the funds in the account at any time. However, actual withdrawal of funds from the account or removal of the asset by the other person would remove the funds or property from the control of the individual and so would constitute a transfer of assets. Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (i.e., the addition of another person's name requires that the person agree to the sale or disposal of the asset, where no such agreement was necessary before), such placement would constitute a transfer of assets.

C. The Look-back Period and the Penalty Period

The Deficit Reduction Act (DRA) of 2005

On February 8, 2006, the Deficit Reduction Act of 2005 (the "DRA") was signed into law. On July 20, 2006, the New York State Department of Health issued an Administrative Directive, which detailed how New York would implement the DRA effective August 1, 2006.

The DRA contains three major changes to Medicaid eligibility rules, along with many other significant changes to existing Federal Medicaid laws.

1. Look-back Period

When an individual in receipt of or applying for nursing facility services transfers assets, the look-back date is 60 months (pre-DRA, the look-back period was 36 months) prior to the first day of the month in which the individual requested Medicaid nursing home coverage.[5] However, in New York, in practice, the local social services districts will continue to only

request asset documentation for the past 36 month (60 months for certain trusts) until February 1, 2009. Beginning February 1, 2009, the local social services districts will require asset documentation for the past 37 months. The look-back period will increase thereafter by one-month increments until February 2011, at which time the full 60-month look-back period will be in effect for all asset transfers.

2. Penalty Period

The penalty period resulting from a transfer of assets for nursing home care is determined by a calculation based on the uncompensated value of the assets transferred. The enactment of DRA has changed the way in which transfer of asset penalties are calculated.

a. Calculation of Penalty Period

To establish the penalty period, the total value of all uncompensated transfers is divided by the average monthly cost of nursing home care as established by New York State. The State is divided into seven districts, and the average cost of nursing home care depends on the county of residence. The number of months of ineligibility is determined by dividing the total value of the assets transferred by the appropriate monthly figure. For example, a transfer of $200,000, where the average nursing home cost in the region is $10,000, would result in a penalty period of twenty (20) months.

b. Regional Rates

For purposes of calculating the penalty period, the cost of care to a private patient in the region in which the individual is institutionalized is presumed to be 120% of the average Medicaid rate for nursing facility care for the facilities within the region. The Regulations provide that the average regional rate will be updated on the first of January every year by the New York State Department of Social Services.[6] The actual average cost of care to a private patient for nursing facility services in the various regions of New York is substantially higher than the regional rates set forth in the annual Administrative Directive ("ADM") issued by the Department, inasmuch as the actual cost of nursing home care is substantially higher than 120% of the average Medicaid rate.

(i.) 2011 Regional Rates

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[6] 18 NYCRR § 360-4.4(c)(2)(iv)(a).

Central	$7,688
Long Island (Nassau and Suffolk)	$11,445
New York City (5 Boroughs)	$10,578
Northeastern	$8,323
Northern Metropolitan	$10,105
Rochester	$8,942
Western	$7,863

c. Transfers by a Spouse

For married couples, a transfer by one spouse to a third person will affect the nursing home eligibility of the other spouse if the transfer was made prior to the spouse's application for benefits. Thus, if either spouse applies for nursing home care, transfers by the applicant and/or the non-applicant spouse will be applied to the applicant.

d. No Cap

There is no cap on the penalty period.[7] If an applicant applies for Medicaid fifty-nine (59) months after a transfer of $850,000, he or she would be ineligible for 88 months. If the applicant had waited until month sixty-one (61) and then applied for Medicaid, he or she would have been eligible, as the transfer of assets would have been beyond the look-back period. The look-back period functions as a "statute of limitations," but any application filed within the look-back period can result in a penalty period that is longer than the look-back period.

e. Partial Month Penalty

Prior to the enactment of DRA, monthly penalty periods were "rounded down." For example, if an uncompensated transfer of assets generated a 5.9 month penalty period, the resulting period of ineligibility would be five months. DRA requires states to impose partial month penalty periods. A 5.9-month penalty period therefore would result in approximately a 5-month and 27 day period of ineligibility. The DRA mandates that States can no longer round down partial penalty periods.

f. Apportionment of Penalty Period

7 18 NYCRR § 360-4.4(c)(2)(iv).

When either spouse makes a prohibited transfer that results in a penalty period for the institutionalized spouse, and the community spouse subsequently enters a nursing facility, the penalty period must be apportioned equally between the spouses.[8] If one spouse is no longer subject to a penalty (e.g., the spouse dies), the remaining

penalty period for both spouses must be applied to the remaining spouse.[9]

g. <u>Commencement Date of Penalty Period</u>

The penalty period for uncompensated transfers for nursing home care will not begin until the later of (1) the month following the month in which the asset transfer is made or (2) the date on which an individual is both receiving nursing home care and whose application for Medicaid would be approved but for the imposition of a penalty period at that time. Therefore, the applicant must be otherwise eligible (ie, less than $13,800 in assets). Pre-DRA, a penalty period commenced on the first day of the month following the month in which the transfer was made.

h. <u>Continuation of Penalty Period</u>

A penalty period imposed for a transfer of assets runs continuously from the first date of the penalty period regardless of whether the individual continues to receive nursing facility services..

Practitioners should be aware that if during the interview with the local social services district it becomes known that the individual had previously applied for Medicaid in another district, the former district must be contacted to determine if it had any knowledge of a possible transfer or to determine whether the Individual is currently in a penalty period.[10]

Practitioners also should be aware that after the submission of a written application and prior to notification by the social services district of the applicant's eligibility determination, the applicant may withdraw his or her request for Medicaid. Once the applicant is notified in writing of the Medicaid eligibility determination, the

[8] 18 NYCRR § 360-4.4(c)(2)(vii).

[9] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

[10] *Id.*

application may *not* be withdrawn, and any penalty period imposed will remain in effect, even if the applicant subsequently re-applies for Medicaid.[11]

i. Multiple Transfers

For multiple transfers made after February 8, 2006 within the 60-month look-back period in which assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, the penalty period is calculated by adding together the uncompensated value of all assets transferred, and dividing this total by the Medicaid regional rate.

D. Annuities

For all annuities purchased on or after February 8, 2006, the State must be named the primary remainder beneficiary. In the case where there is a community spouse and/or a minor or disabled child, the State must be named the secondary beneficiary.[12] In addition, unless the annuity is held in a retirement account, it must be irrevocable and non-assignable, actuarially sound, and provide for payments in equal amounts during the term of the annuity with no deferral or balloon payments made, in order to not be considered a transfer of assets for Medicaid eligibility purposes.

Community spouses may continue to purchase annuities to decrease their assets in excess of the CSRA post DRA. However, the annuity purchased by the community spouse must be disclosed to Medicaid upon the application of the institutionalized spouse and the State must be named as the primary beneficiary with respect to any benefits paid to the institutional spouse.

E. Life Estates

1. Definitions

a. Life Estate

A life estate is a limited interest in real property. A life estate holder does not have full title to the property, but has the use of the property

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11 *Id.*

12 N.Y.S. Department of Social Services Administrative Directive: 06 OMM/ADM-5

for his or her lifetime, or for a specified period. Generally, life estates are in the form of a life lease on property that the person is using, or has used, for a homestead.

b. Value of a Life Estate

Social services districts must use a reasonable method of calculating the value of a life estate, based on the current fair market value of the property and the age of the person. A life estate and remainder interest table is published by CMS in its State Medicaid Manual. This table sets forth percentages of fair market value corresponding to the values of the life estate and the remainder interest, based on the age of the person possessing the life estate. Districts may, but are not required, to use this table in calculating the value of life estates and remainder interests.

c. Value of the Remainder Interest

The value of the remainder interest is the current market value of the property less the value of the life estate.

d. Remainderperson

A remainderperson is an individual who has the right to possession or ownership of the property after the life estate holder dies or surrenders the life estate.[13]

2. Transfers Involving Life Estates

Transferring property within the look-back, while retaining a life estate, is a partially uncompensated transfer. The uncompensated value of the transfer is the value of the remainder interest at the time the life estate is created. If the remainderperson of a life estate is an individual to whom the property could be transferred without penalty, the establishment of the life estate is not a prohibited transfer.

If the holder of a life estate transfers the life estate during the look-back period, it must be determined if FMV was received for the life use. If FMV was not received, a transfer penalty must be imposed.

When an individual both transfers property (retaining a life estate) and transfers the life estate interest within the look-back period, the uncompensated value of the transfers are the value of the remainder interest

[13] *Id.*

at the time the life estate is created plus the value of the life estate at the time it was transferred.[14]

3. Availability of a Life Estate as a Resource

For the purpose of determining an A/R's net available resources, a life estate will not be considered a countable resource, and no lien may be placed on the life estate.[15] Social services districts cannot require an A/R possessing a life estate to try to liquidate the life estate interest or to rent the life estate property.

If an A/R possessing a life estate sells the life estate interest, the proceeds of this liquidation are a countable resource for purposes of the A/R's MA eligibility. If the A/R sells the life estate interest foe less than fair market value, the uncompensated value of the life estate interest is the amount transferred for purposes of the MA transfer-of-assets rule.

If an A/R possessing a life estate rents the life estate property, any net rental income received is counted in determining eligibility. If under the terms of the life estate, the life estate holder must pay taxes and maintenance, these costs can be deducted from the rental income. Conversely, if the life estate holder does not have to pay taxes or maintenance, a gross rental figure must be used.

The provisions of 96 ADM-8 supersede any previous instructions or policies issued by the Department of Social Services with respect to the MA treatment of life estates.[16]

F. New York State Partnership for Long Term Care

Under the New York State Partnership for Long Term Care, resources are exempt for Medicaid eligibility purposes. Therefore, a transfer of resources by those individuals who have purchased long-term care insurance policies under this program (and have received three years of nursing home coverage, or six years of home care services, or a combination of nursing home care and home care services where one nursing home day equals 2 home care days) will have no effect on their eligibility for nursing facility services. However, their income must still be contributed towards their cost of care.

14 *Id.*
15 N.Y.S Department of Social Services Administrative Directive: 03 OMM/ADM-1
16 *Id*

An alternative Partnership policy is the "Dollar-for-Dollar Policy" which allows for less than three years of insurance coverage. The policy can provide a minimum of twelve months of coverage (as opposed to the 36 months for conventional Partnership policies), with Medicaid asset protection limited to the policy's coverage. For example, if the Partnership policy pays for $100,000 in benefits, the policy owner will be able to retain $100,000 in assets when s/he applies for Medicaid benefits after the policy benefits have been exhausted. Any additional assets above the covered amount protected under this policy, would have to be transferred/spent down before becoming eligible for Medicaid benefits.

G. Exceptions to the Transfer Penalty Rules

Exceptions to the application of transfer of assets penalty rules are:

1. The asset transferred is the individual's home, and title to the home is transferred to:

   a. The spouse of the individual;

   b. A child of the individual who is under age 21;

   c. A child of the individual who is certified blind or certified disabled, regardless of age;

   d. The sibling of the individual who has an equity interest in the home, and who has been residing in the home and using it as his or her primary lawful residence for a period of at least one year immediately before the date the individual becomes institutionalized; or

   e. A son or daughter of the individual (other than a child as described above) who was residing in the homestead, using it as his or her primary lawful residence for a period of at least two years immediately before the date the individual becomes institutionalized, and who provided care to the individual, which permitted the individual to reside at home rather than an institution or facility.[17]

2. An asset other than the individual's homestead was transferred:

   a. To the individual's spouse, or to another for the sole benefit of the individual's spouse;

   b. From the individual's spouse to another for the sole benefit of the individual's spouse;[18]

   c. To the individual's child who is certified blind or certified disabled; or

   d. To a trust established solely for the benefit of an individual under 65 years of age who is disabled.[19]

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[17] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

[18] 18 NYCRR § 360-4.4(c)(2)(iii)(b)(1)(ii); Soc.Serv.L. § 366.5(d)(3)(i)(B).

[19] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

3. The individual or spouse intended to dispose of the assets either at FMV or for other valuable consideration.

   In determining whether an individual or the individual's spouse intended to dispose of an asset for FMV or for other valuable consideration, the individual must establish the circumstances that caused the asset to be transferred for less than FMV. Generally, the individual would be required to provide written evidence of attempts to dispose of the asset for FMV, as well as evidence to support the value at which the assets were disposed.[20]

4. The assets were transferred exclusively for a purpose other than to qualify for MA.

   The individual must establish that the asset was transferred for a purpose other than to qualify for MA coverage for nursing facility services. Factual circumstances supporting a contention that the assets were transferred for a purpose other than to qualify for MA include, but are not limited to: the unexpected onset of a serious medical condition subsequent to the transfer; the unexpected loss, subsequent to the transfer, of income or resources that would have been sufficient to pay for nursing facilities; or the existence of a court order specifically requiring the transfer of a certain amount of assets.

   Practitioners should be aware that according to 96 ADM-8, at the time of the personal interview, the individual must be given the opportunity to establish that the transfer was made for a purpose other than to qualify for MA coverage for nursing facility services. Social services districts must not take any adverse action on an MA-only individual who has transferred assets without first advising the client in writing of his or her right to make such a showing.[21]

6. Imposition of a penalty would work an undue hardship.

   Undue hardship exists when:

   1. The individual applying for nursing facility services is otherwise eligible for MA;

   2. Despite his or her best efforts, as determined by the social services district, the individual or the individual's spouse is unable to have the

[20] *Id.*
[21] *Id.*

transferred asset(s) returned or to receive FMV for the asset or to void the trust; and

3. The institutionalized individual is unable to obtain appropriate medical care such that the individual's health or life would be endangered without the provision of MS for nursing facility services or for home or community-based services furnished under a waiver granted under Section 1915(c) or (d) of the Social Security Act.[22]

Undue hardship cannot be claimed:

1. If the client failed to fully cooperate, to the best of his or her ability, as determined by the social services district, in having all of the transferred assets returned or a trust declared void. Cooperation may include, but is not limited to: (i) assisting in providing all legal records pertaining to the transfer or creation of the trust; and (ii) assisting the district, wherever possible, in providing information regarding the transfer amount, including to whom the asset was transferred as well as any documents to support the transfer or any other information related to the circumstances of the transfer; or

2. If after payment of medical expenses, the individual's or couple's income and/or resources are at or above the allowable MA exemption standards for a household of the same size; or

3. If the only undue hardship that would result is the individual's or the individual's spouse's inability to maintain a pre-existing life style.[23]

DRA now requires states to have a hardship waiver procedure in place if a hardship is imposed on the Medicaid applicant as a result of the transfer of asset provisions. In order to apply, the individual must be deprived of medical care which would endanger his health or life, or he must be deprived of food, clothing, shelter or other necessities of life. There also is a provision pursuant to which a facility in which someone is institutionalized my file a hardship waiver on that person's behalf. While the hardship application is pending, the state may pay for up to thirty days of the cost of the individual's care.

IV. Spousal Planning

[22] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

[23] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

[24] 42 U.S.C. § 1396r-5(d).

A. Rules Protecting the Community Spouse

1. Rules Regarding Income

Under the Medicare Catastrophic Coverage Act ("MCAA"), states are given the discretion to establish an income allowance for the community spouse to be adjusted every year for inflation.[24] New York has consistently chosen the highest income allowance, which currently is $2,739 per month.[25]

Specifically, the community spouse is allowed to have Minimum Monthly Maintenance Needs Allowance ("MMMNA") (the maximum MMMNA in 2009 is $2,739). If the community spouse's income falls below the MMMNA, the community spouse is entitled to receive total income up to the MMMNA amount by deducting income of the institutionalized spouse, but only to the extent such income is actually made available to (or for the benefit of) the community spouse.[26] The MMMNA is equal to or exceeds the following:

a. A sufficient amount of income to increase the community spouse's income to 1/12 of the income official poverty level (as defined by the Office of Management and Budget and as revised annually) for a family of two;[27] and

b. An excess shelter allowance to cover high housing costs. This allowance is calculated by adding:

   i. The spouse's expenses for rent or mortgage payments (principal and interest), taxes, insurance, and (if applicable) condominium or cooperative maintenance charges; and

   ii. The standard utility allowance used by some states for the Food Stamp Program or the spouse's actual utility expenses; and

   iii. If the sum of (a) and (b) exceeds 30 percent of the income allowance, the excess is considered an additional amount that the community spouse may retain from his or her own income or receive from the institutionalized spouse's income.[28]

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25 Soc.Serv.L. § 366-c.2(h).

26 42 U.S.C. § 1396r-5(d)(1)(B); Soc.Serv.L. § 366-c.4(b).

27 42 U.S.C. § 1396r-5(d)(1)(B); Soc.Serv.L. § 366-c.2(h)

28 Soc.Serv.L. § 366-c.2(k).

If the community spouse requires income in excess of the MMMNA, and if a state court orders such support, the MMMNA will be increased up to the amount set by the court.[29] The standard in New York for court-ordered support is the same as the standard used at a fair hearing.

At a fair hearing, the community spouse must show that he or she needs income above the MMMNA because of "exceptional circumstances resulting in significant financial distress."[30]

German war reparation payments received by the institutionalized spouse do not count as income.[31]

Besides providing for the community spouse, Congress has also provided for allocations of the institutionalized spouse's income by deducing the following amounts:

a. Personal Needs Allowance for the Institutionalized Spouse;[32]

b. Community spouse monthly income allowance for the community spouse "but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse;[33]

c. Family allowance for each "family member" (i.e., minor or dependent parents, or dependent siblings of either spouse who reside with the community spouse). This allowance equals the amount by which one-third of the state minimum allowance exceeds that person's actual monthly income;[34] and

d. Medical expenses for the institutionalized spouse.[35]

Except as provided in the following paragraph, any income received by the community spouse is not considered available to the institutionalized spouse

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29 42 U.S.C. § 1396r-5(d)(5), Soc.Serv.L. § 366-c.2(g).

30 42 U.S.C. § 1396r-5(e)(2)(B), Soc.Serv.L. § 366-c.8(b).

31 42 U.S.C. § 1396a(r).

32 42 U.S.C. § 1396r-5(d)(1)(A), Soc.Serv.L. § 366-c.4(a), 18 N.Y.C.R.R. § 360-4.10(b)(4)(ii).

33 42 U.S.C. § 1396r-5(d)(1)(B), Soc.Serv.L. § 366-c.4(b), 18 N.Y.C.R.R. § 360-4.10(b)(4)(iii).

34 42 U.S.C. § 1396r-5(d)(1)(C), Soc.Serv.L. § 366-c.4(c), 18 N.Y.C.R.R. § 360-4.10(b)(4)(iii).

35 42 U.S.C. § 1396r-5(d)(1)(D), Soc.Serv.L. § 366-c.4(d), 18 N.Y.C.R.R. § 360-4.10(b)(4)(iv).

36 42 U.S.C. § 1396r-5(b)(1).

37 These rules apply except as otherwise provided in 42 U.S.C. § 1396r-5(b)(2)(A)(iii) and are applicable notwithstanding any state laws regarding community property or the division of marital property. 42 U.S.C. § 1396r-5(b)(2).

for purposes of Medicaid eligibility.[36] Social Services Law § 366-c.3(a) provides that this presumption applies unless established by a preponderance of the evidence to the contrary.

After the institutionalized spouse is deemed eligible to receive Medical Assistance, Congress has established certain rules to determine how income is apportioned between the community spouse and the institutionalized spouse.[37]

a. Nontrust Property[38]

i. If income is paid solely in the name of the institutionalized spouse or solely in the name of the community spouse, the income is deemed available only to that particular spouse.[39]

ii. If income is paid in the names of the institutionalized spouse and the community spouse, one-half of the income is deemed available to each of them.[40]

iii. If income is paid or distributed in the names of the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the spouse's interest (or, if income is paid with respect to both spouse's and no such interest is specified, one-half of the joint interest is deemed available to each spouse.[41]

b. Trust Property

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38 18 NYCRR § 360-4.10(b)(1) provides that "[a]t any time after the commencement of a continuous period of institutionalization, an assessment of the amount of the community spouse monthly income allowance and/or family allowance may be requested in accordance with...this section." Note that no income of the community spouse shall be considered available to the institutionalized spouse except as provided for in this section. 18 NYCRR § 360-4.10(b)(2)(i).

39 42 U.S.C. § 1396r-5(b)(2)(A)(i), Soc.Serv.L. § 366.3(b), 18 NYCRR § 360-4.10(b)(ii).

40 42 U.S.C. § 1396r-5(b)(2)(A)(ii), Soc.Serv.L. § 366.3(c), 18 NYCRR § 360-4.10(b)(iii).

41 42 U.S.C. § 1396r-5(b), Soc.Serv.L. § 366.3(d), 18 NYCRR § 360-4.10(b)(iv).

Income is deemed available to each spouse as indicated in the trust agreement[42] or if there are no specific provisions in the trust agreement regarding allocation of income, the following rules apply:

i. If income is paid solely to the institutionalized spouse or solely to the community spouse, the income shall be deemed available only to that particular spouse;

ii. If income is paid to both the institutionalized spouse and the community spouse, one-half of the income shall be deemed available to each of them;[43] or

iii. If income is paid to the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the particular spouse's interest (or, if income is paid with respect to both spouses and no such interest is specified, one-half of the joint interest is deemed available to each spouse.[44]

Under New York State law, income from a trust shall be considered available to each spouse in accordance with the provision of the trust instrument, or, in the absence of a specific trust provision allocating income, in accordance with the provisions of subparagraphs (ii) through (iv) of 18 N.Y.C.R.R. 360-4.10(b)(2)(v).

In the situation where income is not paid from a trust and where no instrument exists to establish ownership interest, subject to the following paragraph, one-half of the income is deemed available to the institutionalized spouse and one-half to the community spouse.[45]

The rules regarding non-trust property and the rules regarding property not held pursuant to an instrument are superseded to the extent that the institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided herein.

Note that pursuant to 18 N.Y.C.R.R. 360-4.10(b)(5);

> the community spouse will be requested to contribute 25 percent of his/her income in excess of the minimum monthly maintenance needs

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[42] 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(I), Soc.Serv.L. § 366.3(e)(i).

[43] 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(II), Soc.Serv.L. § 366.3(e)(i).

[44] 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(III), Soc.Serv.L. § 366.3(e)(i)

[45] 42 U.S.C. § 1396r-5(b)(2)(C), Soc.Serv.L. § 366.3(f), 18 NYCRR § 360-4.10(b)(2)(vi).

> allowances toward the cost of necessary care or assistance for the institutionalized spouse. An institutionalized spouse will not be denied Medicaid because the community spouse refuses or fails to make such income available. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any Medicaid provided to the institutionalized spouse.

Also note that pursuant to 18 N.Y.C.R.R. § 360-4.10(b)(6);

> if either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress...the department must substitute an amount adequate to provide necessary income from the income otherwise available to the institutionalized spouse.

The term "income," as used in the Medicaid context, might not include items that are deemed income for tax purposes or in determining Medicaid eligibility.

2. Rules Regarding Resources

Federal law provides that the community spouse is entitled to a Community Spouse Resource Allowance ("CSRA") to be set by the state and adjusted annually pursuant to the Consumer Price Index.

The computation of the CSRA commenced on the first day the institutionalized spouse begins a period of institutionalization that is likely to last for at least 30 consecutive days.[46] The computation consists of:

a. The total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest; and

b. A spousal share that is equal to one-half of the total value of the resources.[47]

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46 42 U.S.C. § 1396r-5(c)(1).
47 42 U.S.C. § 1396r-5(c)(1)(A)(i)-(ii), Soc.Serv.L. § 366-c.2.

At the commencement of the period of institutionalization of the institutionalized spouse, either the institutionalized spouse or the community spouse may request that the state conduct an assessment of the total value of the resources based upon any relevant documentation provided to the state. The state is required to indicate on the assessment that the spouse is entitled to have a fair hearing under 42 U.S.C. § 1396r-5(e)(2), Soc.Serv.L. § 366-c.7(a).[48]

In attributing resources at the time of the initial Medicaid eligibility determination, the following rules apply:

a. Except as provided in the following paragraph, all the resources held by either the institutionalized spouse, community spouse, or both are deemed available to the institutionalized spouse "to the extent that the value of the resources exceeds the maximum community resource allowance;[49] and

b. Resources are deemed available to an institutionalized spouse; but only to the extent that the amount of such resources exceeds the CSRA pursuant to 42 U.S.C 12396r-5(f)(2)(A).[50]

Prior to 1996, New York State always selected the highest amount permitted by Federal law. In 1996, New York State amended this law by providing that the spouse is entitled to retain resources in an amount equal to the greater of the following:

a. $74,820; or

b. One-half of the total value of the resources of the couple as of the month of the first continuous period of institutionalization of the institutionalized spouse, up to a maximum of $109,560 (for the year 2011).[51] Thus, if the couple has assets in excess of $208,800, the CSRA is $109,560.

For example: If the couple has assets valued at $100,000, the CSRA is $74,820. In other words, the community spouse may keep a minimum of $74,820 if the couple's combined countable resources

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48 42 U.S.C. § 1396r-5(c)(1)(B). Similarly, under state law, "[a]t any time after the commencement of a continuous period of institutionalization, either spouse may request an assessment of the total value of their resources, or may request to be notified of the amounts of the community spouse monthly allowance, the community spouse resource allowance, and the family allowance, and/or the method of computing such amounts."18 NYCRR § 3604.10(c)(1). Either spouse can challenge the determination of the local social services district regarding the foregoing assessments. 18 NYCRR § 360-4.10(c)(1)(iii).

49 18 NYCRR § 360-4.10(c)(2), Soc.Serv.L. § 366-c.5(a).

50 42 U.S.C. § 1396r-5(c)(2)(A)-(B). The only resources that are attributed are countable resources, commonly liquid assets like savings accounts, mutual fund investments, certificates of deposit, etc.. H.Rep No. 100-105, 100th Cong., 2d Sess. 214(1988), reprinted in 1988 U.S.C.CC.A.N. 888.

51 Soc.Serv.L. § 366-c(2)(d). 42 U.S.C. § 1396r-5(c)(1).

are less than or equal to $149,640. If the couple's combined countable resources are greater than $149,640, the community spouse may retain one-half of the countable resources up to a maximum of $109,560. In cases where the date of the first continuous period of institutionalization precedes the first month for which Medicaid eligibility is sought, an assessment of the couple's resources will be made for both the first month of institutionalization *and* the initial month for which Medicaid eligibility is sought.[52]

a. Enhancing the Resource Allowance

42 U.S.C. § 1396r-5(e)(2)(C) provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.[53]

Depending upon the amount of the income of the community spouse, this provision may translate into significant increases in the CSRA.

If the spousal share is deemed insufficient to raise the community spouse's income to the MMMNA, the community spouse should seek a fair hearing[54] or a court order[55] aimed at obtaining a greater share of the institutionalized person's resources.

b. Income First Issue

The Court of Appeals held in *Golf v. New York State Department of Social Services*, 674 N.Y.S.2d 600 (N.Y., Apr. 2, 1998)[56] that the language and purpose of the Federal and New York State Medicaid statutes permit the application of the income first rule by the Department of Social Services. Accordingly, as a result of the Court of Appeals' decision, income of the institutionalized spouse may be attributed to the community spouse before

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52 Soc.Serv.L. § 366-c(7), 42 U.S.C. § 1396r-5(c)(1)(B).

53 *See, also* Soc.Serv.L. § 366-c.8(c).

54 42 U.S.C. § 1396r-5(e)(2)(C).

55 42 U.S.C. § 1396r-5(f)(3).

56 Reversing 634 N.Y.S.2d 581 (4th Dept 1995).

the institutionalized spouse's resources are utilized to raise the income of the community spouse to the level of the MMMNA.

Section 6013 of the DRA mandates the "income first rule" as the only permissible methodology for calculating whether a community spouse is entitled to an increased Community Spouse Resource Allowance for all states. States must allocate the maximum available income from the institutionalized spouse to the community spouse first before granting an increased CSRA.

In recent years, there has been some debate on whether the income first rule violates the anti-alienation provision of the Social Security Act. The anti-alienation provision prohibits the assignment or transfer of right to the payment of Social Security benefits protecting the benefits from "…execution, levy, attachment, garnishment or other legal process…" (42 USC §407(a)). However, the Court of Appeals has held in the *Matter of Tomeck*, 2007 NY SLIP Op 05589 (June 28, 2007) that attributing or deeming the institutionalized spouse's Social Security benefits to the community spouse does not violate the anti-alienation provision. The Court held that although a local department of social services may approve the attribution of the institutionalized spouse's Social Security benefits through a Fair Hearing, it cannot force the institutionalized spouse to turn over the Social Security payment to the community spouse; the Court found that the allocation of the Social Security benefits as part of the community spouse's MMMNA is simply a budgeting methodology. Accordingly, as a result of the Court of Appeals' decision, the institutionalized spouse's Social Security benefits may be attributed to the community spouse as part of the MMMNA.

CMS also provides that if there is still a shortfall in the community spouse's income after including the institutionalized spouse's income, an increased community spouse resource allowance may be established by a fair hearing decision or court order to generate income to bring the community spouse's income up to the MMMNA. CMS provides that states may use any reasonable method to determine the increased resource amount needed to generate the necessary income to make up the MMMNA shortfall, including, but not limited to, considering the cost of a single premium annuity.[57] In most circumstances, the average rate of interest on a bank account is more beneficial for the community spouse than a single premium annuity; however, the local department of social services may select the method most beneficial to the state.

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[57] In Re Lynch vs. Commissioner of the New York State Department .of Health, 2008 NY Slip Op 50015(U), 5871-07 (1-9-2008) and Wojchowski vs. Commissioner of the New York State Department of Health, No. 06-3373-cv (2d Cir. Aug 2, 2007)

B. Exempt Interspousal Transfers

It may be possible for the institutionalized spouse to transfer resources to the community spouse to become Medicaid eligible if the institutionalized spouse has resources in excess of the allowable amounts. The transfer of assets rules provide that *any* amount of resources may be transferred between spouses without resulting in the imposition of a penalty period.[58]

Notwithstanding the above paragraph indicating that any amount of resources may be transferred between spouses, once a Medicaid application is submitted on behalf of the institutionalized spouse, Federal law provides that an institutionalized spouse may only transfer to a community spouse an amount equal to the Community Spouse Resource Allowance, which in 2009 is a maximum of $109,560, but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

Practice Issue: May a community spouse transfer assets out of his or her name once the institutionalized spouse's nursing home Medicaid application is approved? Both Federal and state law expressly exempt transfers made "exclusively for a purpose other than to qualify for Medical Assistance."[59] Thus, where the Medicaid application is already approved and, thereafter, the community spouse transfers assets for a purpose other than to qualify the applicant spouse for benefits, the transfer should not result in a period of ineligibility with respect to the institutional spouse's Medicaid eligibility. However, such post-eligibility transfers by the community spouse are subject to the transfer penalty rules with respect to the community spouse's *own* Medicaid eligibility.

C. The Right of Spousal Refusal

In addition to the right to retain a fixed income and resource allowance, under Federal law, the community spouse may also exercise a right of "spousal refusal"[60] and retain amounts in excess of the CSRA or the MMMNA without jeopardizing the institutionalized spouse's Medicaid eligibility, provided that:

1. *For resources*: (a) the institutionalized spouse assigns to the state any right of support from the community spouse;[61] or (b) the institutionalized spouse lacks the ability to execute an assignment of support due to physical or mental problems in which case the state has the right to bring a support proceeding

58 42 U.S.C. § 1396p(c)(2)(A)(i). Soc.Serv.L. § 366.5d(3)(ii)(A).
59 42 U.S.C. § 1396p(c)(2)(C)(ii).
60 42 U.S.C. § 1396k(a)(1)(A).
61 42 U.S.C. § 1396r-5(c)(3)(A); Soc.Serv.L. § 366-c.5(b).

against the community spouse without such assignment;[62] or (c) the state finds that the denial of eligibility would "work an undue hardship";[63]

2. *For income*: The community spouse exercises his or her right of refusal pursuant to 42 U.S.C. § 1396r-5(b)(1), which provides that "During any month in which an institutionalized spouse is in the institution, except as provided in certain specific circumstances, no income of the community spouse shall be deemed available to the institutionalized spouse."[64]

   Social Services Law §366.3(a) provides:

   > Medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance.
   >
   > In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law.

As a condition of eligibility for Medicaid, an individual who has the ability legally to execute an assignment for him or herself, also must:

> cooperate with the state in identifying, and providing information to assist the state in pursuing any third party who may be liable to pay for care and services under the plan, unless such individual has good cause for refusing to cooperate as determined by the state agency in accordance with the standards prescribed by the Secretary [of Health and Human Services], which standards shall take into consideration the best interests of the individuals involved. [65]

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62 42 U.S.C. §1396r-5(c)(3)(B).

63 42 U.S.C. §1396r-5(c)(3)(C); Soc.Serv.L. §366-c.5(b).

64 New York creates an obligation of a responsible relative - spouse for spouse, for example, to support the recipient, "if [the responsible relative] is of sufficient ability" (Soc.Serv.L. §101.1); and provides that the liability for support may be enforced by the local department of social services. Soc.Serv.L. §366.3(a)(d) and §101.2. Section 101.2 provides, in part, that the liability imposed by this section shall be for the benefit of the public welfare district concerned . . ., and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction.

65 42 U.S.C. § 1396k(a)(1)(C). See Bowden v. Delaware Dept of Health and Social Services Division of Social Services, 1993 WL 390480 (Del. Super.). At page 3, in which the court held that a community spouse in possession of excess resources could not use the undue hardship provision of 42 U.S.C. § 1396r-5:"[t]he standards in § 1396r-5 were established to prevent hardship to the non-institutionalized spouse so the logical

25% Voluntary Contribution

If the spouse exercises his or her right of refusal to contribute, the local department of social services will nevertheless "request" a contribution of 25% of the community spouse's income in excess of the $2,739 MMMNA,[66] Medicaid must be provided to the institutionalized spouse whether or not the contribution is made. Even if the contribution is made, the community spouse is not immune from suit by the department of social services.

An institutionalized spouse will not be denied Medicaid if the community spouse refuses or fails to make his or her resources or income available.[67] However, certain counties may attempt to seek reimbursement for the cost of care provided.

D. The Right of Recovery

States may not impose a lien on a Medicaid recipient's real property prior to death based on the individual's receipt of Medicaid institutional benefits[68] except under the following circumstances:

1. When a court has found that an individual has incorrectly received Medicaid benefits, the state may place a lien on any real or personal property of the individual;[69]

2. When an individual is receiving services in a medical institution, such as a nursing facility, and needs to spend a considerable portion of his or her income for the cost of the individual's long-term care, the state may place a lien on the person's real property[70]subject to the following:

   a. After notice and a hearing, the state must prove (according to its state procedures) that the individual reasonably cannot be expected to be discharged from the facility and to return home[71] except as provided for in the following paragraph[72]; and

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conclusion is that if the institutionalized spouse does not qualify for benefits, either by virtue of the existence of excessive assets or through failure to satisfy the provisions regarding the assignment of support rights in § 1396r-5(c), there is no hardship posed for either spouse.

66 18 NYCRR § 360-4.10(b)(5).

67 Soc.Serv.L. § 366(3).

68 42 U.S.C. § 1396p(a)(1).

69 42 U.S.C. § 1396p(a)(1)(A).

70 42 U.S.C. § 1396p(a)(1)(B)(i); 42 CFR § 433.36(g)(2).

71 42 U.S.C. § 1396p(a)(2); 42 CFR § 433.36(d).

72 See Anna W. v. Bane, 863 F.Supp. 125 (W.D.N.Y. 1993), which held that New York State's regulation regarding

b. If the real property at issue is the recipient's home, the state is not permitted to impose a lien if the person residing in the home is the person's spouse, a child under 21 or blind or disabled, or a sibling, as long as the sibling has an equity interest in the home and has been legally residing there for at least a year immediately before the person's admission to the nursing facility.[73]

The lien on real property immediately extinguishes upon discharge of the institutionalized spouse from the medical institution and upon his or her return home. Therefore, if a nursing home resident receiving Medicaid returns home before his or her death, as some residents prefer, the lien immediately dissolves.[74]

The state cannot then foreclose upon the lien; however, the state could recover the cost of Medicaid benefits provided on behalf of the institutionalized spouse upon sale of the real property or from the institutionalized spouse's estate upon his or her death.[75]

V. The Homestead

A. Conditional Eligibility

Previously, social services districts were granted the option of authorizing Medicaid benefits based upon conditional eligibility, which provided the local districts with the ability to authorize Medicaid for an applicant pending the liquidation of excess non-liquid resources. However, the conditional eligibility option was eliminated in 1996, as detailed in GIS 96 MA/036. The Administrative Directive 03 OMM / ADM-1 serves to clarify the policies discussed in GIS 96 MA/036.

In particular, the 03 OMM/ADM-1 cites the federal regulations at 42 CFR 435.845(b), in clarifying that for Medicaid applications pending on or after October 9, 1996, social

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when an institutionalized Medicaid recipient's homestead may be deemed an available resource was more restrictive than the standard used in the SSI program. As a result of this case, in New York, Medicaid will no longer include the homes of institutionalized Medicaid applicants or recipients as a countable resource if they clearly express their intent to return home sometime in the future. Intent can be expressed by a written statement from the individual (or possibly the legal representative of the individual) indicating the person's intention to eventually return home. This court ruling applies only to the primary residence of the individual and will not preclude the department of social services from filing a lien against the property.

[73] 42 U.S.C. § 1396p(a)(2)(A)(C); 42 CFR § 433.36(g)(3)(i) - (iii).

[74] Congress wanted to assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for the support of a spouse or dependent children will be used to defray the costs of supporting the individual in the institution. In doing so, it seeks to balance government's legitimate desire to recover its Medicaid costs against the individual's need to have the home available in the event discharge from the institution becomes feasible. P.L. 97-248, 97th Congress, 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 814.

[75] 42 U.S.C. § 1396p(b)(1)(A).

services districts must count resources otherwise excluded under conditional eligibility. All such resources owned by a Medicaid applicant will be deemed available unless there is a legal impediment which precludes liquidation. A legal impediment exists if the applicant lacks the authority to, or is legally prohibited from, liquidating the resource (e.g., when an applicant requires the consent of a co-owner of a jointly held asset in order to sell the property, and the co-owner refuses to give such consent). If such an impediment exists, the resource will not be counted in determining eligibility until the legal impediment is removed.

B. Homestead Exemption

Previously, social services districts followed the homestead exemption policy utilized by the SSI program. The SSI program provides that an applicant's homestead is not counted as a resource for eligibility purposes if the applicant indicates an intent to return home irrespective of the applicant's actual ability to return home. However, the intent to return home only applies to such property that meets the homestead definition (cabins, vacation homes or summer homes are not considered to be homesteads).

The expression of intent to return home affects only the homestead's exemption status for eligibility purposes. The applicant's intent to return home has no impact on the requirement that the local districts' impose a lien on the homestead for reimbursement. In practice, however, many local districts do not actually impose such liens (perhaps due to oversight and/or heavy caseload). A written statement in the case record confirming that the applicant expressed an intent to return home is sufficient documentation to prove the applicant's intent. If the applicant is incapable of stating an intent to return at the time of the application, a past statement may be used. If the applicant is unable to state his/her intent to return home, and no past statement exists, the applicant's authorized agent, power of attorney, health care proxy or guardian may state the intent to return on the applicant's behalf. The applicant's intent to return home must be confirmed and documented at each recertification. However, if the applicant is no longer capable of stating his/her intent, the last documented statement will be sufficient.

Once the applicant is deemed Medicaid eligible, it is required that a lien be imposed on the homestead if the institutionalized applicant is not reasonably expected to return home, unless the homestead is occupied by a spouse, a minor or certified blind or disabled child, or a sibling with equity interest who has resided in the homestead for at least one year prior to the applicant's admission to the nursing home. If adequate medical evidence exists to demonstrate that the applicant is reasonably expected to return home, then no lien can be imposed. If the applicant is discharged and returns home, the lien must be removed.

Under the DRA rules, the net equity in a Medicaid applicant's otherwise exempt home is now limited to $758,000. The home equity limitation applies to both

institutional and community Medicaid benefits. However, the home equity cap does not apply to an individual whose spouse, child under twenty-one, blind or disabled is living in the home. DRA has defined home equity to mean the fair market value of the home minus any mortgage owed. The Medicaid applicant may take out a reverse mortgage or home equity loan to reduce the equity in the home in order to make it an exempt resource. Please note that the equity value cannot be reduced by outstanding medical bills..

When the homestead is considered a countable resource, the social services districts must provide the institutionalized applicant the opportunity to transfer the homestead to either (1) a sibling with equity interest who has resided in the homestead for at least one year prior to the applicant's admission to the nursing home, or (2) a caretaker child who has resided in the homestead for at least two years immediately preceding the applicant's admission to the nursing home. If the applicant elects to transfer the homestead, the social services districts must document the intent to transfer, and allow at least 90 days for the completion of the transfer, or longer if necessary due to a delay out of the applicant's control.

C. Mortgages

Unless the applicant can provide evidence of a legal impediment to transferring ownership, a mortgage agreement (i.e., where the applicant is the owner of the mortgage note) will be assumed to be negotiable. If no legal impediment exists, the value of the mortgage will be considered an available resource for eligibility purposes. If such an impediment does exist, then the value of the mortgage is not counted as an available resource.

To the extent that the mortgage agreement is negotiable, the applicant will be responsible for providing documentation of its current market value. The documentation may be obtained from a third party who consistently engages in the business of making evaluations (e.g., banks, real estate brokers or licensed private investors).

VI. Incapacitated Persons with Excess Resources

If an applicant is eligible for Medicaid, and the appointment of a guardian is necessary so that s/he may access income and/or resources, then social services districts are required to commence a guardianship proceeding against any person who meets the Protective Services for Adults ("PSA") client eligibility criteria. However, in most cases, someone who resides in a nursing home would not qualify for PSA. Nonetheless, a local district ***may*** commence a guardianship proceeding on behalf of an applicant who does not meet the PSA criteria, but does meet the legal standard for the appointment of a guardian. However, in practice, many local districts will not (or, are operating under the mistaken belief that they cannot) commence guardianship proceedings for applicants who do not qualify under the PSA criteria, but do meet the legal standard for the appointment of a guardian.

Upon the filing of the guardianship petition, the resources of the applicant will be considered unavailable for the purposes of determining his/her Medicaid ineligibility. Once a guardian is appointed, the applicant's resources are deemed available, unless there is a Medicaid reimbursement clause in the guardianship petition, or until such time as the incurred medical expenses are equal to or greater than the amount of excess resources.

VII. TRUSTS

A. Definition of a Trust

1. A trust is any arrangement in which a grantor transfers property to a trustee with the intention that it be held, managed, or administered by the trustee for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and must be in writing.

   a. The term "trust" also includes any legal instrument or other device created on or after August 11, 1993 that is similar to a trust.[76]

   b. The trust provisions do not apply to trusts established by will. Neither the principal of a testamentary trust nor any in-kind benefits received by the Medicaid applicant as a result of distributions from such a trust are counted as an available resource for purposes of determining the recipient's Medicaid eligibility.[77]

   c. A legal instrument or device is similar to a trust if, attendant upon its creation, assets are put under the control of an individual or entity with fiduciary obligations to manage such assets for the benefit of a designated beneficiary. For example, legal instruments or other devices similar to a trust may include, but are not limited to, escrow accounts, investment accounts, and pension funds.[78]

B. Establishment of a Trust

1. The trust rules apply to any individual who "establishes" a trust and who is an applicant for, or recipient of, Medicaid. An individual is considered to have established a trust if his assets were used to form all or part of the corpus of the trust and if certain individuals "establish" the trust.[79]

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76 18 NYCRR § 360-4.5(e).
77 18 NYCRR § 360-4.5(c).
78 18 NYCRR § 360-4.5(e).
79 18 NYCRR § 360-4.5(b).

2. The trust must be established, other than by will, by any of the following persons:

   a. the individual;

   b. the individual's spouse;

   c. a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or

   d. a person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.[80]

3. If a trust contains the assets of an individual and of other persons, the provisions of 18 NYCRR § 360-4.5 apply to the portion of the trust's assets which are attributable to the individual.[81]

4. Subject to the exempt trusts discussed below, the trust rules apply without regard to:

   a. the purposes for which the trust is established;

   b. whether the trustees have or exercise any discretion under the trust;

   c. any restrictions on when or whether distributions may be made from the trust; or

   d. any restrictions on the use of distributions from the trust.[82]

VIII. TYPES OF TRUSTS

A. Revocable Trust

1. A trust which can be revoked by the grantor under applicable State law.

   a. The trust principal and the income generated by the trust are considered an available resource to the individual.

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[80] *Id.*
[81] *Id.*
[82] 42 U.S.C. § 1396p(d)(2)(C).

b. Payments made from the trust to or for the benefit of the Medicaid applicant are considered available income in the month paid.

c. Any other payments from the trust (e.g., payments to third parties) are considered assets transferred by the Medicaid applicant for purposes of the transfer of asset rules and his/her Medicaid eligibility.[83]

B. Irrevocable Trust

1. A trust which cannot, in any way, be revoked by the grantor.

a. The availability of assets held in an irrevocable trust to a Medicaid applicant depends on the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the Medicaid applicant.[84]

b. The beneficial interest of the grantor or grantor's spouse includes any income or principal amounts to which the grantor or grantor's spouse would be entitled under the terms of the trust, by right or in the discretion of the trustee, assuming the full exercise of discretion by the trustee.

2. Any portion of the trust principal, and of the income generated by the trust principal, from which no payments may be made to the Medicaid applicant under any circumstances, are considered to be assets transferred by the Medicaid applicant for purposes of the transfer of asset rules and that individual's Medicaid eligibility. The date of the transfer is the date the trust is established or, if later, the date on which payment to the Medicaid applicant is foreclosed under the terms of the trust agreement.[85]

a. A provision in any trust created on or after April 2, 1992, other than a testamentary trust, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the grantor or the grantor's spouse in the event that the grantor or grantor's spouse applies for Medicaid or requires medical, hospital or nursing care or long term custodial, nursing or medical care is void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.[86]

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83 18 NYCRR § 360-4.5(b)(2).

84 18 NYCRR § 360-4.5(b)(1).

85 18 NYCRR § 360-4.5(b)(1)(i).

86 EPTL § 7-3.1(c).

b. The "triggering" event has no effect on the trustee's powers and thus no transfer of assets occurs for Medicaid eligibility purposes; instead, the trust assets subject to the "trigger" provision continue to be considered an available resource.

3. The grantor of an otherwise unamendable and irrevocable inter-vivos trust may amend or revoke the trust agreement upon the written consent of all persons beneficially interested in the trust.[87] Amendment or revocation of a trust agreement may be permitted without the consent of infants or other beneficiaries unable to give their consent where the change is beneficial to their interests.[88]

4. Any portion of the trust principal, and of the income generated from the trust, which can be paid to or for the benefit of the Medicaid applicant, under any circumstances, is considered an available resource of the Medicaid applicant.[89]

5. Payments from the trust:

   a. to or for the benefit of the Medicaid applicant, are considered available income in the month received.[90]

   b. for any other purpose (e.g., payments to third parties) are considered assets transferred by the Medicaid applicant for purposes of the transfer of asset rules and his/her Medicaid eligibility.[91]

6. Limited Powers of Appointment

   a. A limited power of appointment exists when the grantor reserves the right to change the beneficiaries of the trust, but limits the parties to persons other than himself, his spouse, creditors of the grantor or his spouse, the estate of the grantor or his spouse, or creditors of either estate.

   b. There have been several Court cases regarding the issue of limited powers of appointment.[92] It has been held that a limited power of

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87 EPTL § 7-1.9.

88 Matter of Bruce Hausman, N.Y.L.J., 11/15/95, p.26, col.2 (Surr. Ct., N.Y. County).

89 18 NYCRR § 360-4.5(b)(1)(ii).

90 18 NYCRR § 360-4.5(b)(1)(iii).

91 18 NYCRR § 360-4.5(b)(1)(iv).

92 *Irene Spetz v. New York State Department of Health and Chautauqua County of Department of Social Services*, No. K1-000778 slip op., (S. Ct. Chautauqua County, filed January 15, 2002) and *Verdow v. Sutkowy,* 2002 WL 31027942 (N.D.N.Y. 2002).

appointment in an irrevocable trust does not render the trust assets available for the purposes of determining Medicaid eligibility of the grantor.

IX. EXEMPT TRUSTS

Funding an exempt trust does not create a transfer penalty period[93]; nor is the corpus of an exempt trust considered an available resource to an individual when determining his/her Medicaid eligibility.[94]

A. Special Needs Trust

1. A trust containing the assets of an individual with disabilities if:

   a. the trust was created for the benefit of the individual with disabilities when the individual with disabilities was under the age of 65;

   b. the trust was established by:

      (i.) the individual's parent;

      (ii.) the individual's grandparent;

      (iii.) the individual's legal guardian; or

      (iv.) a court of competent jurisdiction; and

      (v.) the trust agreement provides that upon the death of the individual the State receives all amounts remaining in the trust up to the total value of Medicaid paid on behalf of the individual.[95]

2. When a trust is established for an individual with disabilities under age 65, the trust maintains its exempt status after the individual attains age 65.

3. Once established, additional funds can be added to the trust until the individual attains age 65.

4. Assets added to a disability trust after an individual attains age 65 should not disqualify the entire trust; rather, the transfer of additional assets to the trust

93 Soc.Serv.L. § 366(5)(d)(3)(iii)(D).
94 Soc.Serv.L. § 366(2)(b)(2)(iii)(A).
95 18 NYCRR § 360-4.5(b)(5)(i)(a).

would not be eligible for the disability trust exemption to the transfer of asset provisions.

B. Pooled Trust

1. A trust containing the assets of an individual with disabilities if:

a. the trust is established and managed by a non-profit association which maintains separate accounts for the benefit of individuals with disabilities, but for purposes of investment and management of trust funds, pools the accounts;

b. each account in the trust is established solely for the benefit of an individual with disabilities by:

(i.) the individual;

(ii.) the individual's parent;

(iii.) the individual's grandparent;

(iv.) the legal guardian of the individual; or

(v.) a court of competent jurisdiction; and

(vi.) upon the individual's death, amounts remaining in the individual's account which are not retained by the trust are paid to the State up to the total value of all Medicaid paid on behalf of the individual.

2. The funding of the pooled trust may be subject to the transfer of asset rules if the individual with disabilities is age 65 or older.[96]

C. 18 NYCRR § 360-4.5(b)(5)(ii) provides that in the event a lien has been imposed pursuant to the provisions of sections 104-b or 369 of the Social Services Law upon the funds which are to be used to establish an exempt trust, on account of Medicaid provided prior to the date the trust is to be established, such lien must be satisfied or otherwise resolved in order for the assets, subject to such lien, to be disregarded in determining the disabled individual's Medicaid eligibility.

D. Reporting Requirements

[96] N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

1. Under 18 NYCRR § 360-4.5(b)(5)(iii), a trustee of a disability or pooled trust, in order to fulfill his/her fiduciary obligations with respect to the State's remainder interest in these types of trusts, must:

    a. notify the social services district of the creation or funding of the trust;

    b. notify the social services district of the death of the beneficiary of the trust;

    c. notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust, in the case of a trust valued at more than $100,000.

        (i.) for these purposes, the trustee must notify the district of disbursements from the trust in excess of the following respective percentages of the trust principal and accumulated income:

        (a) 5 percent for trusts with assets valued over $100,000 and not more than $500,000;

        (b) 10 percent for trusts with assets valued over $500,000 and not more than $1,000,000; and

        (c) 15 percent for trusts with assets valued over $1,000,000;

    d. notify the social services district in advance of any transactions involving transfers from the trust principal for less than FMV; and

    e. provide the social services district with proof of bonding if the value of trust assets at any time exceeds more than $1,000,000, unless that requirement has been waived by a court of competent jurisdiction, and provide proof of bonding if the value of trust assets is less than $1,000,000, if required by a court of competent jurisdiction.

    f. The regulations further provide that the social services district or the Department of Social Services may commence a proceeding under section 63 of the Executive Law against the trustee if the district considers any acts omissions, or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations or contrary to the fiduciary obligations of the trustee.[97]

[97] 18 NYCRR § 360-4.5(b)(5)(iv).

X. ESTATE RECOVERY

A. Definition of Estate

1. The term "estate" includes all real and personal property and other assets included within the individual's estate, as determined under applicable State probate law.[98]

2. The State, at its option, may include any other real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including property passing by joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.[99]

B. Age Requirement

1. The State may seek recovery against the Estate of any Medicaid recipient who is 55 years of age or older at the time s/he is receiving the benefits.[100]

XI. SUPPLEMENTAL NEEDS TRUSTS ("SNTs")

A. A supplemental needs trust, as defined in section 7-1.12 of the Estates, Powers and Trusts Law ("EPTL"), is a trust established for the benefit of an individual of any age with a severe and chronic or persistent impairment. The trust is designed to supplement, rather than supplant, government benefits for which the individual is otherwise eligible. Under the terms of such a trust:

1. The beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distributions from the trust; and

2. The trust document generally proscribes the trustee from expending funds in any way that would diminish the beneficiary's eligibility for or receipt of any type of government benefit.[101]

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98 42 U.S.C. § 1396p(b)(4)(A).

99 Soc. Serv.L. §104; 42 U.S.C. §1396p(b)(4)(B).

100 Soc. Serv.L. §369(2)(b)(i)(B), 18 NYCRR §360-7.11(b)(1)(i); 42 U.S.C. § 1396p(b)(1)(B).

101 N.Y.S. Department of Social Services Administrative Directive: 96 ADM-8.

B. A Third Party SNT is funded with the assets of a third party, not those of the Medicaid applicant/disabled individual. Unlike the provisions of a Special Needs Trust, there is no pay back requirement for a Third Party SNT.

XII. TAX CONSEQUENCES OF TRUSTS

A. Grantor Trust Rules

1. The grantor trust rules are set forth in sections 671 through 678 of the Internal Revenue Code of 1986, as amended (the "Code"). A grantor who transfers property to a trust and retains certain powers or interests over the trust is treated as the owner of all or a portion of the trust for income tax purposes.

2. Section 671 of the Code provides that a grantor includes in computing his taxable income those items of income and deduction which are attributable to or included in any portion of a trust of which the grantor is treated as the owner. If Section 671 of the Code applies, income and deductions are treated as if they had been received or paid directly to the grantor for income tax purposes.

3. Sections 673 through 678 of the Code set forth the rules for determining when the grantor or another person is treated as the owner of any portion of a trust.

4. The income generated by the assets of a grantor trust is taxable to the grantor. All items of income and deduction flow through to the individual grantor's tax return.

5. If the grantor is not a trustee or co-trustee, then the trust will have its own taxpayer identification number. Although a separate information return will be filed by the trust, no tax will generally be payable by the trust. A separate statement is merely attached to Form 1041, the fiduciary income tax return.

6. If the same individual is both grantor and trustee or co-trustee and the grantor trust rules apply, Form 1041 need not be filed. All items of income and deduction are reported on the individual grantor's Form 1040. In this instance, the trust is not required to obtain a separate taxpayer identification number.

7. Generally, the maximum income tax rate of 35% applies to trust taxable income over $11,150; whereas, the 35% bracket does not begin until an individual has more than $372,950 in taxable income.

B. Revocable Trusts

1. Income Taxation

a. A trust in which the grantor reserves the right to revoke or amend the trust, will cause the trust assets to remain the grantor's for tax purposes.

b. Section 676 of the Code provides that a trust will be considered a grantor trust for income tax purposes if the grantor retains the right to revoke the trust.

2. Gift Taxation

a. Under section 2511 of the Code and section 25-2511-2 of the Treasury Regulation, gift tax is generally due upon transfer of a completed gift.

b. A completed gift does not occur unless the donor parts with dominion and control of the asset. There should be no gift tax due upon funding of a revocable trust since the grantor retains the power to revoke the trust and, thus, has not parted with dominion and control of the asset.

c. Under section 25.2511-2(f) of the Treasury Regulation, any distribution of income or corpus from a revocable trust by the trustee to an individual other than the grantor is treated as a completed gift by the grantor at the time of distribution to the third party.

3. Estate Taxation

a. The property of a revocable trust is includable in the Grantor's estate under section 2038 of the Code.

C. Irrevocable Living Trusts

1. Income Taxation

a. A trust in which the grantor has no power to revoke or amend the trust may, nonetheless, be considered a grantor trust for income tax purposes.

b. If the grantor retains the right under section 674 of the Code to control the beneficial enjoyment of the trust property or retains the right to

receive trust income under section 677 of the Code, the trust is a grantor trust.

c. Under section 671 of the Code, income generated by trust assets is taxable to the trust, the grantor or other beneficiaries of the trust, depending upon the terms of the trust. A trust is a separate taxable entity or a conduit through which income is passed to the beneficiaries.

d. Under sections 671 and 672 of the Code, it is possible for a grantor of an irrevocable trust to be treated as the owner with respect to trust income without being treated as the owner of trust principal. This may become an important issue if trust assets are sold, especially if the trust is the owner of the grantor's principal residence. For example, the grantor must be treated as the owner of the trust principal, if capital gains are allocable to principal under local law, in order for a sale of the residence by the trustee to be eligible for the section 121 exclusion.

e. Trusts other than grantor trusts are taxed as separate taxpayers on any income that is not distributed to beneficiaries during the taxable year

   (i.) The trust can be set up so that part of the income is taxable to the trust and part to the beneficiaries.

   (ii.) Income is taxable to the trust if it is accumulated by the trust.

   (iii.) Income is generally taxable to the beneficiaries to the extent that the trust actually distributes the income to them or makes it available to them.

f. The grantor may be taxed on trust income in accordance with any of the grantor trust rules of sections 671 through 677 of the Code.

   (i.) Section 673 of the Code (Reversionary Interests) taxes the income to the grantor if he retains a reversionary interest in either trust principal or income with a present value of more than 5% of the value of the trust.

   (ii.) Section 674 of the Code (Power to Control Beneficial Enjoyment) taxes the income to the grantor if he retains the right to control the beneficial enjoyment of the trust property or its income.

(iii.) Section 675 of the Code (Administrative Powers) taxes the income to the grantor if he retains possession of certain administrative powers.

(iv.) Section 676 of the Code (Power to Revoke) does not apply to irrevocable trusts, since it deals only with the power to revoke a trust.

(v.) Section 677 of the Code (Income for Benefit of Grantor) taxes the income to the grantor if trust income is or may be payable to or for the benefit of the grantor or his spouse, accumulated for them, or applied to the payment of premiums on insurance on the life of the grantor or his spouse.

g. Under sections 674 and 677 of the Code, if a power is exercisable by someone who is described as a non-adverse party, the rules are the same as if the power were exercisable by the grantor.

(i.) The same rule applies under section 676 of the Code as to revocable trusts.

(ii.) A non-adverse party is any person who does not have a substantial beneficial interest which would be adversely affected by the exercise or non-exercise of that power which he possesses.

2. <u>Gift Taxation</u>

a. <u>Funding the Trust</u>

(i.) Upon funding of an irrevocable trust, there may be a taxable gift under section 2501 of the Code, depending upon the terms of the trust. If a taxable gift is deemed to occur, the trust beneficiaries, rather than the trust or trustee, are the donees.

(ii.) The essential elements of an inter-vivos gift are: (1) an intention on the part of the donor to make the gift; (2) delivery by the donor of the subject-matter of the gift; and (3) acceptance of the gift by the donee.

(iii.) There must be a donor competent to make the gift, a clear and unmistakable intention on his part to make it, a donee capable of taking the gift, a conveyance, assignment, or transfer sufficient to vest the legal title in the donee, without

power of revocation at the will of the donor, and a relinquishment of dominion and control of the subject matter by delivery to the donee.[102]

(iv.) If a transfer of any interest is not complete, it becomes a completed gift when and if, during the lifetime of the grantor, the property ceases to be subject to such power.

(a) This can occur if the grantor releases the retained power, or, if the grantor holds the power as trustee and resigns from office.

(b) It can also occur if another person exercises a power of appointment that distributes or vests the property in such a way that the grantor's retained powers are negated or canceled.

(c) Furthermore, a distribution from the trust to a beneficiary will place the distributed property beyond the control of the grantor.

b. Completed Gift

(i.) Once the grantor has parted with dominion and control over the property so that the grantor cannot change its disposition, the gift is deemed complete pursuant to section 25.2511-2(b) of the Treasury Regulation.

(ii.) A gift is incomplete in every instance in which donor reserves the power to revest the beneficial title to the property himself.

(iii.) Under section 25.2511-2(c) of the Treasury Regulation, if the grantor retains a power over the disposition of the assets, such as a testamentary power of appointment over the remainder upon death, then no portion of the transfer is considered a completed gift. A special power of appointment allows someone at a later date to alter the disposition planned under the trust agreement. Therefore, gift taxes can be avoided upon funding of the trust or at the time a revocable trust becomes irrevocable, although a gift tax return asserting that no tax is due may be required (Regulation § 25.2511-2(j)).

(a.) If the grantor is physically or mentally incapable of exercising the limited power of appointment,

102 Edson v. Lucas, 40 F.2d 398, 404 (1930).

"possession" at death (rather than the exercise or non-exercise of the power) of the power would likely cause the funding of the trust to be an incomplete gift.[103]

(b.) From a Medicaid eligibility and estate recovery context, the testamentary power of appointment should be limited to a class of beneficiaries, excluding the grantor, grantor's estate and creditors of the grantor or grantor's estate.

(iv.) Distributions from the Trust

(a.) If the transfers funding the trust are considered "completed gifts" subject to gift tax, then the distributions from the trust are not taxable gifts.

(b.) If the transfers funding the trust are considered "incomplete gifts" and thus not subject to gift tax, then the distributions from the trust to individuals other than the grantor are taxable gifts under section 25.2511-2(f) of the Treasury Regulation.

3. Estate Taxation

a. If the gift is incomplete or if the grantor has retained powers over the transferred property under sections 2035 through 2038 of the Code, such property will be included in the grantor's estate at death.

b. For example, if the grantor is the recipient of some part or all of the trust income and/or principal, the trust will be includable in the grantor's gross estate for estate tax purposes because the grantor has retained an income interest from the trust created by the grantor (Code §§ 2036, 2037 and 2038).

c. If the trust assets are includable in the grantor's estate, then the beneficiaries will receive the property with a tax basis equal to the property's FMV at date of death or alternate valuation date under section 1014 of the Code.

[103] See Revenue Ruling 55-518, 1955-2 C.B. 384, Boeving v. U.S., 493 F. Supp. 665 (E.D. Mo. 1980) rev'd 650 F.2d 493 (8th Cir. 1981), and Alperstein v. C.I.R., 613 F.2d 1213 (2d Cir. 1979), cert. denied, 446 US 981, 100 S.Ct. 1852, 64 L.E.2d 272 (1980), which holds that the possession of the limited power causes estate tax inclusion under section 2042 of the Code.

ENEA, SCANLAN & SIRIGNANO, LLP
ATTORNEYS AT LAW

245 Main Street
White Plains, New York 10601

(914) 948-1500
Facsimile: (914) 948-9316

New York State Bar Association
Basic Elder Law Practice (Spring 2011)

BASICS OF MEDICAID ELIGIBILITY

By: Anthony J. Enea, Esq., CELA*

I. OVERVIEW OF MEDICAID

In 1965 the Federal Medicaid Assistance Program commonly known as "Medicaid" was created as part of the same legislation that created the Medicare program. Medicaid was created as a health insurance program for the poor. It is a "means tested" entitlement program wherein individuals are entitled to benefits if they are financially and categorically eligible. It is a jointly financed federal-state program.[1]

In 1966, New York State Statutorily adopted the Medicaid program.[2] New York's program encompasses virtually every medical program available. New York elected to give the responsibility for administering Medicaid to the Counties.

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[1] 42 U.S.C. §1396 et seq.1 42 C.F.R. §430 35 et seq
[2] Soc. Serv. L. §§363 et seq., 18 NYCRR §§360.1 et seq

For every dollar spent on Medicaid in New York, fifty (.50) cents comes from the Federal Medicaid Program, twenty-five (.25) cents from New York State and twenty-five (.25) cents from the Counties.[3]

The Medicare Catastrophic Coverage Act of 1988, effective October 1, 1989, made significant changes to the structure of the Medicaid program in three main areas: (1) the transfer of assets rules, (2) the rules regarding the treatment of assets owned by the spouse of an institutionalized patient, and how the assets of that spouse would effect the eligibility for Medicaid of the institutionalized patient, and (3) the rules regarding the amount of income and resources the spouse living in the community would be allowed to keep.

Further changes to the Medicaid program were later enacted as part of the Revenue Reconciliation Act of 1993 (often referred to as "OBRA 93" which became effective on August 10, 1993). These changes were adopted by the New York Legislature and signed into law on June 9, 1994. OBRA 93 applied to transfers of assets made after August 10, 1993, and with respect to applications for and recertifications of eligibility for medical assistance submitted on or after September 1, 1994.

[3] Soc. Serv. L. §62

Most recently the enactment of the Deficit Reduction Act of 2005 ("DRA") on February 8, 2006 imposed harsh restrictions upon Medicaid eligibility and the rules relevant to the transfers of assets for Medicaid eligibility. The New York State Department of Health on July 20, 2006, issued Administrative Transmittal #06 OMM/ADM-5, which interprets and implements the provisions of the DRA in New York effective August 1, 2006.[4] The federal agency responsible for Medicaid, the Center for Medicare and Medicaid Services ("CMS"), issued its guidance to the DRA on July 27, 2006 in publication SMDL #06-108 and SMDL #06-019.

II. Categories of Medicaid Coverage

A. Community Medicaid - Physicians, dentists, pharmaceutical, nursery services and other professional services provided to individuals on a clinical or outpatient basis for individuals who are eligible; and

B. Home Care Services - Home health services, such as personal care services, nursing, physical therapy, occupational therapy and home health aid services; and

C. Institutional Services - Hospitals, other medical facilities, nursing homes and services under the Lombardi long-term home health care program. (A waivered program).

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[4] Public Law 109-171(2006)

III. Eligibility for Medicaid

A. Medicaid may be authorized for individuals whom are:

a. Medically needy;

b. Categorically needy;

c. Legal U.S. Residents

B. To be eligible for New York Medicaid, the applicant must be:

a. A legal U.S. resident, citizenship is not a requirement. There is no durational residency requirement.

On October 26, 2004, ADM 04-OMM/ADM-07 was issued to clarify the Department of Health's policies relevant to Medicaid for non-citizens and aliens. The ADM provides a detailed historical overview of prior legislation relevant to Medicaid eligibility for non-citizens and aliens, and creates the guidelines as to how the Medicaid program will continue to be available to immigrants. The ADM can be found at www.health.state.ny.us/nysdoh/medicaid/ publications/docs/adm/04adm-7.pdf.

b. The applicant must be a resident of the state and county where the application for Medicaid is made. Residency requires a physical presence

within the state and the "intent to remain." Any person age twenty-one (21) and over is a resident of New York State[5] if he or she is living in the State and:

(i) intends to remain permanently or indefinitely; or

(ii) is unable to state intent unless he or she is in an institution, and another state made the placement.[6]

c. Under the age of twenty-one (21) or over the age of sixty-five (65) and disabled.[7]

If you are between the ages of twenty-one (21) and sixty-five (65) you can be eligible for Medicaid, only if you are:

1. Disabled - a physical or mental incapacity which prevents you from any gainful employment, which is expected to endure for at least one (1) year;[8]

2. Blind - certified blind by NYS Commission for Blind and Visually handicapped.[9]

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[5] Soc. Serv. L. §§117,18; 18 NYCRR §§349.4, 360.2
[6] 18 NYCRR § 360-3.2(g)(5)
[7] Soc. Serv. L. §366(1),(2),(3)
[8] Soc. Serv. L. §366 (1)(a)(2), 18 NYCRR §360-3.3 (a)(3)
[9] 18 NYCRR §368.13

3. Eligible for Public Assistance – either receiving or be eligible to receive safety net assistance or family assistance, thus, must be below the public assistance income and resource levels;[10] or

4. Recipient of Supplemental Security Income ("SSI") - If receiving SSI from the Social Security Administration, you will be automatically eligible for Medicaid. No application for Medicaid is necessary.[11]

C. Medicaid is a "means tested" entitlement program: There are both resource and income eligibility requirements. Applicant must have income and assets below specified amounts.[12]

Factors considered in determining financial eligibility:

1. Size of the household of the applicant, i.e., is applicant single or married;

[10] Soc. Serv. L. §366 (1)(a)(4),(7)
[11] Soc. Serv. L. §366 (1)(a)(2)
[12] 18NYCRR §360-4.1

2. Income - available to the applicant during period for which Medicaid is requested.

- Medicaid counts most income with certain specified exceptions, irrespective of whether the income is earned or unearned.[13] Certain income is exempt (not counted as available) for Medicaid eligibility purposes.[14] For example, the first twenty ($20) dollars per month of income whether earned or unearned is exempt. German and Austrian reparation payments, Nazi Persecution Funds, State Crime Victims Assistance Funds as well as other income sources are totally exempt, so long as they are kept segregated from other funds.[15]

- Income can be "deemed" or attributed to another irrespective of whether it is actually paid. "Deeming" is only applied to legally responsible relatives, i.e., husband and wife, parents and a child under age twenty-one (21). However, deeming not applicable in "Spousal Refusal" cases.[16]

3. Resources available to the applicant during period for which Medicaid is requested.

[13] 18 NYCRR §360-4.3 (b)(2) and 18 NYCRR §360-4.3(b)(3)
[14] 18 NYCRR §360-4.6 (a)
[15] 18 NYCRR §360-4.6 (b)(2)(iv), 18 NYCRR §360-4.6(a)(1) (xxii)
[16] 18 NYCRR §360-1.4(e)

A. Available Resources

- Resources are defined to include property of all differing kinds, e.g., personal property, (cash, IRA's, stocks, bonds) real property, tangible, intangible, liquid or illiquid (real property).

- NYS DSS Administrative Directive: 96 ADM - 8, "assets" for purposes of Medicaid are defined as all income and resources of the individual applicant and the applicant's spouse.

- Income and/or resources which the applicant or the applicant's spouse is entitled to, but does not obtain because of action or inactions takes by (a) the applicant or his or her spouse, or (b) a person, Court, administrative body with legal authority to act on behalf of applicant or applicant's spouse; or (c) a person, Court or administrative body acting at the direction or request of the applicant or applicant's spouse.

Examples of actions taken which would cause resources or income not to be received, but still considered as an available resource or income pursuant to NYS DSS 96 ADM - 8 are:

a. Renunciation of an inheritance or waiver of spousal right of election;

b. Waiving pension income irrevocably; and

c. Waiving or not accessing personal I injury or tort settlements.[17]

C. IRA's KEOGH's and 401K's

- Are considered available as illiquid resources for Medicaid eligibility purposes.[18]

- Medicaid will not consider the IRA or retirement account as an available resource if the applicant places the account into "payout status" (begins taking the minimum required distribution or "MRD"). However, Medicaid will count the income received as available income.[19]

- If an IRA is cashed out, even before age 59 1/2, the net proceeds (after payment of any taxes or penalties) are considered an available resource for eligibility purposes.[20]

D. Annuities

- Annuities must meet the requirements of the DRA and 06 0MM/ADM-5 which are discussed in greater detail herein.

- Annuities are a type of investment wherein one ("annuitant") in consideration for his or her investment

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[17] 26 U.S.C.A §408
[18] 18 NYCRR §§360-4.4; 4.6 (b)(2)(iii)
[19] GIS 98 MA/024
[20] ID at 18

will receive the right to receive fixed periodic payments either for a term of years or for life.

- If the projected return ("payout") from the annuity is reasonably proportionate ("actuarially sound") to the investment made (based on life expectancy and rate of return) for Medicaid purposes the purchase of the annuity will be considered a compensated transfer, thus, not creating a period of ineligibility for Medicaid. However, if the projected return is proportionately less than the investment made, Medicaid will consider the purchase of the annuity as a trust related transfer in an amount less than fair market value, which creates a period of ineligibility for Medicaid nursing home.[21]

- Health Care Financing Administration, State Medicaid Manual Transmitted No. 64 (November 1994) and HCFA Pub. 45-3 (HCFA Transmittal No. 64) delineates how annuities are treated under the trust/ transfer provisions.

- If the annuity is "actuarially sound" and the annuity has been reduced to an income stream (a "fixed annuity"), no period of ineligibility for Medicaid would be created under the trust/transfer provisions. However, the

[21] NYSDSS 96ADM-8,(a)8

monthly payout will be considered and counted as available income.[22]

The following have been determined to be "exempt resources", therefore, they are not considered or counted for purposes of Medicaid eligibility:

(1) "Homestead" - "primary residence" (not a second or vacation home) which is occupied by the applicant, applicant's spouse, minor, blind or disabled child.[23] A one, two or three family home, condo, co-op, mobile home is considered to be a homestead. The homestead can be income producing property, or even attached or contiguous to income producing property. Although the primary residence will be considered as an exempt homestead, however, any income will be counted and treated as available.[24]

The DRA has placed a cap on the equity of the homestead of an applicant who does not have a spouse, child under 21 or a blind or disabled child residing in the home may have and still qualify for certain Medicaid benefits. The DRA provides that an individual applying for "nursing facility or other long term care services" is not eligible for such services if his or her equity in the home exceeds $500,000.

[22] Id at 21
[23] Soc. Serv. L. §366 (2)(a); 18 NYCRR §§360-1.4 (f), 4.7 (a)(1)
[24] 18 NYCRR §360-1.4 (f); 18 NYCRR §360-4.3 (d)

However, each state was given the option to increase this amount to $750,000. New York has increased the equity cap to $758,000 for the year 2011.[25] Pursuant to New York State Department of Health Administrative Transmittal 06 OMM/ADM-5, there is a hardship exception to the home equity cap, if a legal impediment prevents the applicant from accessing his or her equity in the homestead and the denial of Medicaid would deprive the applicant of medical care to the extent the applicant's health or life would be endangered or deprive the applicant of food, clothing, shelter or other necessities of life.

- If the applicant is institutionalized and expresses the intent to return home, the homestead will not lose its exempt status but Medicaid may place a lien on the home. However, the homestead can still lose its exempt status if the applicant is declared to be in "permanent absent status."[26] A declaration of permanent absent status can be made upon the applicant entering the nursing home, or if applicant remains in a hospital for more than six (6) months. By declaring the individual to be in permanent absent status, Medicaid could count the house as a resource

[25] Soc. Serv. L. §366 (2)(a)(1)(ii)
[26] 18 NYCRR §360-4.10

and find the applicant ineligible for Medicaid or attempt to place a lien on the homestead.[27]

(2) Burial Allowance - $1,500 cash or face value of life insurance. Must be in a separate account designated as "burial allowance."[28]

(3) Burial Space and Irrevocable Burial Trust - Applicant may own in addition to the $1,500 burial allowance, a burial space, grave, crypt, mausoleum, headstone, casket, without effecting Medicaid eligibility.[29]

- Effective January 1, 1997 NY Law was amended to permit the applicant/recipient of Medicaid to pre-pay his or her funeral and burial expenses with a funeral home director by using an Irrevocable Trust Fund. There is no dollar limit on the amount that can be placed in the Irrevocable Trust. However, it is not recommended that the trust be over funded, because any monies not utilized for the funeral and burial must be turned over to Medicaid.[30]

(4) Personal Property - The applicant's personal belongings and furnishings are exempt. No valuation is made for Medicaid eligibility purposes.[31] One automobile, irrespective of its value is also exempt.

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[27] 18 NYCRR §360-7.11 (a)(3)
[28] 18 NYCRR §360-4.6 (b)(1)
[29] 18 NYCRR §360-4.7
[30] Soc. Serv. L. §209 (6)(b), General Business Law §453 (1)(b)
[31] 18 NYCRR §360-4.7 (a)

(5) $13,800 of Exempt Resources a/k/c "Luxury Fund" for the year 2011.

4. Comparison of Applicant's Net Available Income and Resources to the Eligibility Standards for His or Her Medicaid Household Size.

If the applicant's net available resources exceed the eligibility standards for his or her household size, then he or she will be ineligible for Medicaid until he or she has incurred medical expenses equal to or greater than the amount of his or her excess resources. Similarly, if the applicant's net available income is above the income standard for his or her Medicaid household size, he or she will be ineligible for Medicaid until medical expenses are incurred equal to or greater than the excess income.

IV. Income and Resource Eligibility Requirements for 2011

A. Income Levels for a Single Individual

(i) For Community/Homecare Medicaid - $767 per month plus $20 per month disregard.[32]

(ii) For Nursing Home - all of the recipients monthly income (except exempt income) in

[32] GIS 06 MA/029 Exhibit A

excess of $50 per month ("personal needs allowance"),[33] must be paid to nursing home as an offset to the services provided by Medicaid.

- New York is an income spend down state.

Pursuant to the Section 6013 of the DRA, all states are required to attribute or allocate the maximum available income of the institutionalized spouse to the community spouse before granting an increase of the community spouse resource allowance ("CSRA") under Section 1924 (e)(2)(C).

B. Income Levels for a Couple

(i) For a Couple receiving Community/Home Care Medicaid - $1,117 per month or $13,800 per year plus one $20 per month disregard.[34]

C. Resource Levels for a Single Individual

- $13,800 Total[35] - Known as "Luxury Fund"

D. Resource Levels for a Couple for Community/Homecare Medicaid

- $20,100[36]

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[33] 18 NYCRR §360-4.9 (a)(1)
[34] Id at 32
[35] Id at 32
[36] Id at 32

E. Income and Resource levels for the Community Spouse of an Institutionalized (Nursing Home) Medicaid Recipient

- Minimum Monthly Maintenance Needs Allowance (MMMNA)

- $2,739 per month[37]

- Community Spouse Resource Allowance ("CSRA")

On a sliding scale from a minimum of $74,820 to a maximum of $109,560 total.[38]

V. Spousal Impoverishment Provisions

As part of the Medicare Catastrophic Coverage Act ("MCCA") of 1988, changes were made to prevent the impoverishment of the Community Spouse. Congress granted the states the authority to establish income and resource levels for the community spouse of an institutionalized Medicaid recipient. However, the law established a maximum level that could be utilized by the states.[39] New York has adopted and consistently selected the Federal maximums.[40]

VI. Community Spouse Income Allowance

The Community Spouse is permitted a Minimum Monthly Maintenance Needs Allowance ("MMNA"), the maximum MMNA for

[37] Id at 32
[38] Id at 32
[39] 42 U.S.C. §1896R-5(d)
[40] Soc. Serv. L. §366-c.2(h)

2011 is $2,739 per month. If the Community Spouse's income falls below the MMNA, the Community Spouse is permitted to receive total income up to the amount of the MMNA by deducting income of the Institutionalized Spouse. However, the income can be made available to the Community Spouse only if it is actually made available to or for his or her benefit.[41]

96 ADM-11 of the NYS Dept. Of Social Services provides that income (not the resources of the Institutionalized Spouse) should be transferred first to the Community Spouse to allow the Community Spouse to receive income up to the MMNA. DSS's position on this issue was tested in Golf v. NYS Dept. Of Soc. Services, 221 A.D. 2d 997, 634 N.Y.S. 2d 581 (4th Dept 1991) order reversed, 91 N.Y.3d 656, 674 N.Y.S. 2d 600, 697 N.E. 2d 555(1998). In Golf, the Court of Appeals in reversing the Appellate Division Fourth Department held that the "income first" approach of the Dept. of Social Services and the Federal Statutes had to be applied. The Community Spouse must first seek an income contribution from the Institutionalized Spouse, before the Institutionalized Spouse's resources are utilized to increase the income of the Community Spouse to the MMNA level.

[41] 42 U.S.C. §1396r-5(d)(1)(b); Soc. Serv. L. §366-c.4 (b)

If the Community Spouse requests income in excess of the MMNA and a State Court orders said increase, the MMNA can then be increased to the Court established amount.[42]

In Robbins ex rel. Robbins v. DeBuono, 218 F. 3d 197 70 Soc. Sec. Rep. Serv. 408 (2nd Circuit 2000), cert. Denied, 531 U.S. 1071 121 S. St. 760, the Second Circuit decided that the "income first" approach does not apply to the Social Security income of the Institutionalized Spouse. The Court determined that the application of the "income first" approach to the Social Security income resulted in the alienation of Social Security benefits, which amounted to a violation of federal law.[43]

The effect of Robbins was that a Community Spouse would not be required to raise his or her MMNA by a contribution from the Institutionalized Spouse's Social Security benefits, thus, perhaps, permitting him or her to apply for an increased Community Spouse Resource Allowance ("CSRA") in an amount that would be sufficient to increase his or her MMNA to the maximum amount.

Prior to the DRA, the states could use either the "income first" approach or a "resource first" approach. New York was an "income first" state. The DRA has made the

[42] 42 U.S.C. §1396Rr-5 (d)(5); Soc. Serv. L. §366-c.2 (g)
[43] 22 U.S.C.A. §407

"income first" approach mandatory for all states. States using the "resource first" approach (increased CSRA calculated based on comparing community spouse income to the minimum monthly maintenance needs allowance without assuming any allocation of income from the institutionalized spouse) will have to convert to the "income first" approach.

On January 12, 2005, the NYS Dept. of Social Services in GIS05MA/002 rescinded GIS00MA/027 relevant to the "Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Allowances," which dealt with Robbins and the provisions of 01 OMM/ADM-4 related thereto. The Department of Social Services decided that it would no longer treat Institutionalized Spouses with Social Security Income differently than other Institutionalized Spouses. Thus, Community Spouses with income less than the MMNA will not be allowed to retain resources in excess of the maximum CSRA in order to generate income that could be provided by the Institutionalized Spouse from his/her Social Security Benefits; irrespective of whether the Institutionalized Spouse makes the Social Security benefits available to the Community Spouse. The decision to give a Community Spouse a higher CSRA continues

to necessitate resolution by a fair hearing or a Court Order. The Department of Social Services went on to further state that an Institutionalized Spouse is not required to transfer Social Security benefits to the Community Spouse. He or she is allowed, but not required to make it available. The Department of Social Services relied upon the 2003 U.S. Supreme Court Decision in Washington State Dept. of Social Services v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) in support of its position. In Keffeler, the United States Supreme Court addressed the interpretation of the term "other legal process" in the statute prohibiting the alienation of social security benefits. The Court held that "other legal process" should be interpreted restrictively and be understood to a process much like the process of execution, levy, attachment and garnishment. In Robbins the Second Circuit had used an expansive definition of legal process.

In Ruck v. Novello, 295 F. Supp. 2d 258, the Federal District Court noted that the Supreme Court's decision in Keffeler undermined the rationale for the Robbins' decision. The Court in Ruck stated that the mere attribution of income, and a fair hearing process that reviews such an

attribution but has no power to direct that control over property be passed from one person to another does not involve "legal process" as defined by the Supreme Court in Keffeler.

In Matter of Tomeck 2006 NY Slip Op 01683 the Appellate Division, Third Department held that no implied contract arose because it was improper for DSS, in 1997 to allocate Social Security income from the husband to decedent to raise her income level to MMMNA. Thus, because decedent did not have "sufficient income and resources to provide medical assistance" to her husband at that point, no implied contract was created and her estate cannot now be held liable for the medical assistance furnished to her husband.

Consequently, the Court held because "recovery for medical assistance from the estate of the secondarily deceased spouse can only be had on proof that such spouse, at the time of the medical assistance, was a financially responsible relative in that he or she had sufficient income and resources to provide medical assistance." Matter of Conroy, 201 AD. 2D 855, 608 N.Y.S. 2d 333 (1994), and in light of our holding that no implied contract arose at the time that decedent executed the spousal refusal or at any

point thereafter, we find that respondent has not established a cognizable claim against decedent's estate."

Based on these decisions, the NYS Department of Health issued Administrative Directive Transmittal letter #06 OMM/ADM-3 dated May 4, 2006, which rescinded GIS 00 MA/0027 "Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances," which dealt with the Robins v. DeBuono court decision and the provisions of 01 OMM/ADM-4, "Spousal Impoverishment Allowance Increases for 2001 and Treatment of Institutionalized Spouses' Social Security Benefits Requests for Additional Resource Allowances," related to Robins.

As advised in GIS 05 MA/002 a community spouse with income less than the MMMNA will not be allowed to retain resources in excess of the maximum CSRA Community Spouse Resource Allowance in order to generate income that could be provided by the institutionalized spouse from his/her social security benefits.

Notable Provisions of 06 OMM/ADM-3

- In response to Robbins, NYS instituted a policy (GIS 00 MA1027 and 01 OMM/ADM4), an Institutionalized Spouse's Social Security benefits were not included in

determining the Community Spouse's income unless the Institutionalized Spouse intended to make this income available to the Community Spouse.

- If the Institutionalized Spouse did not make his/her Social Security available to the Community Spouse, an increased CSRA can be established pursuant to a fair hearing decision or court order.

- If the Institutionalized Spouse's income is insufficient to bring the Community Spouse's income up to the MMMNA, an increased CSRA may be established to generate income to bring the Community Spouses' income up to the MMMNA.

- Federal law provides that Social Security benefits cannot be alienated.

- Based on Keffeler and Ruck, NYS has rescinded the provisions related to Robbins.

- Per GIS 05 MA/002, a Community Spouse with income less than the MMMNA will not be allowed to retain resources in excess of the maximum CSRA in order to generate income that could be provided by the Institutionalized Spouse from his/her Social Security benefits.

- The decision to give a Community Spouse a higher CSRA continues to be an issue resolved only by a fair hearing decision or court order.

- If the Institutionalized Spouse chooses not to make his/her income available, this income will be counted in determining the amount of the Institutionalized Spouse's income to be applied toward the cost of care.

VII. Enhanced Income Allowance

If the Community Spouse wishes to seek an increase of the permitted MMNA ($2,739 for 2011) he or she must either at a fair hearing or in a family court proceeding establish that there exist "exceptional circumstances which result in significant financial distress". If the above is established Medicaid must permit an amount adequate to provide additional necessary income to the Community Spouse from the income of the Institutionalized Spouse.[44]

In Gomprecht v. Sabol, 86 N.Y.2d 47, 629 N.Y.S. 2d 190 (1995), the NY Court of Appeals severely limited the ability of Community Spouses to increase the MMNA in a state Court proceeding. The Court determined that the fair hearing "exceptional circumstances" test was to be utilized by the Court in support proceedings. The Court opined that "exceptional circumstances" must be the result of "true financial hardship that is trust upon the Community Spouse by circumstances over which he or she has no control." See

[44] 18 NYCRR §360-4.10 (b)(6)

Schachner v. Perales, 85 N.Y. 2d 316, 624 N.Y. 3d 558 (1995).

In an Article 78 proceeding, the Court in Mater of Balzarini v. Suffolk County Dept. of Social Services (2008 NY Slip of 06704), held that reasonable, ordinary expenses can be exceptional and thus, satisfy the standard established in Gomprecht. The expenses of the Petitioner in Balzarini were for housing, utilities, food, Medicare and her automobile. The Court held that these ordinary expenses met the statutory requirement and held that her MMNA should be increased to include such expenses.

In February 2011, the New York State Court of Appeals reversed the lower court's decision and held that "exceptional circumstances" causing "significant financial distree" do not encompass everyday living expenses.

VIII. Community Spouse Resource Allowance

The spouse of an Institutionalized Spouse, who is residing in the community (a/k/a "community spouse") is granted by Federal Law a Community Spouse Resource Allowance ("CSRA") which is set by the State. The CSRA can be adjusted annually pursuant to the Consumer Price Index ("CPI").[45] The minimum spousal share for 2011 is $74,820.

[45] 42 U.S.C. §1896-5 (c)(1)

In cases where the spousal share exceeds $74,820, the community spouse is allowed to retain resources in an amount equal to the spousal share but not to exceed $109,560 effective January 1, 2010. In order for the spousal share to be more than $74,820, the total countable resources of the couple would have to be more than $149,640. (See 06 OMM/ADM-3).

The spousal share is an amount equal to one-half of the total value of the countable resources of the community spouse and institutionalized spouse as of the beginning of the most recent continuous period of the institutionalization of the institutionalized spouse on or after September 30, 1989. Continuous period of institutionalization means at least thirty (30) consecutive days of institutional care in a medical institution and/or nursing facility, or receipt of home and community based waivered services, or a combination of institutional and home and community based waivered services.

IX. Computation of Maximum CSRA

For budgeting periods beginning January 1, 2011 and after, Social Service Districts must use the minimum CSRA of $74,820 and the maximum CSRA of $109,560 to determine the amount of resources that a community spouse is allowed to

retain. In applying these (2) figures to the community resource allowance formula, the applicable allowance is to be determined by taking the greatest of the following amounts:

1. $74,820; or
2. the amount of the spousal share not to exceed $109,560 effective January 2011; or
3. the amount established for support of the community spouse pursuant to a fair hearing decision or court order.

In order to determine whether a couple's spousal share is applicable in determining the community spouse's resource allowance, social service districts must first determine if the total countable resources of the couple were more than $149,640 as of the beginning of the most recent continuous period of institutionalization of the institutionalizes spouse. If they fail to provide verification of resources for the beginning of the most recent period of institutionalization, the social services district shall use the minimum spousal resource standard of $74,820.[46]

X. CMS letter dated July 27, 2006 Enclosure §6013 Increasing the CSRA

[46] 06 OMM/ADM-3 NYSDOH, 42 U.S.C. §1896-5(c)(i)

As the DRA makes use of the "income first" approach mandatory for all states. Thus, all states are required to attribute or allocate the maximum available income of the institutionalized spouse to the community spouse before granting an increase in the CSRA under §1924(e)(2)(C) of the Act. This applies to determination of the CSRA made on or after February 8, 2006 and only when the institutionalized spouse became institutionalized on or after the effective date.

In cases where a community spouse is seeking an increased CSRA on the basis that additional resources are needed to generate the monthly maintenance needs allowance, (MMMNA) States may now follow the following steps:

1. Determine the MMMNA for the community spouse in the same manner you currently use pursuant to Sections 1924(d)(3),(4) and (5) of the Act;
2. Determine the community spouse's total gross monthly income, including income from income-producing assets (interest and dividends) retained by the community spouse;
3. Subtract the community spouse's total monthly gross income from the MMMNA. If there is a deficit, this is the amount of the income "shortfall" for the community spouse;

4. Determine the institutionalized spouse’s total gross monthly income. Deduct the personal needs allowance. Allocate sufficient income from the remainder of the institutionalized spouse’s income to meet the “shortfall” amount for the community spouse.
5. If after step 4 above, there is some “shortfall” remaining for the community spouse, determine the amount of increased resources needed to generate that amount of income for the community spouse. In making this calculation, States may use any reasonable method for determining the amount of resources necessary to generate adequate income including adjusting the CSRA to the amount a person would have to invest in a single premium annuity to generate the needed income, attributing a rate of return based on a presumed available rate of interest, or other methods.

The above steps are offered for illustrative purposes, and do not preclude States from applying the income first method in a different manner or sequence.

XI. Enhanced Resource Allowance

Pursuant to the Federal Statute if it can be established that the CSRA is an amount which is insufficient

to raise the community spouse's income to the MMNA level, then Medicaid must permit as the CSRA an amount sufficient to do so.[47] Again, as set forth in 18 NYCRR §360-4.10 [a] [10].

For example, if a Community Spouse only has $1,000 of monthly income, he or she could argue that he or she should be entitled to retain resources in excess of the $109,560 CSRA permitted in 2011, so as to generate sufficient income to allow her to achieve the $2,739 MMMNA for the year 2011.

XII. Transfer of Asset Rules (Pre-"DRA")

A. Penalty and Look Back Periods

Because Medicaid is a "means tested" entitlement program, if assets were "transferred," i.e., given away by the applicant or his/her spouse without the receipt of something of equivalent value in return ("uncompensated transfer"), within thirty-six months immediately prior to the application for Medicaid, a period of ineligibility for Medicaid nursing home care was triggered, unless the transfer is deemed to be an exempt transfer.[48]

The transfer of asset rules contain two separate and distinct components, being, the "look back period" and the "penalty period". Pursuant to the Omnibus Budget

[47] Soc. Serv. L. §366-c.8(c)
[48] Social Security Act §1917, 42 U.S.C. §1396 p, Soc. Serv. L. §366.5

Reconciliation Act of 1993 ("OBRA 93"),[49] a thirty-six (36) month "look back period" was created for outright transfers of assets. Thus, Medicaid would "look back" thirty-six (36) months immediately prior to the date of the Medicaid application to determine whether or not any uncompensated transfers of assets had been made. OBRA 93 created a "look back" period of sixty (60) months for any transfers of assets made to or from a "lifetime trust".[50]

The second component of the transfer of asset rules was the "penalty period". The "penalty period" commenced on the first of the month following the date of the uncompensated transfer,[51] and was a number of months determined by taking the value of the uncompensated transfer and dividing it by the average monthly cost of a nursing home for the applicants Medicaid district as determined by Medicaid. New York is divided into seven Medicaid districts. (See Regional Rates infra.)

For example, for 2011 the average monthly cost of a nursing home for Westchester County is determined by Medicaid to be $10,105 per month. Thus, Pre-DRA a $100,000 uncompensated transfer would have created an 9.90 month period of ineligibility for a Medicaid nursing home

[49] P.L. 103-66, 1993 H R 2264
[50] 18 NY CRR §360-4.4(c)(2)(i)(C),NYS Dept. of Soc. Serv. 96 ADM-8
[51] Id

applicant.[52] Pre-DRA thirty-six (36) months was the maximum period of ineligibility for Medicaid nursing home care created by an outright transfer (not to or from a lifetime trust), so long as no application for Medicaid was made until all periods of ineligibility expired. Pre-DRA sixty (60) months was the maximum period of ineligibility for Medicaid nursing home care that was created for all transfers to or from a lifetime trust, so long as no application for Medicaid was made until all periods of ineligibility expired.

XIII. Transfer of Asset Rules (Post "DRA")

On December 18, 2005, the U.S. Senate in a vote of 51-50 with Vice-President Cheney casting the deciding vote passed the Deficit Reduction Act of 2005 ("DRA"). As a result of some differences in the Senate and House versions, the legislation was sent back to the House of Representatives for a final vote. On February 1, 2006, the House of Representatives by a vote of 216 to 214 approved the DRA. On February 8, 2006, President Bush signed the legislation into law. The States pursuant to the DRA were granted a specified period of time within which to adopt said changes or enact enabling legislation if determined to be necessary. New York State Department of Health on July

[52] Soc. Serv. L. §366.5(d)(4)

20, 2006, issued Administrative Transmittal #06OMM/ADM-5 which implemented the provisions of the DRA in New York effective August 1, 2006. See also CMS publication SMDL #06-108 and SMDL #06-109 for the Center of Medicare and Medicaid Services guidance relevant to the DRA.

The DRA affects Medicaid eligibility and the transfer of asset rules in three (3) significant ways:

1. Creation of a sixty (60) month look back period for all transfers of assets, irrespective of whether they are outright transfers or transfers to certain trusts. Under prior law there was a sixty (60) month look back period for transfers to certain trusts (i.e., Irrevocable Income Only Trust) and a thirty-six (36) month look back for all other transfers. Thus, under the DRA, for transfers made on or after February 8, 2006, the look back period is 60 months.

2. The penalty period (period of disqualification for Medicaid) created by a non-exempt transfer of assets will commence on the later of (a) the first day of the month after assets have been transferred, or (b) the date on which an individual is both receiving institutional level of care (i.e., is in a nursing home) and whose application for Medicaid would be approved, but for

the imposition of a penalty period at that time. Multiple transfers made during the look back period, including transfers that would otherwise result in a fractional penalty, are accumulated into one total amount to determine the penalty period. An application for a waivered program such as the Lombardi Long Term Home Health Care program is not sufficient to trigger the ineligibility period and be considered an "institutional" level of care.

In the event that the imposition of a transfer penalty would create an undue hardship for an applicant, an exception may be made to the application of the penalty. However, there are no substantive changes to the high standards of "undue hardship" as described in 96 ADM-8; however, the procedural requirements as required by the DRA have changed. Undue Hardship requests in the past have been rarely granted utilizing the standards of 96 AMD-8 ("exceptional circumstances resulting in significant financial distress").

Thus, the penalty period for a non-exempt transfer of assets made within the sixty (60) month look back period will commence when the applicant has $13,800 or less, is receiving institutional care in a nursing home, has applied to Medicaid for assistance, and the application would be

approved, but for the penalty period imposed. This is the most onerous measure contained in the new legislation.

It should be noted that, pursuant to the provisions of the DRA, and as under the prior law no penalty period is imposed for transfers made by an applicant requesting community Medicaid (homecare Medicaid).

3. An applicant's Homestead (house, condo, co-op) with net equity above $758,000, in 2011, in New York will render an applicant ineligible for Medicaid. This provision does not apply if a spouse, child under age of 21, or a blind or disabled child resides in the house. Additionally, homeowners will have the ability to reduce their equity through a reverse mortgage or home equity loan.

Some of the other significant changes contained in the DRA with respect to Medicaid are that: (a) annuities will be required to name the state as a remainder beneficiary, and annuities that have a balloon payment will be considered a countable asset; (b) multiple transfers in more than one month must be aggregated; (c) the "income first" rule will be mandatory in all states (already required in New York); (d) penalty periods will be imposed for partial months (rounding down will no longer be permitted); (e) Partnership long term care insurance policies will be

permitted in additional states other than the four presently permitted, including New York.

XIV. Modification of old “Rule of Halves” or “Half a Loaf” Planning

The enactment of the DRA effectively eliminated the ability of the Elder Law Attorney to engage in the old “Rule of Halves” or “Half a Loaf” planning. In the past elder law attorneys could advise their clients to gift approximately half of their assets, create a penalty period and utilize the remaining half of their assets to self pay for their nursing home care during the penalty period. This planning option is effectively eliminated by the DRA which requires that for a transfer made within the 60 month look back period, that the penalty period will not commence on said transfer until the applicant is “otherwise eligible” for Medicaid.

Thus, in a Post DRA crisis situation the elder law attorneys options other than a “Medicaid crisis plan” (which is discussed later herein) is to consider transfers and transactions that are not uncompensated transfers (gifts), but, transactions which involve the applicant receiving consideration for the transfer of assets made. Some of the transactions which can be utilized are as follows:

(a) Purchase of a Life Estate

The DRA provides that if one purchases a life estate interest in the home of another and does not reside in it for at least one year after the date of purchase, the purchase would be treated as a transfer of assets, even if it was for full consideration. Thus, the DRA explicitly creates the possibility of purchasing a life estate in the home of another and having the transfer not be considered a transfer of assets (uncompensated transfer/gift) so long as purchaser resides in the home for at least one year. Need to be aware of capital gains tax consequences.

(b) Personal Service Contract

An agreement between two or more parties in which one or more parties agree to provide managerial or personal services to the other party in exchange for compensation for services provided. Generally, the services can be for such services as cooking, cleaning, assisting with activities of daily living, care giving. If the agreement is with family members, it is advisable to consult with a geriatric care manager whom services the particular geographic area in question, to ascertain what the going fair market value rate for the services to be provided is.

The personal service contract can have both a managerial component and a personal care services component.

The payment options can be either in lump sum or multiple payments. Compensation received by the care giver is income taxable to the care giver. If in a lump sum, could be negative income tax consequences, may want to spread out over 1 or 2 years. Could also possibly have payment made to an escrow account, with annual payments being made therefrom.

-Contract should not have compensation payable to care giver which is higher than market rate compensation.

-Real Estate can be used as a consideration for services, so long as it is commensurate with value of services provided.

-May wish to use escrow agent for payment

See Matter of the Appeal of Jerome Carolla, Fair Hearing # 3565848H

(c) Annuities

Both annuities and Promissory Notes will need to meet the stringent requirements provided in the DRA and 06 OMM/ADM-5.

With respect to an annuity, the applicant will generally either pay to a family member or an entity (bank

or insurance company) a lump sum of money in return for which he or she will receive regular payments of income for the balance of his life or fixed payment of time. Presently, there are few commercial annuities on the market for the short period of time needed to do the crisis planning, thus, most elder law attorneys will need to create private annuities or promissory notes. One other option is where the applicant makes a gift of a certain amount of assets, which creates a period of ineligibility and an additional transaction is entered into which will create the annuity.

The DRA and the ADM treat the annuity as an uncompensated transfer of assets (gift) unless it is part of a retirement plan or if it meets the following requirements:

(a) It must be irrevocable;

(b) Non-Assignable;

(c) Actuarially sound;

(d) No deferral of payments is permitted;

(e) Balloon payments are not permitted;

(f) Payments must be made in equal amounts during the annuities term;

(g) Effective 8/1/06 if an applicant or the applicant’s spouse purchased an annuity on or

after 2/8/06, and the applicant is seeking Medicaid coverage for nursing facility services, the State must be named as remainder beneficiaries in the first position or the purchase of the annuity will be considered an uncompensated transfer of assets.

If there is a community spouse, blind or disabled child, the State must be named in the second position, and in first position if said spouse or representative of such child disposes of the remainder for less than fair market value.

If applicant or applicant's spouse refuses to name state as a remainder beneficiary, the purchase of the annuity will be considered an uncompensated transfer of assets.

**It appears from a close reading of the ADM that letters (b) through (f) above may not apply to an annuity created by the spouse of the applicant.

(d) Promissory Note

The DRA and ADM provide that the funds used to purchase a promissory note, loan or mortgage on or after February 8, 2006 will be treated as an uncompensated transfer (gift) of assets unless it satisfies the following criteria:

(a) the repayment term is actuarially sound;

(b) payments are made in equal amounts during term of loan, with no deferral and no balloon payments made; and

(c) prohibits cancellation of the balance upon the death of the applicant/recipient.

** Promissory Note does not require that the state be named as a remainder beneficiary in the first position or second position. However, it is possible that the note could be treated as an accounts receivable upon the death of the applicant, thus, as asset against which Medicaid will have a claim.

At this time there still exists significant uncertainty as to how Medicaid will decide upon an application where the above stated crisis planning vehicles have been utilized. The risks attendant thereto will need to be explained to the client in great detail.

XV. UTILIZING A MEDICAID CRISIS PLAN WHEN ADVANCE PLANNING IS NOT AN OPTION

The following is an example of a typical crisis plan:

After keeping $13,800 (the "luxury fund") in separate bank account and paying for a pre-need irrevocable burial agreement, if the Medicaid applicant so chooses, the Medicaid

applicant would gift 40-45% of his or her assets to a family member/friend. Simultaneously, the applicant will lend to a family member/friend, his or her remaining excess resources, to be returned monthly pursuant to the terms of a DRA compliant promissory note.

The gift of assets made by the Medicaid applicant will trigger a period of ineligibility for Medicaid covered nursing home care. The monthly promissory note payments will pay for the cost of nursing home care during the period of ineligibility. The monthly payments are made to the Medicaid applicant as the "payee" under the promissory note from the "maker", the person to whom the Medicaid applicant loaned the money, pursuant to the DRA complaint promissory note. In turn the payee will pay the nursing home.

Once the Medicaid applicant's resources are below $13,800 and he or she is residing in a nursing home, he or she should then be eligible for Medicaid in all respects, but for the ineligibility period created, by the uncompensated gift made. Thus, for example if the dollar value of the gift is $100,000, the period of ineligibility for a Westchester County resident would be 9.90 months of ineligibility (100,000 divided by 10,105). A Medicaid application would then be filed with the local Department of Social Services

(DSS). The application should be denied on the sole basis of the gift. The denial will serve as formal notification of the Medicaid penalty period of ineligibility created by the uncompensated transfer for Medicaid-covered nursing home care.

The monthly promissory note payments paid by the maker coupled with the applicant's monthly Social Security and other income, such as a pension, will provide an income stream from which he or she will pay the nursing home during the Medicaid period of ineligibility. The total monthly income plus - the promissory note payment, Social Security income and pension, if you receive one and/or any other income received by the applicant for Medicaid- must total less than the private pay rate of the nursing home, amounting to a monthly short fall. This shortfall amount should not be paid to the nursing home until the Medicaid application has been approved by Medicaid.

When the penalty period expires, a second Medicaid application or recertification is filed with DSS, which should be approved.

XVI. THE DRA's EFFECT UPON THE PLANNING OPTIONS AVAILABLE TO PRESERVE REAL PROPERTY FOR THE FAMILY

Even before the enactment of the DRA the decision to transfer the primary residence raised a number of important

issues and concerns for both the attorney and client, for example; gift taxes, potential capital gains tax consequences and, of course, the transfers impact on the Medicaid eligibility of the senior.

However, once the decision was made to transfer the primary residence to someone other than a spouse, for Medicaid planning purposes, there were generally three primary planning options available:

(a) Outright Transfer of the Residence Without the Reservation of a Life Estate. Perhaps the least desirable option available, as the transferee of the property will receive the transferor's original cost basis in the property (original purchase price/value upon receipt plus capital improvements), and the outright transfer is a completed gift subject to gift taxes. For Medicaid eligibility purposes and pursuant to the DRA, the outright transfer of the residence would be subject to a 60 month look back period, and if the transfer of the residence was made within the look back period, the ineligibility period created would not commence until the individual was in the nursing home had applied for Medicaid and would otherwise be eligible for Medicaid, but for the transfer. For example, although the formula used to calculate the period of ineligibility created by a non-exempt

transfer of assets would be to take the fair market value of the property transferred, and divide said amount by Medicaid Nursing Home Rate for County of Applicant's Residence ($500,000 ÷ $10,105 (Westchester County Rate) equals approximately 49.50 months of ineligibility), under the DRA if Medicaid was needed within the 60 month look back period, the period of ineligibility would not commence until the applicant was receiving institutional care (in a nursing home), had applied for Medicaid and would have been approved but for the transfer made.

Additionally, from a tax perspective the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code ("IRC") §121(a) principal residence exclusion for capital gains of $250,000 (single person) or $500,000 (married couple). However, if the transferee owns and resides in the premises for two out of the five years he or she will be able to use said principal residence exclusion. Any Veteran's, STAR and Senior Citizen's Exemptions are also lost. It is necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the federal gift tax credit ($1,000,000 per person) utilized by the transfer.

(b) Transfer of the Residence with the Reservation of a Life Estate. Under prior law and from purely a Medicaid planning perspective relevant to the length of the ineligibility period created by a non-exempt transfer, this option had some important advantages. Because the retained life estate was given a value by Medicaid, which is subtracted from the overall fair market value of the premises at the time of transfer, the period of ineligibility for Medicaid could, depending on the age of the transferor, be significantly reduced. It was possible to create a period of ineligibility for Medicaid that was often less than 36 months. This was a distinct advantage over the use of a deed without the reservation of a life estate, and a transfer to an Irrevocable Income Only Trust, wherein no reduction in the value of the fair market value of the assets transferred was permitted, for purposes of calculating the period of ineligibility. However, the DRA has significantly reduced the effectiveness of this option. Although technically the period of ineligibility created by a deed with a reservation of a life estate would not be longer than 36 months; pursuant to the DRA, if the transfer was made within the look back period (60 months), the period of ineligibility would not commence until the applicant was receiving institutional care

in a nursing home, and was otherwise eligible for Medicaid, but for the transfer made (has no more than $13,800). Thus, under the DRA a transfer of real property by deed with a retained life estate will also require that the transferor not apply for Medicaid within the look back period to avoid an onerous period of ineligibility.

Pursuant to §2036(a) of the IRC, the transfer of a residence with a retained life estate permits the transferee of the residence to receive a full step up in his or her cost basis in the premises upon the death of the transferor, to its fair market value on the transferor's date of death. This occurs because the residence is includible in the gross taxable estate of the transferor upon his or her demise. This, of course, presumes the existence of an estate tax upon the death of the transferor. A "life estate", pursuant to §2036(a) of the IRC, is the possession or enjoyment of, or a right to the income from the property or the right either alone or in conjunction with another to designate the persons who shall posses or enjoy the property or income thereof.

The most significant problem in utilizing a deed with the reservation of a life estate results if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the

step up in cost basis, thus, subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and (b) the life tenant pursuant to Medicaid rules is entitled to a portion of the proceeds of sale based on the value of his or her life estate. This portion of the proceeds could be significant and will be considered an available resource for Medicaid eligibility purposes, thus, impacting the transferor's eligibility for Medicaid or being an asset against which Medicaid may have a lien. The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored in great detail with the client.

If for tax planning purposes it is prudent to make the gift an "incomplete gift" for gift tax purposes, the reservation of a limited power of appointment to the Grantor should be considered.

It should be remembered that §2702 of the IRC values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained.

Retention of a life estate falls within one of the exceptions of §2702.

If the transfer does not fall within §2702 of the IRC, or if one of the available exceptions applies (e.g. treated as a transfer in trust to or for the benefit of), calculation of the life estate is performed pursuant to IRC §7520, and the tables for the month in issue need to be consulted to determine the correct tax value of the remainder interest.

Pursuant to IRC §2702 if the homestead is transferred to a non-family member, the use of a traditional life estate will result in a completed gift of the remainder interest. It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion of $12,000 per donee for the year 2007.

(c) Transfer to an Irrevocable Income Only Trust a/k/a ("Medicaid Qualifying Trust"). As a result of the enactment of the DRA and from a purely Medicaid Planning perspective, the use of the Irrevocable Income Only Trust may be the most logical advance planning option. As previously explained, irrespective of the fair market value of the residence transferred to the Trust, the period of ineligibility will effectively be five years (60 months), in

order to avoid the harsh penalties contained in the DRA for transfers made within the look back period. However, the properly drafted Irrevocable Income Only Trust will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as it is possible to utilize the transferor's personal residence exclusion of up to $500,000 if married, and $250,000 if single, by reserving in the trust instrument the power to the Grantor(s) in a non-fiduciary capacity and without the approval and consent of a fiduciary to reacquire all or any part of the trust corpus by substituting property in the trust with property of equivalent value. The Grantor(s) will be considered the owner for income tax purposes. See IRC §675(4). Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor. §2036(a) of the IRC.

While the lengthy Medicaid ineligibility period must be appropriately considered, however, the tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax

consequences makes the Irrevocable Income Only Trust an option worthy of consideration, in most circumstances.

The transfer of the residence to the Irrevocable Income Only Trust is a taxable gift of a future interest, no annual exclusion available. Full value of premises reported on gift tax return. If value over $1,000,000 gift taxes are due.

If a limited power of appointment is retained, the gift to the trust is incomplete. Treasury Reg. 25.2511-2(b). No gift tax return is required.

On the death of the Grantor of the Trust, the date of death value of all assets in the trust will be included in the Grantor's taxable estate pursuant to §2036(a) of the IRC, as a result of the life income interest retained by the Grantor. Inclusion in Grantor's estate will result in a full step up in cost basis for all trust assets pursuant to §1014(e) of IRC, assuming an estate tax is still in existence at the time of the Grantor's demise.

The DRA more than anything else severely punishes those who procrastinate in planning for their long term care. Whether it be the transfer of assets to an Irrevocable Income Only Trust, use of a deed with a life estate or the purchase of long term care insurance, it is clear that with advance

not receive because of any action or inaction on their part, court or administrative body, or person acting on their behalf, such as, waiving pension income, renunciations of inheritance, waiver of right of election.[55]

- In New York the transfer of asset penalty periods do not apply to Medicaid homecare. OBRA 93 permits the states to extend the penalty periods to the Medicaid home care program.

- In New York jointly owned assets are presumed to be owned entirely by the Medicaid applicant. However, this presumption can be overcome by evidence that the joint owner actually owns part or all of the property.[56] The joint owner would need to submit documentary proof, i.e., deposit slips. The presumption that the applicant owns the joint account entirely does not apply to non bank account such as brokerage accounts or other financial service account. The joint tenants are personal to own the account equally.

- If assets are held by the applicant as a tenant-in-common, an asset transfer will be deemed to have occurred when any action is taken which reduces or eliminates his or her ownership interest or control. The act of placing

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[55] 18 NY CRR §360-4.4(c)(2)(i)(a), §360-4.4(c)(2)(i)(a)(1), Soc. Serv. L. §366.5(d)(1)(i)
[56] Soc. Serv. L. §366(5)(d)(5)

another's name on an asset is not in and of itself a transfer of assets.[57]

- Penalty periods are imposed for a partial month.[58]

- Post DRA, multiple transfers made during the look back period, including the transfers that would otherwise result in a fractional penalty, are accumulated into one total amount to determine the penalty period.

- Life estates are not available/countable resources for purposes of Medicaid eligibility.[59]

- When real property or assets are transferred to a lifetime trust, the value of the life estate retained is not subtracted for purposes of determining the value of the uncompensated transfer for purposes of calculating the period of Medicaid ineligibility.[60]

XIX. <u>Exempt Assets and Transfers Post DRA</u>

The Pre-DRA exempt transfers were preserved in New York's enabling legislation.[61]

There are transfers of assets which can be made by the Medicaid applicant which do not trigger a period of ineligibility for Medicaid:

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[57] NYS Dept. Of Soc. Serv. 96 ADM-8
[58] Id
[59] 18 NY CRR §360-4.4 (c)(1)
[60] Id

1. If an asset other than the homestead is transferred to: (a) the applicant's spouse, or to another for the sole benefit of the individual'sspouse;[62] (b) from the applicant's spouse to another for the sole benefit of the individual's spouse;[63] (c) disabled child;[64] or (d) to a trust established solely for the benefit of an individual under 65 years of age who is disabled;[65] the transfer will be an exempt transfer which does not create any period of ineligibility for Medicaid.

2. If the homestead is transferred to: (a) the spouse of the applicant;[66] (b) a child of the applicant who is under age 21;[67] (c) a child of the applicant who is blind or disabled, regardless of age;[68] (d) the sibling of the applicant who has an equity interest in the home, and who has resided in the home, and is using it as his or her primary residence for at least one (1) year prior to applicant's admission

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[62] 18 NY CRR §360-4.4(c)(2)(iii)(c)(1)(i); Soc. Serv. L. §366.5(d)(3)(ii)(A)
[63] 18 NY CRR §360-4.4(c)(2)(iii)(c)(1)(i); Soc. Serv. L. §366.5(d)(3)(ii)(A)
[64] 18 18 NY CRR §360-4.4(c)(2)(iii)(b)(1)(iii); Soc. Serv. L. §366.5(d)(3)(i)(C)
[65] 18 NY CRR §360-4.4(c)(2)(iii)(b)(1); Soc. Serv. L. §366.5 (d)(3)(i)(D)
[66] 18 NY CRR §360-4.4(c)(2)(iii)(b)(1); Soc. Serv. L. §366.5 (d)(3)(i)(A)
[67] 18 NY CRR §360-4.4(c)(2)(iii)(b)(2); Soc. Serv. L. §366.5 (d)(3)(i)(B)
[68] 18 NY CRR §360-4.4(c)(2)(iii)(b)(2); Soc. Serv. L. §366.5 (d)(3)(i)(B)

to a long term care facility;[69] or (e) a child of the applicant who has resided in the home as his or her residence for at least two (2) years immediately prior to applicant's admission to the long term care facility and has provided care to his or her parent,[70] ("caretaker exempt transfer") the transfer will be an exempt transfer that does not create a period of ineligibility for Medicaid.

3. Transfers Made by the Community Spouse

If after the institutionalized spouse has been residing in the nursing home for thirty (30) days and receiving Medicaid, any non-exempt transfer of assets made by the community spouse, will only effect his or her eligibility for Medicaid and not the eligibility of the institutionalized spouse.[71]

4. Transfers Made For Purposes Other Than Qualifying for Medicaid

If the applicant can factually establish that the asset transfer was made for purposes other than qualifying for Medicaid for nursing home care, i.e., catastrophic illness occurred unexpectedly

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[69] 18 NY CRR §360-4.4(c)(2)(iii)(b)(3); Soc. Serv. L. §366.5 (d)(3)(i)(C)
[70] 18 NY CRR §360-4.4(c)(2)(iii)(b)(4); Soc. Serv. L. §366.5 (d)(3)(i)(D)
[71] NYS Dept. Of Soc. Serv. Administrative Directive: 96 ADM-11

after transfer was made; the transfer will be an exempt transfer for Medicaid eligibility purposes.[72]

5. <u>Imposition of Penalty Period Creates an Undue Hardship</u>

If it can be established that the imposition of an eligibility period would cause an "undue hardship" upon the applicant, Medicaid is prohibited from denying nursing home benefits to the applicant.

In order to establish an "undue hardship" it must be shown that:

a. The applicant is otherwise eligible for Medicaid;

b. Applicant and/or applicant's spouse are unable to have transferred assets returned despite their efforts to do so;

c. The denial of care would endanger the applicant's health or life.[73]

The granting of Medicaid based upon "undue hardship" rarely occurs in New York.

6. <u>Assets Comprising the Non-Exempt Transfer are Returned to Applicant</u>

If prior to a decision being made as to Medicaid eligibility, all of the assets comprising the non-

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[72] NYS Dept. Of Soc. Serv. Administrative Directive: 96 ADM-8

[73] 18 NY CRR §360-4.4(c)(2)(iii)(e); Soc. Serv. L. §366.5 (d)(3)(iv)

exempt transfer are returned, a period of ineligibility will not be imposed.[74]

If only a portion of the assets comprising the non-exempt transfer are returned prior to a decision being made on Medicaid eligibility, the value of the uncompensated transfer is reduced by the value of the portion returned.[75]

Spousal Refusal In New York

A. Overview

As part of the Medicare Catastrophic Act of 1988, Congress passed the "spousal impoverishment" rules. This allowed the spouse who remained at home("community spouse") to retain resources and income above the levels permitted to unmarried individuals without impacting the eligibility of the spouse applying for Medicaid. The statute created a Minimum Monthly Maintenance Needs Allowance(MMMNA), which for the year 2011 in New York is $2,739 per month and a maximum Community Spouse Resource Allowance(CSRA) which for 2011 is $109,560. More importantly, Congress permitted the community spouse to refuse to contribute his or her assets above the CSRA without jeopardizing the eligibility for the nursing

[74] 18 NY CRR §360-4.4(c)(2)(iii)(d)(1)(iii); Soc. Serv. L. §366.5 (d)(3)(iii)(c)
[75] NYS Dept. Of Soc. Serv. Administrative Directive: 96 ADM-8

home spouse, provided that the State was assigned the nursing home spouse's ("institutionalized spouse") right of support.[76]

The State of New York codified these "spousal refusal" rules so that the community spouse may keep resources and income in excess of the CSRA once two documents are executed:[77]

a. A "spousal refusal" letter, signed by the community spouse, stating that he or she refuses to make available his or her resources to the institutionalized spouse; and

b. An "assignment of support" which is signed by the institutionalized spouse, or if the spouse is unable to sign, a statement explaining the medical reason is to be provided.

The signing of the "assignment of support" authorizes the Department of Social Services ("DSS") to commence an action for support against the refusing spouse. DSS will be able to assert its claim against the refusing spouse once the application has been approved and Medicaid services provided.

From a practical perspective, the decision of whether or not to file the "spousal refusal" is more often than not a purely financial decision. Obviously, if the surviving spouse has income and resources only slightly above the MMMNA

[76] 42 U.S.C. §1396K(a)(1)(A)
[77] Soc. Serv. L. §366(3)(a)

and CSRA, the community spouse may consider alternatives other than utilizing the "spousal refusal", e.g., funding an irrevocable burial trust, creating a "luxury fund" or making improvements to the homestead. However, when the resources and income are significantly in excess of the permitted amounts and the prospect of spending in excess of $130,000 per year for the nursing home looms in the background, "spousal refusal" may be the only viable alternative. Additionally, the election of "spousal refusal" will allow the nursing home spouse to be eligible for Medicaid immediately without necessitating a spend down of the community spouse's resources. This is especially important when the community spouse is younger than the institutionalized spouse, and requires significant resources to be able to continue to reside in the community.

B. Executing a Spousal Refusal

1. In order to qualify the institutionalized spouse for Medicaid nursing home benefits, the institutionalized spouse will generally need to transfer his or her resources to the community spouse who will then often own non-exempt resources in excess of the current maximum CSRA level of $109,560 and/or have monthly income above the current MMMNA level of $2,739. Thus, an otherwise Medicaid eligible institutionalized spouse will be deemed ineligible for

Medicaid. The community spouse will then need to execute a "spousal refusal".

A transfer of assets between spouses will not affect the applying spouse's right to secure Medicaid. Said transfer is commonly known as an "inter-spousal transfer".[78]

2. Under Federal law, the community spouse may exercise "spousal refusal", and may thereby retain resources and income in excess of the CSRA or the MMMNA without jeopardizing the institutionalized spouse's Medicaid eligibility, provided that:[79]

a. As to Resources - (i) the institutionalized spouse assigns to the state any right of support from the community spouse;[80] or (ii) if the institutionalized spouse is unable to execute an assignment of support due to physical or mental impairments, in which case the state may commence a support proceeding against the community spouse without the assignment;[81] or (iii) the state finds that the denial of eligibility would "work an undue hardship".[82]

b. As to Income - The exercise of a "spousal refusal" necessitates that during any month in which an

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[78] 42 U.S.C. §1396 P(c)(2)(A)(i)
[79] 42 U.S.C. §1396K(a)(1)(A)
[80] 42 U.S.C. §1396R 5(c)(3)(A); Soc. Serv. L. §366-C.5(b)
[81] 42 U.S.C. §1396R-5(C)(3)(B)

[82] 42 U.S.C. §1396R-5(c)(3)(C); Soc. Serv. L. §366-C.5(b)

institutionalized spouse is in the institution, except as provided in certain specific circumstances, no income of the community spouse shall be deemed available to the institutionalized spouse.[83]

c. Statutorily Authorized in New York To Establish Medicaid Eligibility Through the Execution of a "Spousal Refusal"

1. "Medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law."[84]

[83] 42 U.S.C. §1396R-5(b)(ii)
[84] Soc. Serv. L. §366.3(A)

d. “Spousal refusal” can be used in the context of not only Medicaid nursing home benefits, but also other types of community-based Medicaid. For example, the Lombardi Long Term Home Health Care Program and home care.

3. Impact of “Spousal Refusal”

a. Medicaid may only consider the income and resources of the applying spouse.

b. The community spouse, outside New York City must disclose information about his or her resources and income, as well as any personal information which must be included as part of the Medicaid application.

c. If a husband and wife were living “separate and apart” from one another at the time that the applying spouse was institutionalized, he or she may be unable to obtain information as to the income and resources of the non-applying spouse.

d. Refusing spouse does not have to sign the Medicaid application on behalf of the institutionalized spouse.

4. Spousal Recovery Suits

- If the non-applying spouse has resources and/or income above the allowable levels, and exercises his or her

"spousal refusal" to render the ineligible applying spouse, eligible for Medicaid, the refusing spouse may be sued by Medicaid for the benefits paid on behalf of the spouse receiving Medicaid.[85]

- In New York, Medicaid also relies on Social Services Law §101 in asserting its right to seek reimbursement from the "responsible relative".

- Social Services Law §101 provides the refusing spouse have "sufficient ability", which infers that the refusing spouse must only have resources or income above the allowable Medicaid levels.

- Spousal recovery cases are pursued both in State Supreme Court and Family Court, although there is no authority for Medicaid to bring such proceedings in Family Court under the Family Court Act.

5. Spousal Recovery Cases

a. Matter of Shah, 95 N.Y.S. 2d. 148, 711 N.Y.S. 2d 824(2000), the Court of Appeals recognized the doctrine of "spousal refusal" and upheld the refusing spouse's right to transfer all of the institutionalized spouse's assets to her, and to thereafter execute a "spousal refusal" to render the institutionalized spouse eligible for Medicaid nursing home benefits.

[85] Soc. Serv. L. §366(3)(a)

b. Department of Social Services v. Fishman, NYLJ July 23, 1998, p.21 (Supreme Ct. NY Co.), reversed, 713 N.Y.S. 2d. 152 (1st Dept. 2000). The trial court dismissed the complaint filed by Medicaid seeking reimbursement from the refusing spouse on that ground that they did not plead that income and resources of the refusing spouse were above the allowable levels at all times during the period that Medicaid had paid for the institutionalized spouse's care. The complaint had instead only plead that there were excess resources at the time that eligibility was established.

c. The Appellate Division, First Department reversed, finding that: "Since "the furnishing of such assistance" to an applicant who has a "responsible relative with sufficient income and resources...as determined by the regulations of the department" who has failed or refused to provide assistance "creates an implied contract with such relative," the implied contract is created at the time the responsible relative refuses to make his or her income available to provide care to the institutionalized spouse. A contrary interpretation would engraft on to the statute a requirement that DSS make continual reassessments of the

responsible spouse's ability to pay." 713 N.Y.S. 2d. At 154.

d. Commissioner of the Department of Social Services v. Mandel, N.Y.L.J., September 14, 2001, p. 18, col. 1, Supreme Court, New York County): Medicaid was awarded summary judgment on its claim that the community spouse owed Medicaid $319,656.50 for benefits paid on behalf of the institutionalized spouse. The Court held that the community spouse (assets exceeding $1.5 million) had sufficient ability to pay for his wife's care. The community spouse's argument that his assets included illiquid commercial real estate that should be considered exempt was rejected by the Court. The Court also ordered interest be paid.

e. Matter of Craig, 82 N.Y. 2d 388, 604 N.Y.S.2d 908 (1993), in which DSS sought recovery from the estate of the refusing spouse of a Medicaid recipient, the Court of Appeals held "recovery" against the refusing spouse's estate in the nature of an implied contract for support is possible against the estate of the refusing spouse who was possessed of "sufficient ability" to provide support to the institutionalized spouse at the time that Medicaid paid benefits out on behalf of the

institutionalized spouse. "The plain import of the Social Services Law §366(3)(a),... allows the belated recovery [emphasis added] from the responsible relative only if that party had sufficient means during that period of medical assistance was rendered." 82 N.Y.2d at 393, 604 N.Y.S.2d at 911.

f. Matter of the Estate of Lois Link, 718 N.Y.S.2d 758 (App. Div. 4th Dep't 2000): Medicaid was allowed to recover monies from the estate of the community spouse that it had paid on behalf of an institutionalized spouse. The Court opined that the community spouse had sufficient income and resources to pay for the institutionalized spouse's care. It also determined that Medicaid was also entitled to interest at the rate of 9 percent per year from the date of each separate payment of medical assistance made on the institutionalized spouse's behalf.

6. Recovery Against the Estate of a Refusing Spouse

- Claims against the estate of the institutionalized spouse are not permitted if he/she survived by the refusing spouse. However, at the time that the refusing spouse dies, a lien for the amount paid on behalf of the Medicaid spouse can be placed against the refusing spouse's estate.[86]

[86] 18 NY CRR §360-7.1(b)(2)

- New York only seeks to recover against assets which are part of the Medicaid spouse's estate and passing under a valid Last Will or in intestacy (does not include property passing by operation of law).[87] However, this regulation would not protect the refusing spouse's estate in the event that Medicaid seeks reimbursement for monies paid out on behalf of the Medicaid spouse.

- A 10 year statute of limitations prohibits Medicaid's recovery of benefits paid 10 years or more after the Medicaid spouse's death also applies to the refusing spouse and his or her estate.[88]

- If the refusing spouse survives the Medicaid spouse by more than 10 years, and if Medicaid benefits were paid on behalf of the Medicaid spouse when he or she was 55 years or older, Medicaid has no claim against the refusing spouse or the refusing spouse's estate.[89]

- In the event that the refusing spouse predeceases the Medicaid spouse, then a lien may be placed against the refusing spouse's estate for benefits paid on behalf of the Medicaid spouse as long as Medicaid can show that the refusing spouse had "sufficient ability" to pay for the Medicaid spouse's care during the period in question. Matter

[87] Soc. Serv. L. §366(6)
[88] Soc. Serv. L. §104(b)
[89] 18 NY CRR §348.4, §352.31(d)(5)

of Craig, supra (i.e., that the refusing spouse had resources and/or income above the CSRA and MMMNA levels respectively).

Spousal Right of Election

Pursuant to New York's Estates, Powers & Trusts Law (EPTL) §5-1.1-A, the surviving spouse has a "personal right of election" to take a pecuniary amount equal to the greater of $50,000, or one-third of the net estate.

A pecuniary amount is defined as a specific amount (not a fractional share) of the ultimate amount. 1/3 of the net estate means 1/3 of the pecuniary value of the decedent's estate at the time of death. The net estate does not increase or decrease during the estate administration.

The net estate is comprised of the following:

(a) All assets passing under the Will;

(b) All property passing under intestacy;

(c) All "Testamentary Substitutes". Within the definition of testamentary substitutes are included:

- US Savings Bonds
- General Powers of Appointment
- Totten Trusts
- Gifts Causa Mortis
- Retirement Plans

- Joint Bank Accounts, Joint/POD Accounts
- Transfers made within 1 year of death
- Revocable Trusts

Exercise of the Right of Election

- The surviving spouse can exercise the right of election. The election cannot be made by a fiduciary after the death of the surviving spouse.
- When authorized by the Court, the right of election can be exercised on behalf of the surviving spouse by:
- The guardian of the property of an infant/mentally retarded or developmentally disabled (SCPA Article 17-A guardian) spouse;
- The committee/conservator of an incompetent spouse, when so authorized by the court;
- The guardian ad litem for the surviving spouse;
- A guardian authorized under Mental Hygiene Law Article 81.

How to Exercise the Right of Election

- Must be made within 6 months from the date of issuance of letters testamentary or letters of administration, but not later than 2 years after the date of decedent's death.

- The original must be filed with proof of service in the Surrogate's Court where letters were issued.

- Written notice must be served upon any personal representative in the manner provided within the statute, or upon a person named in the Will on file in the Surrogate's Court.

- Waiver of the right of election may be made by a spouse during the lifetime of the other spouse.

- The waiver of election must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws for the recording of real property.

- An unacknowledged waiver is ineffective.

<u>Right of Election and Medicaid Transfer of Asset Rules</u>

- A waiver of the right of election constitutes a transfer for less than adequate and full consideration... and results in a penalty period for Medicaid eligibility purposes.

- "The critical question is the consequences of such inaction, irrespective of its legality... The test relative to Medicaid is the availability of this resource."

- <u>Matter of Maffei</u>, 169 Misc.2d 989 (Nassau County 1996) <u>Date of Transfer for Failure to Exercise Right of Election</u>

- Example 3 p.16 of 06 OMM/ADM-5 involves the transfer penalty imposed on the failure to exercise a right of election.

- The ADM states that the date of transfer is "the last date the institutionalized individual could have pursued his elective share..."

- The position stated in the ADM significantly differs from the position established in prior case law. Estate of Dionisio v. Westchester County DSS 244 A.D. 2d 483, 655 N.Y.S. 2d 204, the date of death was considered the date of transfer for failure to exercise a right of election.

- The DRA penalty will not begin to run until one has applied for Medicaid, is otherwise eligible for Medicaid in a nursing home or a waivered program and not from the transfer date, it is uncertain what impact this change will have. However, if death was before February 8, 2006 or, if later, more than 5 years before the Medicaid was filed, it could be significant.

ARTICLE 81 OF THE MENTAL HYGIENE LAW— APPOINTMENT OF A GUARDIAN FOR PERSONAL NEEDS AND/OR PROPERTY MANAGEMENT

Rose Mary Bailly, Esq.*

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[0.1] I. APPOINTMENT OF A GUARDIAN

[0.2] A. Who May Be Appointed Guardian

In appointing a guardian, the court must observe the following order of priority: (1) a written nomination, and (2) a nomination orally or by other conduct of the incapacitated person during the proceeding.[1] Although the courts generally give great weight to the alleged incapacitated person's wishes regarding the person to be appointed, the court may choose someone else if there would be a conflict of interest.[2] The statute also lists the general criteria the court should consider in selecting the guardian. These criteria address the relationship between the proposed guardian and the alleged incapacitated person, the needs of the alleged incapacitated person and the experience of the proposed guardian.[3] The courts have long regarded family members as the most suitable guardians barring evidence that they have neglected to care for the person or their interests conflict with those of the incapacitated person.[4] In *Chase*, the Appellate Division overturned the appointment of a "stranger" as guardian. The trial court had based its appointment on evidence of neglect and dubious transfers of substantial assets by the alleged incapacitated person's daughter. The Appellate Division found that the evidence demonstrated that the daughter was caring for her father in an appropriate manner and that the transfers had occurred with the father's consent. Nevertheless, it ruled that certain additional safeguards of requiring a physical examination by a court-appointed physician and by requiring semi-annual reports on the finances of the incapacitated person would serve to curb the potential for abuse.

While family members are generally preferred by the court, the statute does not give them any particular status. Moreover, if there is acrimony among the family members, the court can select a neutral

1 MHL § 81.19(b), (c). *See In re Kathleen F.F.*, 6 A.D.3d 1035, 776 N.Y.S.2d 609 (3d Dep't 2004). This case involved a self-petition for the appointment of the alleged incapacitated person's niece and attorney-in-fact as her guardian. The matter was contested by another niece and nephew who became aware of the petitioner's assets when the niece/attorney-in-fact contacted them for consent to partially revoke an irrevocable trust that had been established without their knowledge. The court affirmed the decision to appoint the niece guardian since this choice was in accordance with the alleged incapacitated person's wishes.

2 *See, e.g., In re Gorayeb*, N.Y.L.J., Jan. 6, 2003, p. 27, col. 4 (holding that a conflict of interest existed between the alleged incapacitated person and his ex-wife to whom he owed arrears in child support and this conflict was sufficiently grave to override his expressed desire at the hearing that she be appointed his guardian); *In re Kustka*, N.Y.L.J., Jan. 11, 1995, p. 25, col. 5 (Sup. Ct., Queens Co.); *In re Loury*, N.Y.L.J., Sept. 23, 1993, p. 26, col. 2 (Sup. Ct., Kings Co.).

3 MHL § 81.19(d).

4 *See, e.g., In re Anonymous*, 41 A.D.3d 346, 839 N.Y.S.2d 78 (1st Dep't 2007); *In re Gladwin*, 35 A.D.3d 1236, 828 N.Y.S.2d 737 (4th Dep't 2006); *In re Chase*, 264 A.D.2d 330, 694 N.Y.S.2d 363 (1st Dep't 1999); *see also In re Joseph V.*, 307 A.D.2d 469, 762 N.Y.S.2d 669 (3d Dep't 2003) (affirming a judgment awarding guardianship of the incapacitated person, a comatose patient, to a nonfamily member since immediate family members suffered from drug and alcohol problems and were deemed unsuitable to be guardians); *In re Keele (An Incapacitated Person)*, N.Y.L.J., June 12, 2001, p. 18, col. 3 (Sup. Ct., N.Y. Co.) (court declined to appoint the petitioner's attorney as co-guardian for the incapacitated person and instead appointed an attorney who had not been part of the proceeding); *In re Jeraldine C.*, 14 A.D.3d 560, 789 N.Y.S.2d 180 (2d Dep't 2005) (trial court appointed the nephew of the incapacitated person and his wife as co-guardians and on appeal, despite the absence of findings of fact to support this appointment, the appellate division upheld the appointment because the record supported the court's decision. The nephew enjoyed a close relationship with his aunt and his wife had experience in elder care. The daughters of the incapacitated woman had what the court described as a "breakdown in communications," which led to the guardianship proceeding, neither lived near their mother, and, perhaps, most important, the petitioner did not object to the appointment of the nephew and his wife.).

party.[5] In addition to appointing individuals, the statute permits the court to appoint a not-for-profit corporation or a public agency authorized to act in such capacity, a social services official or any community guardian program.[6] The court may also appoint a corporation except that only a not-for-profit authorized by law to act as a guardian may be appointed to exercise powers with respect to the personal needs of the incapacitated person.[7] If the local department of social services commences the proceeding, and the proceeding is brought in New York City, it may nominate a participant in the Community Guardian Program as guardian. The Community Guardian Program is limited to New York City, and the alleged incapacitated person must reside in the community or a return to the home is contemplated as part of the guardianship plan.[8]

The Jewish Association for Services for the Aged (JASA), a community guardianship program appointed as conservator for Mrs. Cedeno in 1991 under Article 77 of the Mental Hygiene Law, sought to be discharged when its client was transferred to a nursing home, a placement JASA approved. (Note that even though it was only a conservator of the property, JASA apparently had the additional authority over Mrs. Cedeno's person at least to the extent of the authority to approve nursing home placement.) Community guardianship programs such as JASA, which are governed by SSL § 473-d, serve individuals while they are in the community. The programs are not authorized to be appointed for persons in residential care facilities. Consequently, upon Mrs. Cedeno's transfer to a nursing home, JASA petitioned the court to approve its final accounting and to appoint a guardian *ad litem* for Mrs. Cedeno. The trial court refused to discharge JASA, appointed JASA as guardian and directed JASA to assist the court in finding a guardian. The court opined it was precisely at the time when a person is transferred to a nursing home that he or she needs an advocate. The appellate court, while sympathetic to the trial court's concerns, reversed, remanded the proceeding to the trial court to permit JASA to file its final accounting, and directed the trial court to appoint a guardian *ad litem* for Mrs. Cedeno. The appellate court noted that while the trial court's efforts to "bridge the gap" and protect Mrs. Cedeno while a new guardian was sought were "well intentioned," there were several reasons why its solution was incorrect. Section 473-d expressly forbids a community guardian program from assuming responsibility for a person not residing in the community. Additionally, in expanding the authority of JASA to include authority over Mrs. Cedeno's person, the court overlooked the requirements of Article 81. Finally, it created the potential for a conflict of interest in that JASA, by appealing the court's order, was in an adversarial relationship with the person whom it was intended to protect.

5 *In re Ollie D.*, 817 N.Y.S.2d 142, No. 100105/03 (2d Dep't 2006). *See also In re Ardelia R.*, 28 A.D.3d 485, 812 N.Y.S.2d 140 (2d Dep't 2006) (family member was unsuitable because the brother of his allegedly incapacitated sister had obtained a power of attorney and thereafter mismanaged her funds); *In re J.M.*, 13 Misc.3d 582, 823 N.Y.S.2d 843, 2006 WL 1674299 (Sup. Ct., Bronx Co. 2006) (son of an incapacitated woman could not serve as guardian because of his felony conviction. The court proposed certain amendments to the rules of Part 36 of the Rules of the Chief Judge [22 N.Y.C.R.R. Part 36] governing fiduciaries to insure that criminal convictions come to light.). *But see In re Samaritan Med. Ctr.*, 38 A.D.3d 1204, 832 N.Y.S.2d 374 (4th Dep't 2007) (At the hearing, a representative from the local social services office testified that DSS was not willing to take responsibility, so the trial court dismissed the proceeding. The Appellate Division reversed and remitted the matter to the trial court for the appointment of a guardian.).

6 MHL § 81.19(a).

7 *Id.*

8 *See, e.g., In re Jewish Ass'n for Servs. for the Aged (Cedeno)*, 171 Misc. 2d 689, 655 N.Y.S.2d 283 (Sup. Ct., N.Y. Co.), *rev'd*, 251 A.D.2d 105, 674 N.Y.S.2d 34 (1st Dep't 1998).

Under the statute, a creditor or a service provider other than a relative may be appointed as guardian only as a last resort.[9] "[A] service provider makes some decisions in terms of the fiscal and political needs of [the] organization and is not in a position to give his sole attention to the best interests of the individual receiving the service."[10] The case of *In re Patrick BB*[11] illustrates the issues raised when a creditor seeks to be appointed guardian. Patrick BB, a 65-year-old, developmentally disabled man residing in a family care home and receiving case management services from the Office of Mental Retardation and Developmental Disabilities (OMRDD), was determined by the court to be incapacitated and in need of a guardian. After settling an issue relating to the funding of a supplemental needs trust with Mr. BB's inheritance, OMRDD sought to be appointed guardian of his personal funds. The trial court appointed OMRDD as guardian. Citing section 81.19(e), the court on appeal reversed, holding that OMRDD was ineligible to act as guardian since it occupied the position of creditor and provider of services to Mr. BB. Mr. BB requested that the New York State Association for Retarded Children (NYSARC) hold his inheritance in a charitable Medicaid-qualified pool trust, administered by NYSARC, because NYSARC could become a potential creditor. Citing *In re Commissioner of Cayuga County Department of Social Services (Bessie C.)*,[12] the appellate court noted that NYSARC could be appointed if no neutral person could be found to serve.

The case of *In re F.I.*[13] explored whether the court could appropriately appoint either a court evaluator or counsel for the alleged incapacitated person as the person's guardian. Petitioner, the city of New York, sought the appointment of a guardian for the person and property of F.I. The proposed guardian, a community guardian, would not accept the appointment because Mr. I. was in a hospital and not technically in the community. Noting that F.I.'s spouse was incapacitated and no other family member was available to act, the court considered whether appointing the court evaluator or F.I.'s counsel would create a conflict of interest. Mindful of the December 2001 Report of the Commission on Fiduciary Appointments, which found that a conflict of interest arises when a court appoints counsel or an evaluator as guardian for an alleged incapacitated person,[14] the court opined that the report did find that an evaluator may be appointed without a conflict of interest where there are minimal assets, as was the case with F.I. The court also noted that MHL § 81.19 does not contain any language absolutely prohibiting the appointment of certain individuals. Because of the lack of statutory prohibition, and the close relationship that had been established between Mr. I. and both counsel and evaluator, the court determined that there was no conflict of interest in granting them co-guardianship.

Many of the issues about who is a suitable guardian arise because of a shortage in many cases of available guardians, so courts look at alternatives such as a not-for-profit corporation like the depart-

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9 MHL § 81.19(e)(1), (2); *see Samaritan Med. Ctr.*, 38 A.D. 1204 (upon remitting to trial court for appointment of guardian, the Appellate Court noted that the hospital petitioner, even though a creditor, was a potential guardian); *In re Gorayeb*, N.Y.L.J., Jan. 6, 2003, p. 27 (holding that the ex-wife of the alleged incapacitated person to whom he owed arrears in child support was a creditor).

10 The President's Committee on Mental Retardation, *The Mentally Retarded and the Law* at 85.

11 284 A.D.2d 636, 725 N.Y.S.2d 731 (3d Dep't 2001).

12 225 A.D.2d 1027, 639 N.Y.S.2d 234 (4th Dep't 1996).

13 N.Y.L.J., Apr. 5, 2002, p. 20, col. 2 (Sup. Ct., Kings Co.). *See In re Meyers*, 195 Misc. 2d 610, 760 N.Y.S.2d 648 (Sup. Ct., Kings Co. 2003) (appointment of court evaluator as guardian was appropriate under Rule 36.29(c)(10) because extenuating circumstances warranted the appointment. The parents of the minor incapacitated person were divorced and antagonistic to one another but they both liked the court evaluator and agreed to his appointment).

14 *F.I.*, N.Y.L.J., Apr. 5, 2002 (citing Report on the Commission of Fiduciary Appointments, 23–24, 38–39, Dec. 2001).

ment of social services. 22 N.Y.C.R.R. § 36.2(c)(7) provides that a person who has been convicted of a felony is disqualified from serving as guardian unless the individual has received a certificate of relief from disabilities. The certificate of relief must be permanent in order for the person to be an acceptable candidate.[15]

[0.3] B. Duties and Powers of Guardian

[0.4] 1. Duties

The statute emphasizes the unique relationship between the guardian and the incapacitated person. The guardian must use the utmost care and diligence when acting on behalf of the incapacitated person and exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person.[16] The statute identifies the primary duties of all guardians. They include the duty to: (1) exercise only those powers that the guardian is authorized to exercise by court order; (2) file an initial report and annual reports thereafter; and (3) visit the incapacitated person not less than four times a year or more frequently as specified in the court order.[17]

To the extent the guardian has authority with respect to property management, the guardian must observe additional duties listed in the statute, including: (1) preserving, protecting and accounting for such property and financial resources; (2) using the property and financial resources and income available therefrom to maintain and support the incapacitated person and those persons dependent upon the incapacitated person;[18] and (3) filing with the recording officer of the county where the incapacitated person owns real property an acknowledged statement identifying the real property, its tax map numbers, the date of adjudication of incapacity of the person regarding property management, and the name, address and telephone number of the guardian and the guardian's surety.[19]

To the extent the guardian has authority with respect to personal needs, the guardian has the duty to afford the incapacitated person the greatest amount of independence and self-determination in light of

15 *See, e.g., In re V.W.*, 2007 WL 1214661 (Sup. Ct., Bronx Co. 2007); *In re J.M.*, 13 Misc. 3d 582, 823 N.Y.S.2d 843 (Sup. Ct., Bronx Co. 2006).

16 *See In re Nicks*, N.Y.L.J., Jan. 29, 1998, p. 32, col. 6 (Sup. Ct., Nassau Co.) (in discharging a not-for-profit organization that had failed to carry out the obligations imposed on it by Article 81, the court noted the serious nature of the duties of a guardian); *In re Ruth "TT,"* 283 A.D.2d 869, 725 N.Y.S.2d 442 (3d Dep't 2001) (the court held that in her capacity as fiduciary, the guardian had standing to move to disqualify the law firm representing the distributees of a trust who were challenging the capacity of the incapacitated person to establish the trust, because the firm had originally represented the guardian during the appointment phase of the guardianship proceeding. The court also held that the trial court did not abuse its discretion in disqualifying the law firm because of the obvious nature of the conflict brought about by representing the proposed guardian and having access to information in that role that the firm could then use to challenge the trust). *See also Columbia Memorial Hosp. v. Barley*, 16 A.D.3d 748, 790 N.Y.S.2d 576 (3d Dep't 2005) (whether a guardian breached the fiduciary duty to the incapacitated person is an issue that must be addressed in an existing Article 81 rather than in a free-standing case).

17 *See* MHL § 81.20(a).

18 *See, e.g., 124 Macdougal St. v. Hurd*, N.Y.L.J., Feb. 2, 2000, p. 28, col. 4 (Civ. Ct., N.Y. Co.) (guardian has the authority to seek vacatur of default judgment against incapacitated tenant).

19 MHL § 81.20(a)(6).

that person's functional level, understanding and personal wishes, preferences and desires with regard to managing the activities of daily living.[20]

[0.5] 2. Powers

In accordance with the functional limitations of the incapacitated person, the person's understanding and appreciation of the harm that could befall him or her because of these limitations in meeting personal needs or property management needs, and the individual's personal wishes, preferences and desires, and the least restrictive form of intervention, the court may grant the guardian the necessary powers.

[0.6] C. Personal Needs Powers

The statute lists powers to provide for the personal needs of the incapacitated person, including the power to:

1. determine who shall provide personal care or assistance;
2. make decisions regarding social environment and other social aspects of the life of the incapacitated person;
3. determine whether the incapacitated person should travel;
4. determine whether the incapacitated person should possess a license to drive;
5. authorize access to or release of confidential records;
6. make decisions regarding education;
7. apply for government and private benefits;
8. consent to or refuse generally accepted routine or major medical or dental treatment;[21]

20 MHL § 81.20(a)(7). *In re Solomon T.R.*, 6 A.D.3d 449, 774 N.Y.S.2d 360 (2d Dep't 2004) (overturning the trial court's granting of petitioner's request to bar two individuals from visiting the incapacitated person. Although petitioner claimed that the individuals were harassing the incapacitated person, the Appellate Division found insufficient evidence to support this claim. The court stated that petition did not establish conduct that constituted harassment, citing to the Penal Law. It also noted that restrictions on their visits to the incapacitated person were not warranted and that the guardian should afford the incapacitated person as much independence as possible).

21 *See In re Guardianship of B.*, 190 Misc. 2d 581, 738 N.Y.S.2d 528 (Tompkins Co. Ct. 2002) (in dicta, court interpreted § 81.22 to include the authority to consent to sterilization of the incapacitated person, provided the standards demonstrating that sterilization was in the best interest of the incapacitated person were met).

9. choose the place of abode.[22]

In making decisions about medical treatment, the statute provides guidance:

> [T]he guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patient's wishes, including the patient's religious and moral beliefs, or if the patient's wishes are not known and cannot be ascertained with reasonable diligence, in accordance with the person's best interests, including a consideration of the dignity and uniqueness of every person, the possibility and extent of preserving the person's life, the preservation, improvement or restoration of the person's health or functioning, the relief of the person's suffering, the adverse side effects associated with the treatment, any less intrusive alternative treatments, and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider.[23]

The statute also provides guidance about choosing the home of the incapacitated person:

> [C]hoice of abode must be consistent with the findings under section 81.15 of this article, the existence of and availability of family, friends and social services in the community, the care, comfort and maintenance, and where appropriate, rehabilitation of the incapacitated person, the needs of those with whom the incapacitated person resides; placement of the incapacitated person in a nursing home or residential care facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility shall not be authorized without the consent of the incapacitated person so long as it is reasonable under the circumstances to maintain the incapacitated person in the community, preferably in the home of the incapacitated person.[24]

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22 *See, e.g., In re Nimon*, 15 A.D.3d 978, 789 N.Y.S.2d 596 (4th Dep't 2005) (after the court's Solomon-like decision appointing two daughters co-guardians and ordering that the incapacitated person residence be divided between the respective cities of her two daughters in Pennsylvania and Massachusetts, the daughter living in Pennsylvania and her brothers sought modification of the order to make the mother's residence in Pennsylvania year-round. On appeal from the trial court's decision that the permanent residence should be in Massachusetts, the court held that the trial court had improvidently exercised its discretion because the evidence demonstrated that a further transfer of the incapacitated person who suffered from Alzheimer's disease would have a deleterious effect on the woman so that it would be in her best interests to remain where she was.). For the entire list, see MHL § 81.22(a). *Cf. In re Julia C.*, N.Y.L.J., Mar. 15, 2004, p. 20, col. 3 (Nassau Co. Ct.) (ruling that a health care agent of the alleged incapacitated person did not have the power to determine the alleged incapacitated person's place of residence).

23 MHL § 81.22(a)(8).

24 MHL § 81.22(a)(9); *see In re McNally*, 194 Misc. 2d 793, 755 N.Y.S.2d 818 (Sup. Ct., Suffolk Co. 2003), *aff'd sub nom In re Marion A.W.*, 4 A.D.3d 432, 771 N.Y.S.2d 356 (2d Dep't 2004) (weighing the balance between nursing home placement and a return to the person's home and concluding that the home to which the alleged incapacitated person wished to return was the home of her happy memories and not reality).

A number of cases have addressed the authority of the guardian to admit the incapacitated person into a nursing home.[25]

Two decisions have raised questions about the guardian's authority to consent to psychotropic medication over the objection of the incapacitated person.[26] Earlier decisions held that Article 81 proceedings differ from a *Rivers* hearing because Article 81 focuses on a person's functional limitations and the *Rivers* hearing has a narrow focus on whether the person had the capacity to consent to the medication. The view consistently adopted by the courts was that where the issue was consent to psychotropic medication, the appropriate route was to seek court approval for each treatment order through a *Rivers* application.[27]

These lower court opinions offer differing views on whether resort to a separate *Rivers* hearing is necessary when the guardian has been appointed and has the authority to consent to the medical treatment including psychotropic medication. Each case involved an individual with a mental illness who had been determined by a Nassau County court to be incapacitated under Article 81 of the Mental Hygiene Law after the appointment of a court evaluator and a hearing. Some time after the appointment of the guardian in *Presbyterian*, the incapacitated person was hospitalized in Westchester County. She had a diagnosis of schizophrenia and some history of lack of compliance with medication and lack of followup. The guardian's order of appointment included the power "to consent to or refuse generally accepted routine or major medical or dental treatment."[28] At the request of the guardian, the appointing court issued an order affirming the guardian's authority "to consent or to refuse the administration of antipsychotic or other psychiatric medications or treatment."[29] The hospital commenced a proceeding under Article 33 of the Mental Hygiene Law. The issue before the court was whether the guardian was authorized to waive a hearing.

While the court acknowledged that *Rivers* requirements are included within an Article 81 hearing, it concluded that the constitutional dimensions of the right to object to the type of treatment in question and the exercise of a guardian's authority circumscribed the authority of a guardian to consent to treatment over the person's objections. The court reasoned that Article 81 requires that the guardian's

25 *See, e.g.*, *In re Skinner (Lyles)*, N.Y.L.J., Feb. 21, 1997, p. 25, col. 3 (Sup. Ct., N.Y. Co.), *rev'd sub nom. In re Lyles*, 250 A.D.2d 488, 673 N.Y.S.2d 122 (1st Dep't 1998) (temporary guardian appointed to transfer patient to nursing home); *In re Grace "PP" (Sautter)*, 245 A.D.2d 824, 666 N.Y.S.2d 793 (3d Dep't 1997) (temporary guardian authorized to transfer patient to nursing home); *In re Gambuti (Bowser)*, 242 A.D.2d 431, 662 N.Y.S.2d 757 (1st Dep't 1997) (temporary guardian should not be authorized to transfer patient to nursing home); *In re Rimler (Richman)*, 164 Misc. 2d 403, 625 N.Y.S.2d 443 (Sup. Ct., Queens Co. 1995), *aff'd sub nom. In re Harriet R.*, 224 A.D.2d 625, 639 N.Y.S.2d 390 (2d Dep't 1996) (court granted guardian the authority to transfer obese woman to a nursing home if maintaining her in her apartment became unreasonable); *In re Jospe (Grala)*, N.Y.L.J., Jan. 30, 1995, p. 30, col. 2 (Sup. Ct., Suffolk Co.) (court granted guardian the authority to place incapacitated person in a nursing home primarily because, even though the incapacitated person expressed a strong desire to return to her home in the community, the back-up personnel required to accomplish this living arrangement were not available and thus Medicaid was denied. The court nevertheless ordered the guardian to explore available arrangements that Medicaid would cover).

26 *Compare In re N.Y. Presbyterian Hosp. (J.H.L)*, 181 Misc. 2d 142, 693 N.Y.S.2d 405 (Sup. Ct., Westchester Co. 1999), *appeal dismissed*, 276 A.D.2d 558, 716 N.Y.S.2d 859 (2d Dep't 2000) (*Rivers* hearing required when incapacitated person challenges the guardian's consent to the administration of psychotropic medication) *with In re Diurno (Conticchio)*, 182 Misc. 2d 205, 696 N.Y.S.2d 769 (Sup. Ct., Nassau Co. 1999) (guardian with authority to consent to psychotropic medications can do so over the objections of the incapacitated person without further court proceedings). *See Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986).

27 *See, e.g.*, *In re Berg*, N.Y.L.J., Dec. 11, 1998, p. 35, col. 5 (Sup. Ct., Rockland Co.).

28 *Presbyterian Hosp.*, 181 Misc. 2d at 152.

29 *Id.* at 145.

decisions should be consistent with the person's "personal wishes, preferences and desires."[30] and prohibits an Article 81 guardian from "consent[ing] to the voluntary formal or informal admission of the incapacitated person [in]to a mental hygiene facility."[31]

In light of the fact there had been no judicial review of her mental status in the three years since the guardian's appointment, the court found that the potential for a change in mental status with respect to treatment decisions should be examined in a *Rivers* hearing.

The court in *Diurno* disagreed on several grounds. First, according to the court, Article 81's procedures for the determination of incapacity and the scope of the guardian's authority meet the requirements of *Rivers*, a point upon which both courts agree. Second, the court noted that the expressed wishes of the incapacitated person that are the product of functional limitations should not bind the guardian because to do so would render the guardian ineffectual. Finally, the court disagreed with the "logical ultimate import of the *Presbyterian* decision . . . that to the extent article 81 authorizes a guardian's consent to be an alternative to a *Rivers* hearing, it is unconstitutional and such a consent is unenforceable."[32] It concluded that not only should Article 81 be presumed to be constitutional in the absence of a showing beyond a reasonable doubt, but that *Rivers* does not require that the only surrogate decision maker for consenting to psychotropic medication be the court. Rather the court in *Rivers* became the surrogate decision maker by default because there was no other choice. In the administrative process criticized in *Rivers*, the only choice of who should decide was between the state doctors whose decision-making process lacked due process and the court because the case arose out of an administrative proceeding where the process afforded to the patient by the state was found lacking. The court pointed out that in *Presbyterian*, unlike *Rivers*, a guardian was available. Moreover, according to the court, New York's laws and public policy recognize other appropriate decision makers in Article 80 of the Mental Hygiene Law (nonjudicial surrogate decision-making panels) and section 2803 of the Public Health Law (authorizing committees and conservators—the Article 81 guardian's legislative predecessors—to exercise a patient's rights regarding medical treatment).

The guardian in *Presbyterian* appealed the order requiring the court to go forward with a hearing. The Appellate Division held that the order was not appealable as of right, and that, since the appellant had not sought leave to appeal, the appeal must be dismissed. It also noted that the appeal was "academic," as the hearing had been held and the court had granted the hospital's petition to administer the medication over the objection of the incapacitated person.[33]

The most recent decision on the issue of the administration of psychotropic medication is *In re Rohdanna C.B.*[34] In that case, the daughters of their alleged incapacitated mother petitioned for the appointment of a guardian. Because the mother had a history of psychiatric illnesses, the order appointing the guardian granted them the authority to consent to the administration of psychotropic medication. This authority was granted in a pro-forma order despite the fact that there had been no medical evidence offered to support the need for such authority. The Appellate Division, Second

30 MHL § 81.01.

31 MHL § 81.22(b)(1).

32 *In re Diurno (Conticchio)*, 182 Misc. 2d 205, 208, 696 N.Y.S.2d 769 (Sup. Ct., Nassau Co. 1999).

33 *See In re N.Y. Presbyterian Hosp. (J.H.L.)*, 276 A.D.2d 558, 716 N.Y.S.2d 859 (2d Dep't 2000).

34 36 A.D.3d 106, 823 N.Y.S.2d 497 (2d Dep't 2006).

Department, held in a three-to-one decision that the failure to hold a hearing on the issue of the person's capacity to object to psychotropic medication and to grant the guardian that authority without such a hearing was a violation of the due process requirements of *Rivers v. Katz*.[35]

The court did not directly declare MHL § 81.22's provisions relating to a guardian's authority to consent to forcible medication unconstitutional, but clearly stated the procedures to be followed to insure that the section did not run afoul of the Constitution by indicating that due process requirements are met only

> when a guardian's consent to a proposed course of psychotropic drug treatment or electroconvulsive therapy over his ward's objection is subjected to the multiple due process safeguards afforded by an adversarial proceeding before an impartial judicial decision-maker who considers both the current mental capacity of the person and the propriety of the proposed treatment.[36]

The debate over this difficult but interesting problem is sure to continue.

A guardian is not authorized to admit the incapacitated person to a mental hygiene facility or to a chemical dependence facility.

A guardian is also not authorized to revoke a power of attorney, health care proxy, or living will that has been executed by the incapacitated person.[37]

[0.7] D. Property Management Powers

The statute lists powers that a guardian may be granted for property management.[38] They include the power to:

1. make gifts;[39]

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35 67 N.Y.2d 485, 504 N.Y.S.2d 497 (2d Dep't 2006).

36 *In re Rhodanna C.B.*, 36 A.D.3d at 115–116.

37 MHL § 81.22(b)(2). *In re Lowe (Lowe)*, 180 Misc. 2d 404, 688 N.Y.S.2d 389 (Sup. Ct., Queens Co. 1999) (court held that the power to appoint a health care proxy is personal to the individual and declined to appoint a temporary guardian to name a standby health care proxy when the existing standby had predeceased the now incapacitated person. The court also found there was no current need for such relief because the health care proxy was alive and able to act.) See discussion *infra* at X.

38 MHL § 81.21.

39 *See In re Burns*, 287 A.D.2d 862, 731 N.Y.S.2d 537 (3d Dep't 2001) (The nephew of the incapacitated person challenged certain gifts that the guardian made to certain charities. The court affirmed the lower court's ruling that the gifts were permissible on the grounds that the incapacitated person could have made such a gift as an *inter vivos* transfer while she had capacity, and the record clearly established that a "competent and reasonable" person in her position would have likely made such charitable donations. The court also noted that the actions of the guardian in reducing the amount in the estate which would become available to the nephew upon the death of the incapacitated person were not inconsistent with the incapacitated aunt's unfavorable opinion of the nephew. The record showed that she was aware of allegations that he had stolen money from her and she refused to transfer to him her interest in the home she owned jointly with the nephew's father); *In re Kathleen Powers Pflueger*, N.Y.L.J., Feb. 14, 2001, p. 30, col. 2 (Sur. Ct., N.Y. Co.). As part of an earlier settlement, court continued oversight of gift-giving plan and required prior judicial approval of specific gifts in accordance with the settlement agreement. For a discussion of the earlier settlement, see *infra* text accompanying note 250.

2. provide support for persons dependent upon the incapacitated person for support;

3. convey or release contingent and expectant interests in property;

4. exercise or release powers held by the incapacitated person as trustee,[40] personal representative, guardian for a minor, guardian or *donee* of a power of appointment;

5. enter into contracts;

6. create revocable or irrevocable trusts of property of the estate that may extend beyond the incapacity or life of the incapacitated person;

7. exercise options of the incapacitated person to purchase securities or other property, exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

8. exercise any right to elective shares in the estate of the incapacitated person's deceased spouse, and renounce or disclaim any interest by testate or intestate succession or by *inter vivos* transfer;[41]

9. authorize access to or release of confidential records;

10. apply for government and private benefits;[42]

11. marshall assets;

12. pay the funeral expenses of the incapacitated person;

13. pay such bills as may be reasonably necessary to maintain the incapacitated person;

14. invest funds of the incapacitated person as permitted by section 11-2.3 of the Estates, Powers and Trusts Law;

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40 *Cf. In re Elsie "B,"* 265 A.D.2d 146, 707 N.Y.S.2d 695 (3d Dep't 2000) (The issue was whether the guardian of an incapacitated person could exercise that person's right as settlor to modify a revocable *inter vivos* trust to name additional trustees when the trust specifically provided that if she became unable to serve as trustee, "the Trustee or Trustees surviving her shall be the sole Trustees." The trust had three trustees, herself, the incapacitated person's brother, and her attorney. The trust provided that, as settlor, she retained that power to withdraw any or all of the trust property and to modify the agreement in any respect. After her brother was appointed as her guardian, he issued a notice modifying the trust to name his two sons as additional trustees. The attorney trustee objected. In the interim the guardian died and one of his sons, who was named as standby guardian, sought the court's ratification of the modification. The trial court ratified the naming of the trustees and the Appellate Division affirmed. The case raises an interesting question about the guardian's authority to override the prior decisions of the settlor. The Appellate Division stated that it was evident that the incapacitated woman intended family involvement in the management of her trust assets; however, the trust document contemplated the possibility of a reduction in the number of trustees when she became unable to serve as trustee. According to the Third Department, the guardian's authority trumped the terms of the trust).

41 *See, e.g., In re Estate of Pflueger, Deceased,* N.Y.L.J., May 5, 1998, p. 26, col. 6 (Sur. Ct., N.Y. Co.) (in determining who should be appointed guardian for the widow of the very wealthy decedent, the court appointed a special guardian to address certain issues regarding the widow's exercise of the right of election against the decedent's will).

42 *See generally In re Szekely,* N.Y.L.J., Apr. 17, 2001, p. 19, col. 2 (Sur. Ct., Bronx Co.).

15. lease the primary residence for up to three years;

16. retain an accountant;

17. pay bills after the death of the incapacitated person provided the authority existed prior to death to pay such bills; and

18. defend or maintain any judicial action or proceeding to a conclusion until an executor or administrator is appointed.[43]

The list is intended to be illustrative rather than exclusive.

The guardian *may* also be granted the power to engage in transactions that transfer a part of the incapacitated person's assets to or for the benefit of another person, consistent with the doctrine of substituted judgment.[44] When the petitioner or guardian seeks the authority to transfer part of the assets to or for the benefit of another person including the guardian, that application must satisfy the notice requirements of section 81.21(b).[45] While the statute recognizes the doctrine of substituted judgment, it also assures that the prior competent choices of the person will be given effect.[46] The statute details the matters the court must consider in approving transfers and other arrangements. Most particularly, the court should consider whether a competent, reasonable person in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances.[47] If the person has manifested a prior intent inconsistent with the act for which approval is sought, it must be shown that the person is likely to have changed such intention under the circumstances existing at the time of the petition.[48] A number of cases address the issues involved in the exercise of the doctrine

43 *See In re Rosen,* 16 Misc. 3d 1108, 27 WL 1989918 (Sup. Ct., Otsego Co. 2007) (the guardian *ad litem* rather than the attorney for the incapacitated person was authorized to enter into a settlement of a case).

44 *See In re Heagney,* N.Y.L.J., Apr. 24, 2000, p. 37, col. 5 (Sup. Ct., Westchester Co.). In this guardianship proceeding, Rockland County claimed that the guardian had breached his fiduciary duty by improperly paying to the incapacitated person's mother, a portion of a debt owed the incapacitated person. In his order of appointment, the guardian was given the authority to give a second mortgage on certain property to the incapacitated person's mother to secure the $91,000 loan. When the bank holding the first mortgage foreclosed, there was a deficiency and the second mortgage was "wiped out." The guardian then paid the mother approximately half the debt out of other funds, and the county objected on the grounds that this money should have been used to pay medical and hospital bills owed to the county. Relying on the order of appointment, which recognized the debt, and MHL § 81.21, which permits the transfer of assets based on the guardian's substituted judgment, the court found that the guardian had exercised his substituted judgment and dismissed the county's objection.

45 *See, e.g., In re Burns,* 267 A.D.2d 755, 699 N.Y.S.2d 242 (3d Dep't 1999).

46 *But cf. In re Elsie "B,"* 265 A.D.2d 146, 707 N.Y.S.2d 695 (3d Dep't 2000) (the express terms of the incapacitated person's *inter vivos* revocable trust were modified by the guardian).

47 MHL § 81.21(e)(2).

48 MHL § 81.21(e)(3).

of substituted judgment to transfer assets of the alleged incapacitated person for a variety of reasons, such as Medicaid planning, estate tax planning and other estate-planning purposes.[49]

In re Kathleen Powers Pflueger[50] involved the application of substituted judgment by the special guardian to determine the disposition of a porcelain collection titled in the name of the deceased husband of the incapacitated person. Although one of the nieces of the incapacitated person was named her guardian, the court had appointed a special guardian because of conflict of interest over the disposition of the collection. The problem arose because of the differing terms of the respective wills of the husband and wife. Under the will of the husband who held title to the porcelain, the collection was bequeathed together with the bulk of his estate to a marital trust for the life benefit of the wife and upon her death, the collection would pass to a museum and the balance to her siblings and nieces and nephews. The wife's will disposes of her estate to her siblings and their issue if her husband predeceases her, with no mention of the porcelain. Her family can inherit the porcelain only if it is in her name.

The special guardian's charge was to examine whether changing the title to the porcelain to the incapacitated person either by asserting a right of election against her husband's estate or suing the estate by claiming that she was the actual owner of some of the porcelain was in the best interest of

49 *See, e.g.*, *In re Forrester*, 1 Misc. 3d 911(A), 781 N.Y.S.2d 624 (Sup. Ct., St. Lawrence Co. 2004) (denying the petitioner's request to transfer assets of the alleged incapacitated person to petitioner and other close family members since clear and convincing evidence of the likelihood that the alleged incapacitated person would have done the same was not established); *In re Heagney*, N.Y.L.J., Apr. 24, 2000, p. 37, col. 5 (Sup. Ct., Westchester Co.); *In re Pugliese (Nicolois)*, N.Y.L.J., July 28, 1997, p. 30, col. 5 (Sup. Ct., Queens Co.) (petitioner sought the authority to transfer the home of the alleged incapacitated person, then held by the alleged incapacitated person and her spouse as tenants by the entirety, solely to her husband. The court discussed whether the transfer presented problems under § 217 of the Health Insurance Portability and Accountability Act of 1996, which made the disposition of assets to qualify for Medicaid a crime if such disposition "resulted in the imposition of a period of ineligibility." A penalty is imposed for a "statement, representation, concealment, failure or conversion." However, a "disposition of assets" is not equivalent to a "conversion." The court noted that the statute is unclear as to who may be prosecuted and to what extent. Nevertheless, the court found that since "essential personal property" is exempt and a personal residence is such a property, no period of ineligibility would be imposed as a result of such a transfer. Since the alleged incapacitated woman's spouse resided in the home, making it exempt as "essential personal property," the court granted the authority to make the transfer. The court, however, made no claim to insulate petitioner from state civil liability or federal criminal liability in connection with the transfer of the property). *See also N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998) (The N.Y. State Bar Association won an injunction against the attorney general of the United States from enforcing § 4734 of the Balanced Budget Act of 1997, which was incorporated into § 217 of the Health Insurance Portability and Accountability Act of 1996. Section 4734 struck the penalties and added a provision making it illegal for counsel to help an individual dispose of certain assets to qualify for Medicaid). *See also, e.g.*, *In re Cooper (Daniels)*, 162 Misc. 2d 840, 618 N.Y.S.2d 499 (Sup. Ct., Suffolk Co. 1994) (transfer of house owned by incapacitated person to a child of the incapacitated person was permissible under Article 81 and proper Medicaid planning when Medicaid rules exempt a transfer of assets to a child under 21 years of age); *In re Beller (Maltzman)*, N.Y.L.J., Aug. 31, 1994, p. 23, col. 4 (Sup. Ct., Kings Co.) (transfer of assets for Medicaid planning even though no showing of any pattern of gifts by the incapacitated person); *In re Goldberg (Ginsberg)*, N.Y.L.J., Aug. 31, 1994, p. 24, col. 1 (Sup. Ct., Kings Co.) (transfer of assets permitted even without clear and convincing proof of prior pattern of gift-giving); *In re Klapper*, N.Y.L.J., Aug. 9, 1994, p. 26, col. 1 (Sup. Ct., Kings Co.) (transfer of incapacitated person's assets to her son acting as her guardian was permissible to establish Medicaid eligibility and was consistent with the support the incapacitated person had provided to guardian's family); *In re Scheiber (Zahodnick)*, N.Y.L.J., Oct. 18, 1993, p. 38, col. 5 (Sup. Ct., Suffolk Co.). *But see* 42 U.S.C. § 1320a-7b, the language of which suggests that disposing of assets may lead to possible criminal liability.

50 N.Y.L.J., June 11, 1999, p. 31, col. 2 (Sur. Ct., N.Y. Co.).

the incapacitated person. The special guardian recommended that the court approve a settlement between the museum and the executor and trustee that involved cash payments to the wife in exchange for not pressing either claim.

In evaluating the settlement, the court concluded that the standard in section 81.21(e) was applicable and described it as one

> where the incapacitated person has indicated views on the act for which approval is sought or his desires are otherwise known, the Court will approve the act even if it is not the optimal choice so long as it is within the parameters of reason. . . . [W]here there is no information as to the incapacitated person's intent regarding the act for which approval is sought, the Court would be more likely to restrict approval to acts within the range of reasonable choices that would optimize the situation of the incapacitated person.[51]

Applying this standard, the court found that the settlement benefited the incapacitated person with little or no cost to her. Her marital trust would be funded to an extent that allowed her to remain in her home surrounded by her beloved porcelain whereas litigating the claims would have caused substantial financial and psychological damage. Additionally, the court found that the pattern of unified actions by the husband and wife over the course of their 50-year marriage was strong support for the conclusion that the wife would not deviate from the plan after the husband's death.

In *In re Kashmira Shah*,[52] the Court of Appeals addressed two issues: (1) whether a New Jersey resident hospitalized in New York with injuries that had rendered him incapacitated was eligible for Medicaid in New York and (2) whether his guardian who was also his spouse could be authorized to transfer his assets to herself in order to make him eligible for Medicaid. Mr. Shah, a resident of New Jersey, suffered serious injuries and lapsed into an irreversible coma after a work-related accident. He was initially hospitalized on Long Island and thereafter transferred to a hospital in Rockland County. His wife filed a Medicaid application and sought appointment as his guardian with the authority to transfer his assets to herself. Rockland County and then Suffolk County denied the Medicaid application on the grounds that he was a New Jersey resident. In the meantime, the trial court appointed Mrs. Shah as guardian with the authority to make gifts on behalf of Mr. Shah and to transfer his assets. Mrs. Shah commenced an Article 78 proceeding to overturn the Medicaid decision and Rockland County appealed the decision regarding the transfer of assets. The Appellate Division affirmed the transfer of assets and ruled that Mr. Shah was a resident of New York for purposes of receiving Medicaid. The Court of Appeals affirmed.

The Court found that Mr. Shah was eligible to receive Medicaid in New York under the plain language of the regulations which provided that when a person is institutionalized and became incapacitated after the age of 21, that person is a resident of the state where the person is physically present. The Court rejected the government's arguments. The government took the position that because Mr. Shah was being treated as a resident of New Jersey for all purposes other than Medicaid planning, he should be treated as New Jersey resident in that regard as well so that he and his wife could not take

51 *Id.*

52 95 N.Y.2d 148, 711 N.Y.S.2d 824 (2000).

advantage of New York's spousal refusal provisions. The Court found the regulations offered no room for doubt as to their applicability to Mr. Shah. It also argued that a letter that had been issued by New Jersey not disputing Mr. Shah's eligibility for New Jersey Medicaid benefits amounted to a letter agreement that under the regulations resolved his residency in favor of New Jersey. The Court found that the letter did not rise to the level of an "agreement" under the regulations because it was not of general applicability to disputed residency questions nor did it provide a procedure for resolving such disputes.

The Court also affirmed the authority of the guardian to engage in Medicaid planning for the benefit of the incapacitated person. The Court based its decision on the following factors: (1) the transfer was proper pursuant to Article 81 of the MHL which contemplates Medicaid planning as within the scope of the authority that may be granted to a guardian and that using the applicable substituted judgment standard, a reasonable person in the position of Mr. Shah would agree to such transfers for Medicaid planning; (2) transfers between spouses are permissible and there is no look-back penalty period; and (3) New York permits a spouse to refuse to make her assets available for the support of her husband and by so doing avoid the community resource and income allowance limitations at the time of application. Taken together, these factors "allow an institutionalized spouse, through guardianship authorization," to become Medicaid eligible. The Court noted that "considering these authorized policy choices, appellant's proposed strictures are not justified in either the Mental Hygiene Law or in the Federal or State Medicaid structures."[53]

In *In re Scheiber (Zahodnick)*,[54] the two daughters and sole beneficiaries of the respondent sought appointment as co-guardians for their mother with the authority to renounce their mother's interest in their deceased father's estate and to effect a transfer to themselves of the assets of their mother in excess of $500,000. The court ordered the appointment of the two daughters as co-guardians and granted them the authority to, among other things, administer the estate of their deceased father and waive their mother's right to be appointed executrix, and make transfers pursuant to MHL § 81.21 to themselves from her assets beyond that amount of $500,000.

In considering whether the transfers were appropriate, the court noted that the petition must allege whether a will or a pattern of gift-giving is consistent with the proposed transfer and must consider "proof or lack of proof adduced on this point." The court went on to note that

> the lack of proof of [respondent's] prior failure to have made gifts or to have established a testamentary plan consistent with the proposed plan of the guardian need not be taken as conclusive proof that the proposed plan must be rejected. . . . What must be prove[n] in such a case by clear and convincing evidence . . . is the likelihood of performance of the acts by "a competent, reasonable individual in the position of the incapacitated person."[55]

The court found there was no proof as to whether the proposed plan was inconsistent with the incapacitated person's intentions prior to her incapacity, no will or other estate-planning instrument to re-

53 Citing *Shah*, the court in *In re Zhou Ping Li*, N.Y.L.J., Nov. 1, 2005, p. 17, col. 1 (Sup. Ct. Kings Co.), held that article 79, which provides for the appointment of a guardian for a ward receiving veteran's benefits, does not preclude an article guardian of a veteran from engaging in Medicaid planning to create a Supplemental Needs Trust.

54 N.Y.L.J., Oct. 18, 1993, p. 38, col. 5 (Sup. Ct., Suffolk Co.).

55 *Id.* (citations omitted).

flect her intention and no proof of any intent contrary to the proposed plan.[56] The court therefore applied the reasonable standard articulated in the statute and found that there was clear and convincing evidence that a reasonable exercise of judgment warranted the proposed transfer. However, it increased the amount of the estate to be set aside for the respondent from $500,000 to $600,000 because the projections of the amounts sufficient to meet the incapacitated person's needs were only estimates, "the accuracy of which may only be judged retrospectively," warranting the exercise of caution and also because the petition lacked the required allegations regarding attempts to locate a will.[57]

The court ordered that the co-guardians had a continuing duty to locate the mother's will.[58] According to the court:

> If a will is located, and if the circumstances reveal such will reasonably could have been located prior to the submission of the instant petition, and if such will includes bequests to third parties which have been diminished due to the . . . transfer . . . , an appropriate surcharge against the guardians to reimburse the guardianship estate . . . shall be imposed.[59]

The transfer of assets also was permitted in *In re Driscoll*.[60] In that case, the proposed guardian sought the power to renounce an inheritance that was due to his incapacitated spouse from the estate of their deceased son and to receive the assets in his own name without rendering her ineligible for Medicaid. The DSS objected on the grounds that the proposed guardian had essentially committed fraud in not disclosing the potential proceeds of the wrongful death action at the time of the Medicaid application, and that the renunciation would render the spouse ineligible for Medicaid.

The court found that the fact that the possible award was not disclosed to the DSS was not fraud given the vagaries of litigation. The court also found that the requested renunciation was not impermissible because SSL § 366(5)(c)(3)(ii) provides that an institutionalized person may transfer a resource to, or for the sole benefit of, the person's spouse without becoming ineligible for nursing facility services. The court noted that if Mrs. Driscoll were competent, she could have accepted her inheritance and transferred it to her husband without any Medicaid ineligibility. The court relied on the fact that Article 81 specifically adopts the substituted judgment doctrine in section 81.21 and allows the court to consider what the incapacitated person would have done if she had the capacity to make the decision. The court found clear and convincing evidence that the spouse would have renounced her inheritance in light of the adverse consequences to her husband if she failed to do so. The court also noted that the guardian could be granted the authority to make such a transfer but, because the transfer would be to himself, the court did not require the guardian to go through the motions of accepting his wife's share of the inheritance and then requesting the court's permission to transfer it to himself.

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56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 N.Y.L.J., Oct. 22, 1993, p. 30, col. 4 (Sup. Ct., Nassau Co.).

In *In re Conservatorship of Moretti*,[61] the court granted the conservator of her adult brain-injured son the authority to transfer personal property of the conservatee into a supplemental needs trust (SNT) with her as trustee. The court indicated that the enactment of the Omnibus Budget Reconciliation Act of 1993, codified as 42 U.S.C. § 1396, specifically provides an exemption from disqualification as a Medicaid qualifying trust, as follows:

> A trust containing the assets of an individual under age 65 who is disabled . . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under [title 42].[62]

The court also noted that Article 81 empowers the court to establish trusts on behalf of persons with disabilities, citing MHL § 81.21(a)(6), which provides that among the powers a guardian may be authorized to exercise is the power to "create revocable or irrevocable trusts of property of the estate which may extend beyond the incapacity or life of the incapacitated person."[63]

There also have been a number of decisions addressing the guardian's authority to create an SNT for the benefit of the incapacitated person and addressing the terms of the SNT.[64]

61 159 Misc. 2d 654, 606 N.Y.S.2d 543 (Sup. Ct., Kings Co. 1993).

62 42 U.S.C. § 1396p(d)(4)(A).

63 *See* MHL § 81.16(b); *see, e.g., In re Pace*, 182 Misc. 2d 618, 699 N.Y.S.2d 257 (Sup. Ct., Suffolk Co. 1999); *In re Conservatorship of Garbow*, 155 Misc. 2d 1001, 591 N.Y.S.2d 754 (Sur. Ct., Kings Co. 1992)

64 The question of whether all the proceeds of a damage award or settlement must be used to satisfy pre-existing Medicaid lien is explored in detail in several cases. *See, e.g., Cricchio v. Pennisi*, 90 N.Y.2d 296, 660 N.Y.S.2d 679 (1997), *aff'd sub nom. Link v. Smithtown*, 267 A.D.2d 284, 700 N.Y.S.2d 52 (2d Dep't 1999) (the Court of Appeals held that Medicaid liens had to be satisfied from settlement proceeds before such could be used to fund an SNT, but left open to the trial court in *Cricchio* whether the entire amount of the personal injury settlement or only that portion attributable to past medical expenses was available to satisfy the lien); *Calvanese v. Calvanese*, 93 N.Y.2d 111, 688 N.Y.S.2d 479 (1999) (the Court of Appeals held that the entire amount of the personal injury settlement is available to satisfy the lien, and specifically found that none of the assignment, subrogation, and recoupment provisions created by federal or state law limit the Department of Social Services' right of recovery against settlement proceeds intended to cover past medical expenses); *see In re Shirley Fane*, N.Y.L.J., Mar. 7, 1997, p. 27, col. 4 (Sur. Ct., Bronx Co.) (SNT established with proceeds of sale of the alleged incapacitated person's condominium); *In re Alfonzo Martorelli*, N.Y.L.J., Feb. 6, 1997, p. 32, col. 2 (Sur. Ct., Kings Co.) (creation of SNT appropriate); *In re DeVita*, N.Y.L.J., Feb. 17, 1995, p. 25, col. 1 (Sup. Ct., Suffolk Co.) (court required that accounting by trustee who was also the guardian be provided to father of the alleged incapacitated person and that the trust contain language requiring that payment from the trust be made to medical professionals who would not otherwise accept government benefits, and that if any of the remaindermen are disabled and eligible for government entitlements, the trust continue for their benefit); *see also DiGennaro v. Cmty. Hosp. of Glen Cove*, 204 A.D.2d 259, 611 N.Y.S.2d 591 (2d Dep't 1994) (Appellate Division affirmed trial court's disapproval of SNT when parents were named as co-trustees and remaindermen beneficiaries); *In re Kacer (Osohowsky)*, N.Y.L.J., Nov. 1, 1994, p. 25, col. 5 (Sup. Ct., Suffolk Co.) (potential conflict of interest where petitioner-guardian and standby guardian were included as potential beneficiaries of the SNT); *In re Conservatorship of Moretti*, 159 Misc. 2d 654 (on reargument of an earlier decision in this case, court authorized creation of an SNT and approved language in the SNT that authorized compensation for the trustee "as may be allowable under the law of the State of New York"); *In re Greenstein*, 195 Misc. 2d 628, 760 N.Y.S.2d 810 (Sup. Ct., Suffolk Co. 2003) (holding that the provisions of an SNT did not authorize the trustee to make a gift to the beneficiary's daughter; moreover, the gift was not for the benefit of the beneficiary and would have ended the beneficiary's Medicaid eligibility).

Although federal legislation suggests criminal liability may arise from a transfer that may result in a period of ineligibility for Medicaid,[65] the New York State Bar Association, in a highly significant case, obtained injunctive relief barring the United States Attorney General from enforcing the provisions of that legislation.[66]

If a third party intends to commence litigation against the guardian, court approval must be sought. In *In re Linden-Rath*,[67] the court discussed the necessity of such approval and the procedure that should be followed. In this case, the landlord served a notice of termination against a tenant on the grounds that conditions in her apartment created a nuisance and a health hazard. A guardian had been appointed for the tenant, with the tenant's consent, after the landlord had earlier petitioned for guardianship. Although the apartment had been repaired and cleaned up, the landlord believed that conditions were again deteriorating and sought to terminate the lease. In *Linden-Rath*, the question before the court was whether the guardian could stay the litigation by seeking a stay from the guardianship court. The court held that the guardian could so move on several grounds, including that litigation against the incapacitated cannot proceed without the court's permission, because the incapacitated person's property is in the control of the court.[68] The court noted that housing issues are critical because the statute envisions that the guardian will make every effort to retain the incapacitated person in the community, particularly in his or her home; the statute and case law recognize that a ward has a liberty interest in remaining in the community. The court indicated that, in such a case, the guardianship court has authority to grant permission for the litigation to proceed or to decide the matter summarily. (In *Linden-Rath*, the court held a hearing and found that the evidence produced did not establish a basis for terminating the lease.)[69]

[0.8] II. GUARDIAN

[0.9] A. Accountability

Article 81 requires the guardian to file an initial report within 90 days of the appointment, as well as annual reports thereafter.[70]

The information required to be contained in the reports concerns the personal status of the incapacitated person and/or the condition of the person's finances and property, to the extent that the guardian has any authority with respect to those two areas. Given the loss of liberties involved in the guardian-

65 42 U.S.C. § 1320a-7b.

66 *N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

67 N.Y.L.J., Apr. 25, 2001, p. 17 (Sup. Ct., N.Y. Co.).

68 MHL § 81.29(c).

69 *See Obszanski v. Simon*, N.Y.L.J., Mar. 5, 2003, p. 25, col. 1 (Civ. Ct., Queens Co.) (where incapacitated person had a guardian, the appointment of a guardian *ad litem* in a proceeding against the incapacitated person for nonpayment of rent was a mistake, so the court vacated the stipulation of settlement entered into by the guardian *ad litem*, substituted the guardian as respondent in the proceeding and ordered the guardian to serve an answer in a timely fashion.) *See also In re Garcia*, 16 Misc. 3d 1123, 2007 WL 2318399 (Sup. Ct., Queens Co. 2007) (Bank repeatedly ignored guardian's request regarding incapacitated person's bank account and then sued the incapacitated person without notifying the guardian. The court reversed the default judgment against the incapacitated person.).

70 MHL §§ 81.30(a), 81.31(a).

ship process and the vulnerability of persons under guardianship, it is critical that the court regularly "receive and review basic information about the well-being of the ward."[71]

To provide the court with sufficient information to appraise the personal status of the incapacitated person, the guardian is responsible for including in the annual report the present phone numbers and addresses of the guardian and the incapacitated person, a statement of whether the current residential setting is best suited for the incapacitated person, and information regarding the physical, mental and social conditions and the functional abilities of the incapacitated person. Such information must include any major changes in the person, physically or mentally; the results of any functional evaluation; the kind of medical treatments the person has received in the preceding year; and the date of and reason for the last physical examination as well as assessment of the social skills and needs of the incapacitated person and what social services he or she has used in the past year. The guardian is also required to submit a plan for the anticipated medical, mental health and related service needs of the incapacitated person for the following year.

In regard to the incapacitated person's estate, the guardian is required to submit an annual accounting of any moneys received by him or her that were earned or derived from the guardian's use or employment of the services of the incapacitated person, or earned or received on behalf of the incapacitated person. The guardian, if responsible for the incapacitated person's property, must submit an accounting of that property.[72]

The guardian is also required to submit in his or her report any and all facts indicating a need to terminate or modify the terms of the guardianship. If any alteration of the terms of the guardianship is indicated, the guardian must apply to the court for relief on notice to all persons entitled to notice as provided in the order of appointment.

A recent report by a grand jury in Queens County investigated the manner in which the court examiners reviewed the records of guardians.[73] The report describes the failure of court examiners to remove a guardian who had engaged in thefts from 12 guardianships in Queens County for five years and makes several recommendations to amend the statute and improve the court system for accountability.[74]

[0.10] B. Compensation

Article 81 provides that

> [t]he court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian or guardians. The plan for compensation . . . *must take*

71 ABA, *An Agenda for Reform; Commission of the Mentally Disabled and the Commission of the Legal Problems of the Elderly* 296–97 (1989).

72 *See Estate of Beatriz H. Livingston*, N.Y.L.J., June 7, 1999, p. 33, col. 6 (Sup. Ct., Queens Co.) (guardian not entitled to reimbursement for routine, incidental expenses incurred as guardian which are "expected to be absorbed in the statutory commission").

73 *See Report of the Grand Jury of the Supreme Court, Queens County Issued Pursuant to Criminal Procedure Law § 190.85(1)(c) Concerning Thefts from Guardianships.*

74 *Id.*

into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person.[75]

Routine incidental expenses may be considered part of the commission and at least one court has held that they are not separately reimbursable.[76]

The guardian may be denied compensation or the compensation may be reduced when the guardian has mismanaged the estate or failed in some way to carry out the requirements of his or her appointment.[77] The guardian's attorneys fees may also be denied when the guardian's legal activities have not

75 MHL § 81.28(a) (as amended by 2004 N.Y. Laws ch. 438, § 20) (emphasis added); *see, e.g., In re Helen C.*, 2 A.D.3d 729, 768 N.Y.S.2d 617 (2d Dep't 2003) (affirming a contested judgment of the lower court regarding the fees awarded to the guardian, finding that the fees awarded were reasonable); *In re Jason A. Turner*, 307 A.D.2d 828, 763 N.Y.S.2d 571 (1st Dep't 2003) (reversing the lower court's decision (that the guardian was responsible for accountant and guardian *ad litem* fees) since the guardian had satisfactorily performed his duties); *In re Brown*, 182 Misc. 2d 172, 697 N.Y.S.2d 838 (Sup. Ct., Queens Co. 1999) (the court denied the guardian's application for attorneys fees when the fees were not expended for the benefit of the incapacitated person. The subjects of litigation were successful removal proceedings against the guardian, the final accounting, and an action to annul the guardian's marriage to the incapacitated person. The court found that, in light of the findings that the guardian had breached her fiduciary duty to the incapacitated person, awarding her fees to defend against the removal would be inappropriate, to the extent that she expended money in hiring an attorney to reconstruct the financial records which she had neglected to maintain. As to the defense of marriage, the court found that was a personal matter and not within the scope of her duties as guardian). For a detailed discussion of compensation of guardians, see *In re Arnold "O" (Towne)*, 256 A.D.2d 764, 681 N.Y.S.2d 627 (3d Dep't 1998); *In re Haberstich*, 169 Misc. 2d 543, 646 N.Y.S.2d 937 (Sur. Ct., N.Y. Co. 1996); *In re Schwartz*, N.Y.L.J., May 2, 1996, p. 33, col. 2 (Sup. Ct., Nassau Co.); and see also *In re Arnold "O,"* 279 A.D.2d 774, 719 N.Y.S.2d 174 (3d Dep't 2001). For an examination of the difficulties of determining compensation where guardian is performing personal care tasks, see *In re Marmol (Pineda)*, 168 Misc. 2d 845, 640 N.Y.S.2d 969 (Sup. Ct., N.Y. Co. 1996). *See also In re Keele (An Incapacitated Person)*, N.Y.L.J., June 12, 2001, p. 18, col. 3 (Sup. Ct., N.Y. Co.) (court declined to authorize payment of a premium to the attorney for a co-guardian. As part of the settlement of the final accounting of one of the co-guardians, who had died, the co-guardian's attorney claimed that her work in locating substantial assets that raised the amount of the estate of the deceased incapacitated person to over $2 million, entitled her to an allowance of $274,532. The basis of her claim was *quantum meruit* "to prevent unjust enrichment of one party at the expense of another; i.e., creating a windfall," because, otherwise, the "beneficiary" of the estate of the incapacitated person is the state of New York. The court provided several reasons for its decision: (1) the work for which the attorney sought the allowance had already been compensated for in her previous requests for compensation; (2) legal work was, for the most part, not involved; and (3) no written agreement between the attorney and her client provided for such an allowance, similar in nature to a contingency fee); *In re Addo*, N.Y.L.J., Sept. 30, 1997, p. 26, col. 4 (Sup. Ct., Bronx Co.) (court authorized salary for mother-guardian of infant with brain damage suffered at birth).

76 *See In re Livingston*, N.Y.L.J., June 7, 1999, p. 33, col. 6 (Sup. Ct., Queens Co.) (court examiner sought removal of guardian for reimbursing herself for photocopies, faxes, local travel expenses and telephone charges. The court found that the guardian's actions did not rise to a level that warranted removal. The court reasoned, however, that she was not entitled to such reimbursement because her compensation should be treated like that of trustees and fiduciaries under the SCPA, which has been interpreted to provide that fiduciary commissions absorb routine expenses.).

77 MHL § 81.28(b); *see, e.g., In re Gerald J. Friedman*, N.Y.L.J., Dec. 28, 2001, p. 18, col. 2 (court refused to allow additional fees to guardian who hired three sets of attorneys and an accounting firm; court referred fee requests of individual attorneys who performed work in the highly contentious case to a special referee); *In re Livingston*, N.Y.L.J., Aug. 31, 2001, p. 20, col. 5 (Sup. Ct., Queens Co.) (court held that guardian was improperly reimbursing herself for those expenses routinely incurred by a fiduciary, and that are expected to be included in the statutory commission. Guardian also sought legal fees for the handling of the incapacitated person's estate. The court also stated that the guardian, as an experienced lawyer, should not be compensated for work that she should have done, as well as for the work that the attorney (she should not have had to hire) performed, resulting in double compensation. The court determined that the guardian was fairly compensated by her guardianship commission and legal fees previously paid and denied additional compensation); *In re Stratton (Heinrich)*, N.Y.L.J., June 21, 2001, p. 19, col. 6 (Sup. Ct., N.Y. Co.) (court reduced fees sought by guardian whom the court criticized for excessive billing).

benefited the estate of the incapacitated person, but rather, have been engendered by the guardian's inappropriate behavior.[78]

Under current practice for the appointment of Article 81 guardians, attorneys are often chosen by the court to act as guardian.[79] When the person has an interested family member, the court may appoint the attorney to act as co-guardian with the family member. When the person has assets but no available family, the court will often appoint an attorney to act as the sole guardian. If the person without family has no assets, the court will more likely appoint the commissioner of the local department of social services or a not-for-profit organization. However, attorney volunteers also accept these *pro bono* appointments.[80]

A new Part 36 of the Rules of the Chief Judge became effective June 1, 2003. These rules govern, among others, guardians, court evaluators, attorneys for incapacitated persons and court examiners. The full text of the rules and commentary are available on the Web site for the Office of Guardian & Fiduciary Services. Part 36 rules also govern what are known as "secondary appointments." "When a guardian . . . subject to the provisions of Part 36 seeks to retain counsel, or an accountant, appraiser, auctioneer, property manager or real estate broker, the retained professional becomes a Part 36 appointee."[81]

In *In re Kurzman*,[82] the trial court had occasion to discuss one of the rules that limit the appointment of the guardian as counsel to the incapacitated person unless there is a compelling reason to do so. As the court pointed out, the rule was adopted "to ensure that appointments are made 'on the basis of merit and without favoritism, nepotism, politics or other factors unrelated to the qualification of the appointment or the requirements of the case.' " *Kurzman* involved an application by the guardian who is an attorney to sell property owned by the incapacitated person. The issue before the court was whether the guardian should be authorized to conduct the closing or if the appointment of an independent attorney was necessary. The court held that it was appropriate in the case before it to permit the guardian to handle the closing because he was already fully familiar with all the details of the matter and it would add additional legal fees to require an independent attorney to review the guardian's work.

78 *See In re Thomas J. Heagney*, N.Y.L.J., Apr. 24, 2000, p. 37, col. 5 (Sup. Ct., Westchester Co.); *Toosie v. Cottrell*, N.Y.L.J., Apr. 10, 2001, p. 18, col. 2 (Sup. Ct., N.Y. Co.); *In re Sherman*, 277 A.D.2d 320, 715 N.Y.S.2d 746 (2d Dep't 2000).

79 Report of Inspector General for Fiduciary Appointments 15 (Dec. 2001). The Special Inspector General for Fiduciary Appointments released a report in December 2001 examining the manner of calculating compensation awarded to some attorney guardians. At the same time, the Commission on Fiduciary Appointments released recommendations suggesting modifications to the fiduciary appointment process in an effort to ensure public confidence in the process.

80 *In re F.I.*, N.Y.L.J., Apr. 5, 2002, p. 20, col. 2 (Sup. Ct., Kings Co.).

81 Part 36 of the Rules of the Chief Judge: An Explanatory Note H at 1.

82 No. 100127/02, 2003 WL 21146886 (Sup. Ct., Kings Co. May 7, 2003).

[0.11] C. Changes Relating to the Guardian

[0.12] 1. Removal

Article 81 authorizes the removal of the guardian for his or her failure to carry out the duties and obligations of a guardian in a responsible manner.[83] An application to remove the guardian can be made by the court examiner or by the incapacitated person or by any other person authorized by the statute to commence a guardianship proceeding.[84]

[0.13] 2. Modification or Discharge

The guardian can be discharged or his or her powers modified upon an application of the guardian, incapacitated person or by any other person authorized by the statute to commence a guardianship proceeding.[85] The statute requires a hearing on notice in some, but not all, instances. The statute permits a court to dispense with the hearing so long as the factual basis for dispensing with the hearing is set forth in an order of modification that increases the powers of the guardian.[86] Where the guardian seeks to expand his or her authority, the guardian has the burden of proving that such relief is necessary. If the application is to terminate the guardianship or reduce the guardian's powers, the burden is on the party objecting to such change.[87]

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83 MHL § 81.35; *see, e.g., Nora McL. C. v. Peggy D.*, 308 A.D.2d 445, 764 N.Y.S.2d 128 (2d Dep't 2003) (revoking the guardianship of the petitioner who improperly disposed of the alleged incapacitated person's accounts to her own benefit); *Report of the Grand Jury of the Supreme Court, Queens County Issued Pursuant to Criminal Procedure Law § 190.85(1)(c) Concerning Thefts from Guardianships* (describing the failure of court examiners to remove a guardian who had engaged in thefts from 12 guardianships in Queens County for five years). *See also In re Sherman*, 277 A.D.2d 320, 715 N.Y.S.2d 746 (2d Dep't 2000); *In re Merkert*, N.Y.L.J., Nov. 3, 1998, p. 30, col. 6 (Sup. Ct., Nassau Co.); *but see In re Estate of Gustafson*, 308 A.D.2d 305, 764 N.Y.S.2d 46 (1st Dep't 2003) (ruling that the trial court erred in appointing a nonfamily member as guardian for the incapacitated person after the family member guardian failed to file accounting reports in a timely manner and basing its decision on the fact that the incapacitated person was not prejudiced by the guardian's actions).

84 *Merkert*, N.Y.L.J., Nov. 3, 1998; *see, e.g., In re Nicks*, N.Y.L.J., Jan. 29, 1998, p. 32, col. 6 (Sup. Ct., Nassau Co.) (court examiner moved to have the not-for-profit guardian discharged for failing to carry out many of its responsibilities to the detriment of the incapacitated person, including not filing timely initial and annual reports, making unauthorized payments to others for case management services that it should have performed and failing to file a Medicaid application. The court ordered the organization to turn over the remaining funds to a successor guardian and denied compensation to the organization).

85 MHL § 81.36; *see generally In re Gambuti (Bowser)*, 242 A.D.2d 431, 662 N.Y.S.2d 757 (1st Dep't 1997) (in reversing the appointment of a special guardian with authority to transfer to a nursing home, the court noted that a transfer under those conditions was essentially irrevocable because it left the incapacitated person without the ability to seek a discharge at some time in the future); *see also In re Jewish Ass'n for Servs. for the Aged (Cedeno)*, 171 Misc. 2d 689, 655 N.Y.S.2d 283 (Sup. Ct., N.Y. Co. 1997).

86 MHL § 81.36(c); *see, e.g., In re Marvin W.*, 306 A.D.2d 289, 760 N.Y.S.2d 337 (2d Dep't 2003) (overruling the supreme court's decision to deny an incapacitated person's motion for a hearing to terminate his guardianship; hearing must be held to determine whether a guardianship should be terminated and it was error to dismiss a motion to terminate a guardianship without a hearing); *In re Turner*, 189 Misc. 2d 55, 730 N.Y.S.2d 188 (Sup. Ct., N.Y. Co. 2001) (appointed guardian moved by Order to Show Cause for an expansion of its powers to allow it to permanently place the incapacitated person in a nursing home); *see also Levy v. Davis*, 302 A.D.2d 309, 756 N.Y.S.2d 35 (1st Dep't 2003). *But see In re New York Foundation for Senior Citizens, Guardian Services, Inc. (Schoon)*, 14 A.D.3d 317, 787 N.Y.S.2d 288 (1st Dep't 2005) (the motion of the guardian to have its duties limited to responding to written requests from the incapacitated person and assisting in finding the man shelter was granted on the grounds that the incapacitated person had threatened on more than one occasion to kill the guardian's caseworkers. The court further held that a hearing was not necessary in light of the threat of the incapacitated person making the provision of services very difficult).

87 MHL § 81.36(d). *See, e.g., In re Penson*, 289 A.D.2d 155, 735 N.Y.S.2d 51 (1st Dep't 2001) (the trial court's determination that the incapacitated person should be restored to capacity was affirmed. The record indicated that the person lived independently with his wife, understood his limitations, and had, on his own, acquired professionals to aid in securing his financial future as well as a degree of self-determination and participation in life decisions).

[0.14] 3. Resignation

The court may allow the guardian to resign.[88] However, if the resignation is merely because there is no more money in the person's estate or the resignation would put the incapacitated person at risk, the courts generally will not permit the resignation.[89]

[0.15] 4. Vacancy

The court can treat the death of a conservator or a committee of the incapacitated person as creating a vacancy which the court can fill in accordance with MHL § 81.38.[90] The court has the discretion to conduct a hearing if it deems it necessary.[91]

[0.16] D. Miscellaneous

Pursuant to MHL § 81.43 (former section 81.44), the guardian may seek to uncover and recover real or personal property that rightly belongs to the incapacitated person. Based in large part on comparable language of SCPA 2103, section 81.43 is an excellent tool to address financial abuses that may have occurred prior to the appointment of a guardian. *In re Kent*[92] illustrates the effectiveness of this section. In *Kent*, the guardian sought an accounting under former section 81.44 (now section 81.43) of money withheld by the niece who had been the agent-in-fact pursuant to a power of attorney and a health care proxy. In considering the agent's argument that the court lacked jurisdiction to order an accounting, the court identified four factors that would create jurisdiction to order an accounting: (1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting. The court found that all four factors were satisfied. The fiduciary relationship was created by the power of attorney. Her aunt had entrusted the niece with money. No other remedy other than an accounting will disclose what the niece did with the money. An informal request for an accounting was made at the time the guardianship proceeding was commenced and the niece never came forward to disclose how she had handled the money. The court noted that although former section 81.44 does not include the term "accounting," courts have used SCPA 2103 as an analogous proceeding to uncover withheld property and denied the niece's motion to dismiss.

88 MHL § 81.37(a).

89 *Jewish Ass'n for Servs. for the Aged (Cedeno)*, 171 Misc. 2d 689; *see In re Nicks*, N.Y.L.J., Jan. 29, 1998, p. 32, col. 6 (Sup. Ct., Nassau Co.) (petition for removal was filed by court examiner against a not-for-profit organization, acting as guardian, which failed to carry out its obligations, including not filing timely initial and annual reports, making unauthorized payments to others for case management services it should have performed, and failing to file a Medicaid application. The court ordered the organization to turn over the remaining funds to a successor guardian and denied compensation to the organization but did not require it to reimburse the incapacitated person for wrongful expenditures. The court also required that the organization pay the court-appointed attorney, noting that where a fiduciary fails to carry out the obligations to an estate, surcharges may be attached for legal expenses incurred in establishing his wrongdoing. The court noted, however, that the altruistic nature of the fiduciary may be a consideration in setting the rate of surcharge).

90 *In re Conservatorship of Stephen D.*, 190 Misc. 2d 760, 739 N.Y.S.2d 913 (Sur. Ct., Bronx Co. 2002).

91 *Id.*

92 188 Misc. 2d 509, 729 N.Y.S.2d 352 (Sup. Ct., Dutchess Co. 2001).

Guardianships in Surrogate's Court

THIS IS A GENERAL DESCRIPTION OF GUARDIANSHIP PROCEEDINGS. PLEASE REFER TO THE STATUTES FOR SPECIFIC REQUIREMENTS.

Guardianship of an Infant:

SCPA Article 17 governs the appointment, duties and authority of a guardian of an infant (any child under the age of 18). A guardian may be appointed of the person and property, of the person only, or of the property only of an infant. The proceeding is brought in the Surrogate's Court of the County where the infant is domiciled or if he/she is a non-domiciliary but has property situate in that County. If an infant is to receive monies over the amount of $10,000.00 pursuant to the terms of a will, by the laws of intestacy, or by a wrongful death proceeding, a petition for guardianship is required by the Court. See FORMS for petition and supporting documents. http://www.nycourts.gov/forms/surrogates/index.shtml

SCPA Article 17-A governs the appointment, duties and authority of a guardian of mentally retarded and/or developmentally disabled persons. Mental retardation means sub-average intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior. (See Mental Hygiene Law Section 1.03 (21)). For purposes of Article 17-A, it is a person who has been certified by one licensed physician and one licensed psychologist (or by two licensed physicians, at least one of whom has professional knowledge in the care and treatment of persons with mental retardation) as being incapable to manage himself/herself and his/her affairs by reason of mental retardation or developmental disability and that such condition is permanent in nature or likely to continue indefinitely. See FORMS for petition and supporting documents. http://www.nycourts.gov/forms/surrogates/index.shtml

A developmentally disabled person (DDP) is a person whose disability:

1. is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury;

2. is attributable to any other condition of a person found to be closely related to mental retardation, because such condition results in similar impairment of general intellectual functioning or adoptive behavior to that of mentally retarded persons; or

3. is attributable to dyslexia from a disability described in subdivisions one or two (above) or mental retardation; and

4. originates before such person attains age twenty-two, provided, however, that no such age of origination shall apply (for the purpose of Article 17-A) to a person with traumatic head injury. (See Mental Hygiene Law Section 1.03 (22) and SCPA Section 1750-a)

Article 17-A applies to the appointment of a guardian of the person and property, the person only, or the property only of either a mentally retarded infant or a mentally retarded adult (MR) and/or a developmentally disabled person (DDP). If a guardian is appointed for a mentally retarded and/or developmentally disabled infant, the guardianship does not terminate upon the infant reaching majority.

Guardianship of Adults Who Become Incapacitated:
Supreme Courts and County Courts have jurisdiction over the person and property of an mentally incapacitated adult. (See Mental Hygiene Law Article 81) A proceeding under this article shall be brought in the Supreme Court within the judicial district, or in the County Court of the county in which the person alleged to be incapacitated resides, or is physically present. Please contact the Supreme or County Court in the appropriate county for additional information.