# INTERMEDIATE ELDER LAW UPDATE

**Tuesday, November 1, 2016**
New York City

**Wednesday, November 2, 2016**
Westchester

**Wednesday, November 9, 2016**
Buffalo/Amherst

**Thursday, November 10, 2016**
Albany

**Wednesday, November 16, 2016**
Long Island

**NYSBA Co-Sponsors:**
**Elder Law and Special Needs Section**
**Committee on Continuing Legal Education**

This program is offered for education purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.

# Lawyer Assistance Program 1.800.255.0569

## Q. What is LAP?

**A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

## Q. What services does LAP provide?

**A.** Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

## Q. Are LAP services confidential?

**A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

**Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993**

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

## Q. How do I access LAP services?

**A.** LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

## Q. What can I expect when I contact LAP?

**A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

## Q. Can I expect resolution of my problem?

**A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

## Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

# There Is Hope

**CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT**

The sooner the better!

**Lawyer Assistance Program**

**1.800.255.0569**

**Program Agenda**

8:30 – 9:00 AM Registration

**9:00 – 9:15 AM Welcome/Opening Remarks**

**9:15 – 10:05 AM Representing the Fiduciary**

• Advising Power of Attorney Agents
• Advising "Responsible Parties" under residential placement contracts
• Discussion of "spend down," the obligation to pay NAMI, and the proper use of funds – all as applied to family members
• Counselling Trustees of Revocable and Irrevocable Trusts during the lifetime of Grantor

**Speakers: Long Island & NYC:** Tammy Rose Lawlor Westchester: Lee A. Hoffman, Jr.

**Albany:** Patricia J. Shevy Buffalo: Laurie Menzies

**10:05 – 10:55 AM Guardianship Update**

• Update on Mental Hygiene Law Article 81 cases from New York State
• Review of guardianship cases of interest from other states
• Mental Hygiene Law Article 81 recent updates
• Mental Hygiene Law Article 83 updates, changes and cases

**Speakers: Long Island, NYC & Westchester:** Ira Salzman Albany: Cailin Connors Brennan

**Buffalo:** Terrie Benson Murray

10:55 – 11:10 AM Break

**11:10 AM – 12:00 PM Ethics**

• Who is the Client?
• How Do You Identify and Handle Conflicts of Interest?
• When Does the Attorney-Client Privilege Apply? Who has the Right to Know What?

- How Do You Represent a Client with Diminished Capacity?

- How Do I Get Paid?

**Speakers: Long Island & NYC**: Sheryl L. Randazzo; **Westchester:** Moira S. Laidlaw

**Albany**: Phillip M. Tribble; **Buffalo:** Bruce D. Reinoso

**12:00 – 1:15 PM Lunch**

**1:15 PM – 2:05 PM Community Medicaid**

• MAGI Medicaid

- What is it and for which clients?
- What are financial eligibility criteria?
- Where to apply – Exchange or DSS?
- Planning opportunities: What happens when client is no longer eligible for MAGI because he/she enrolls in Medicare or has other changes?

• Status of FIDA and MLTC throughout the State
• Tips for advocacy – Delays in MLTC enrollment – using "Immediate Need Medicaid" and MLTC advocacy

**Speakers: Long Island**: Kelly Ann Murray; **NYC:** Valerie J. Bogart Westchester: Andrew S. Lupatkin

**Albany:** Amy Eleanor Lowenstein; **Buffalo:** Kelly M. Barrett

**2:05 – 2:55 PM Social Security**

• Understanding the difference between SSI and SSDI
• Children's benefits
• Spousal benefits
• Eligibility rules for various programs
• Coordinating the benefits: SSI, SSDI, adult child benefits, and dependent's benefits

**Speakers: Long Island:** Beth Polner Abrahams; **NYC:** Joan Lensky Robert; **Westchester:** Steven P. Lerner

**Albany:** JulieAnn Calareso; **Buffalo:** Paul M. Pochepan

**2:55 – 3:10 PM Break**

**3:10 – 4:00 PM Medicaid Planning Update**

• Promissory Note/Gift Update
• Weiss, etc. Return of Gift
• Recent Fair Hearings, Cases and ADMs/GIS
• Spousal Budgeting Issues (eligibility as single person, post-eligibility budgeting)
• MLTC budgeting (spousal impoverishment at post-eligibility budgeting; do spousal refusal with application)

**Speakers: Long Island**: Richard A. Weinblatt **NYC:** David Goldfarb **Westchester:** Michael J. Amoruso

**Albany:** James R. Barnes; **Buffalo:** Kameron Brooks

**Program Faculty**

**Overall Planning Chairs: JulieAnn Calareso,** Principal, Burke & Casserly, P.C., Albany; **Richard A. Weinblatt**, Partner, Haley Weinblatt & Calcagni LLP, New York

**New York City Session: Fern Finkel**, Co-Founding Partner, Finkel & Fernandez LLP, Brooklyn (Chair and Moderator) * **Tammy Rose Lawlor**, Partner, Miller & Milone, P.C., Garden City, NY * **Ira Salzman**, Partner, Goldfarb Abrandt Salzman & Kutzin LLP, New York City * **Sheryl L. Randazzo**, Partner, Randazzo & Randazzo LLP, Huntington, NY * **Valerie J. Bogart**, New York Legal Assistance Group Evelyn Frank Legal Resources Program, New York, NY * **Joan Lensky Robert**, Member, Kassoff, Robert & Lerner LLP, Rockville Centre, NY * **David Goldfarb**, Managing Partner, Goldfarb Abrandt Salzman & Kutzin LLP, New York, NY.

**Westchester Session: Frances M. Pantaleo**, Head of Elder Law Department, Bleakley Platt & Schmidt LLP, One North Lexington Avenue, White Plains (Chair and Moderator) * **Lee A. Hoffman, Jr.**, Hoffman & Keating, New City * **Ira Salzman**, Partner, Goldfarb Abrandt Salzman & Kutzin LLP, New York, NY * **Moira S. Laidlaw**, Shamberg Marwell Hollis Andreycak & Laidlaw, P.C., Mount Kisco, NY * **Andrew S. Lupatkin**, Of Counsel, Kurzman Eisenberg Corbin & Lever, LLP, White Plains, NY, Law Offices of Andrew S Lupatkin, Chappaqua, NY * **Steven P. Lerner**, Kassoff, Robert & Lerner, LLP, Rockville Centre, NY * **Michael J. Amoruso**, Amoruso & Amoruso, LLP, Rye Brook, NY.

**Buffalo Session: Kameron Brooks**, Partner, Brooks & Brooks, LLP, Little Valley (Chair and Moderator) * **Laurie Menzies**, Partner, Pfalzgraf Beinhauer & Menzies LLP, Buffalo, NY * **Terrie Benson Murray**, Cohen & Lombardo, P.C., Buffalo, NY * **Bruce D. Reinoso**, Senior Counsel, Woods Oviatt Gilman LLP, Buffalo, NY * **Kelly**

**M. Barrett**, Attorney, Legal Services for the Elderly, Disadvantaged or Disabled of WNY, Buffalo, NY * **Lindsay V. Heckler**, Attorney, Legal Services for the Elderly, Disadvantaged or Disabled of WNY, Buffalo, NY * **Paul M. Pochepan**, Associate Attorney, Hogan Willig, Amherst, NY *

**Albany Session: JulieAnn Calareso**, Principal, Burke & Casserly, P.C. Albany (Chair and Moderator) * **Patricia J. Shevy**, Founder, The Shevy Law Firm, LLC, Albany, NY * **Cailin Connors Brennan**, Appellate Division 3rd Department, Albany, NY * **Phillip M. Tribble**, Principal, Tribble Law, Clifton Park, NY * **Amy Eleanor Lowenstein**, Senior Staff Attorney, Empire Justice Center, Albany, NY * **JulieAnn Calareso**, Principal, Burke & Casserly, P.C., Albany, NY * **James R. Barnes**, Shareholder, Burke & Casserly, P.C., Albany, NY.

**Long Island Session: Richard A. Weinblatt**, Partner, Haley Weinblatt & Calcagni, LLP, Islandia (Chair and Moderator) * **Tammy Rose Lawlor**, Partner, Miller & Milone, P.C., Garden City, NY * **Ira Salzman**, Partner, Goldfarb Abrandt Salzman & Kutzin LLP, New York, NY * **Sheryl L. Randazzo**, Randazzo & Randazzo LLP, Huntington, NY * **Kelly Ann Murray**, New York Legal Assistance Group, New York, NY * **Steven P. Lerner**, Kassoff, Robert & Lerner, LLP, Rockville Centre, NY * **Richard A. Weinblatt**, Partner, Haley Weinblatt & Calcagni, LLP, Islandia, NY.

**INTERMEDIATE ELDER LAW UPDATE**

Fall 2016

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# POWER OF ATTORNEY: RECENT CASES

**by**

**JILL SPOONER**

Burke & Casserly, P.C.

Albany, NY

# Power of Attorney: Recent Cases

Jill Spooner
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**SUMMARY: Defects in a Power of Attorney does not precludes its validity where parties failed to raise imperfections to the Power of Attorney during litigation, where Principal admitted to signing the Power of Attorney , and where Principal ratified the Power of Attorney by his actions and by revoking the Power of Attorney at a later date.**

*Citibank, N.A. v. Silverman*, 84 A.D.3d 425 (2011) 1st Dep't.

Background: Borrower (B) took out a loan from Citibank (CB) and executed a POA authorizing business associate Marc Roberts to make withdrawals. Under the authority granted by the POA, Roberts made several transfers into his personal account.

History: CB brought action against B for failure to repay the loan. The motion for summary judgment was denied leading to the current appeal.

Decision: On appeal CB submits the credit agreement, executed note, and the executed POA. B alleges that the transfers made by Roberts into his personal account were fraudulent because the POA granting him the authority was invalid under statutory requirements. The Court rejects B's argument because B admits to executing the POA authorizing Roberts to make the transactions. B subsequently noted the debt from the loan on a net worth statement and made interest payments on the debt. Furthermore, upon receipt of CB's initial notice of default to repay the loan, B revoked the POA, however, neither the validity of the document, nor the amount of the debt were brought into question at that time.

The Court found, therefore, that B was not only aware of the POA, but had treated it as if it were valid, giving Roberts the authority to make the transactions. As a result, CB's motion for summary judgment is granted on appeal and B is required to pay back the full amount of the debt.

**SUMMARY: Closing a Totten Trust account is a gift under General Obligations Law and requires authority within the Statutory Gifts Rider.**

*In re Conklin*, 48 Misc.3d 291 (Surr. Ct., Nassau County, 2015).

Background: Decedent executed a LW&T in December, 2003 leaving the proceeds from the sale of his cooperative apartment to be divided equally among his children and ex-wife; his personal savings and checking accounts and personal belongings to his significant other Joan Conklin; and the residue of his estate to Joan.

On February 3, 2010, decedent executed a POA naming Joan and her daughter Lori Conklin as co-agents. On March 24, 2010, decedent executed a second POA with a major gifts rider, naming Joan as agent and Lori as successor agent. Prior to decedent's passing, Lori closed a Totten trust for decedent's daughter, acting under the first POA. Lori subsequently closed 7 additional Totten trust accounts acting under the second POA. The funds from the closed accounts in the amount of $165,302.76 were depositing into an account under decedents name. The Totten trusts for her mother, Joan were not liquidated.

The cooperative apartment was sold approximately two weeks prior to decedent's death. The proceeds of approximately $125,000 were deposited into an account under decedent's name. Nine days after his death, Lori acted under the second POA and closed out decedent's account. Account statements offered into evidence show a deposit of $100,000 into a joint account between Lori and Joan. Lori testified having no knowledge of the large deposit.

Decision: The first POA appointing Lori as co-agent for the decedent was invalid. Lori's name was handwritten next to her mother's name on the document and her signature was not properly acknowledged. Therefore, Lori did not have the authority to close out the first Totten trust account for decedent's daughter.

Although the second POA naming Lori as successor agent was properly executed and acknowledged, it did not have the language required to grant the authority for an agent to close a Totten trust account. The court referred to the General Obligations Law and EPTL and concluded that the authority to close a Totten trust account must be expressly stated in the major gifts rider. "The language must provide in no uncertain terms that the agent is given the authority to open, modify or terminate a back account in trust form and to change the beneficiary or beneficiaries of such account" (Conklin, 456). Therefore, Lori did not have authority to close the seven additional Totten trusts under the second POA and is ordered to return the money with interest. The court also noted that Lori breached her fiduciary duty in closing almost every Totten trust account except the accounts in trust for her mother.

With regard to the sale of decedent's cooperative apartment, the court concluded that although decedent's Will stated that the property should be sold after his death and the proceeds distributed equally between his children and ex-wife, the bequest was adeemed. The sale of decedent's property prior to his death was authorized by the POA and under New York law, the court cannot require that the proceeds be distributed as intended in the Will.

**SUMMARY: Appointment of Power of Attorney Agent as an Article 81 Guardian of the Property is appropriate even when fiduciary has failed to meticulously account for funds and despite comingling of funds where sufficient showing was made that the AIP selected the person as fiduciary, that Agent acted in the AIP's best interest, and that the Petitioner and other available persons were ill-suited to serve as guardian.**

*In re Cox*, 47 Misc.3d 1211(A), 2015 N.Y. Slip Op. 50550(U) (Sup. Ct., Kings County, 2015).

Background: AIP is 95 years old, has advanced dementia, requires 24-hour medical care and lives at home with a health care aide and 2 of her 5 children, Russell (R) and Michael (M). AIP co-owns the residence with daughter Brenda (B). AIP executed a POA in 2001, appointing

B and daughter Claudette (CL) as agents. CL is now deceased. AIP subsequently executed a HCP in 2010 naming B as agent.

History: In 2008, petitioner R filed an OTSC nominating himself as guardian of his mother and a subsequently filed an OTSC seeking to prevent the sale of his mother's residence. Cross-petitioner B opposed the petition but cross-moved to be appointed as guardian in the event that the court decided to appoint one. The court declined the appointment of a guardian for the AIP, but did grant petitioner's application to prevent the sale of the residence. Following five subsequent hearings, the court now reverses its opinion, appointing B as guardian, allowing her the option to sell the residence to pay for AIP's health care costs.

Decision: R alleges that B is abusing her authority as agent under the POA by making financial decisions for the benefit of her own personal enrichment because she wants to sell the house and has not kept a meticulous accounting of expenses paid with AIP's money. B resides in Long Island and travels to visit AIP on a weekly basis. She pays the health care aides and has arranged for hospice care for AIP on weekends; however, she does not provide any physical care to the AIP and does not have a solid plan for AIP's care after the house is sold.

B states that she needs to sell the house in order to be able to pay for the expensive 24-hour health care that AIP requires. She argues that R only wants to stop the sale of the house so that he can continue to live in it and inherit a share of it when AIP passes, rather than stop the sale of the house out of genuine concern for the well-being of the AIP. R has been convicted of a crime, has been arrested more than once, has a suspended driver's license, and a child support judgment of nearly $50,000. She admits to having pooled some of her personal funds with AIP's funds and has not kept a meticulous record of all expenses, but she was able to how expensive AIP's health care costs are and how the sale of the house is required to continue to afford adequate care.

Both parties call on siblings to testify on their behalf. The siblings contend that they are suspicious of how B is spending AIP's money since she has not kept a record and cannot account for certain expenses, but that she has done an excellent job in coordinating care for the AIP.

The court ultimately appoints B as guardian of the AIP because she has done a sufficient job in coordinating the care of the AIP and has shown that the sale is necessary to afford further care. Additionally, R would not make an appropriate guardian because he has too much of an interest in preventing the sale of the residence. If the house were sold against his wishes, he would have to find a somewhere else to live. Therefore he is not in a position to make an objective decision regarding what is in the best interest of the AIP. The court appoints B as guardian of the AIP, giving her the authority to sell the residence to pay for health care costs as necessary.

*In re Engstrom*, 47 Misc.3d 1212(A), 2014 Slip Op. 51936(U) (Surr. Ct., Suffolk County, 2014).

**SUMMARY: Petitioner attempted to claim that a Trust amendment which reduced Petitioner's interest in the residuary when that amendment was executed by the Grantor/Principal was the product of undue influence and fraud and attempted to shift the burden of proof by alleging a confidential relationship existed as a result of a Power of**

**Attorney. Court determined that an Agent's actions under a Power of Attorney to manage the Principal's assets (paying bills) is not sufficient to establish a**

Background: Decedent executed a Will and codicil in 2003, directing that his residuary estate pour over into a trust. The 2010 version of the trust bequeaths $100,000 to petitioner (a close family friend of decedent), Richard Pinner (decedent's godson and attorney-in-fact per a previously executed POA), Elizabeth Pinner, Maxine Pinner, and a Unitarian Universalist Congregation. The residue was to be distributed as 3 shares to Richard, 3 shares to Elizabeth, and 2 shares to petitioner. Richard and another friend of decedent were named as trustees. In 2012, ten days after decedent suffered a stroke and was living in a nursing home, a restatement of the trust provisions was executed. The restatement named Richard as the sole trustee, reduced the bequest to the Unitarian Universalist Congregation to $25,000 and directed that the residue be split only between Richard and his sister Elizabeth.

History: Petitioner objects to the restatement of the trust claiming undue influence and fraud due to the nature of the relationship between decedent and respondent, Richard, and the proximity of its execution to decedent's stroke. Richard, denies the allegations and counterclaims against petitioner for an unknown sum of money (less than $2,000) allegedly owed to the trust. Petitioner denies the counterclaim and the Office of the Attorney General files a responsive pleading requesting the court to determine the allegations made.

Richard moves for summary judgment referencing multiple exhibits obtained in discovery, claiming that petitioner cannot meet the burden of proof required for a successful claim of undue influence. Petitioner opposes the motion and cross-moves for summary judgment, referencing other exhibits obtained in discovery, additionally claiming the existence of a confidential relationship between Richard and decedent, voiding the 2012 restatement, precluding the issue of undue influence.

Decision: In addressing the issue of whether or not a confidential relationship existed, the court turns to the applicable case law. A confidential relationship exists where one party has disparate power over the other. The relationship between an attorney-in-fact and the grantor of the POA can constitute a confidential relationship due to the fiduciary duty of the agent to always act in the best interest of the principal. The court notes, however, that a close family relationship can negate the existence of a confidential relationship.

The court rejects Richard's contention that a close family relationship existed because he is only a godchild and is too far removed. The court also rejects petitioner's claim, however, finding that no confidential relationship existed. Richard only acted under the power of attorney after the restatement's execution in 2012. Further, there is no evidence that Richard exercised his authority as co-trustee under the previous versions of the trust. The court concludes that paying bills under the authority granted in a POA does not constitute the disparate power required to determine the existence of a confidential relationship. As a result, the court continues on to address the issue of the alleged undue influence.

*In re Dietz*, 47 Misc.3d 1202(A), 2015 N.Y. Slip Op. 50359(U) (Surr. Ct., Erie County, 2015).

**SUMMARY: Estate proceeding seeking an accounting of Agent under a Power of Attorney. During decedent's lifetime, an Article 81 guardian was appointed, but not accounting of the Power of Attorney Agent was ever pursued by the Guardian. Summary Judgment granted because Administrator of the estate used prior testimony of the Agent and decedent to prove entitlement.**

In December, 2008, one month after being diagnosed with dementia, decedent executed a POA appointing his brother Robert Swaldi (R) as his attorney-in-fact with the power to make gifts. In April, 2009, acting under the POA, R cashed in a demand note owned by decedent for $417,906.08 and deposited the funds into an account jointly held with decedent. Using those funds, R made several gifts totaling $379,283.98, a majority of which was a gift to himself to pay off his own mortgage.

In September, 2009, Erie County Supreme Court appointed Arcangelo Petriccia, Esq. as guardian for the decedent. An accounting of decedent's assets was request from R, but was never provided. In a subsequent records proceeding and evidentiary hearing during decedent's lifetime, R stated that decedent had given him permission to use the funds to help himself and the family. R also admitted to using a large sum of the money to pay off the mortgage on his own home. Decedent testified during the Article 81 proceeding that never gave R that permission and that his brother was trying to "swindle his lifetime savings." In 2012, decedent's sister, Eleanor Dietz (E), was appointed administrator of decedent's estate. She has filed a motion for summary judgment seeking to recover nearly $380,000 made in gifts from the estate.

Decision: The court now seeks to determine whether R breached his fiduciary duty as decedent's attorney-in-fact considering the gift-giving authority granted in decedent's POA. A study of previous case law demonstrates that gift-giving authority only authorizes the agent to make gifts that he reasonably believes to be in the best interest of the principal. This authority is only intended to give the agent the ability to carry out principal's intended estate or financial plans, such as minimizing income, estate, inheritance, generation-skipping transfer, or gift taxes. It is not meant to give the agent the authority to make gifts that do not benefit the principal in any way. Additionally, the court notes the agent's duty to act in the best interest of the principal when appointed under a POA.

The court concludes that R did breach his fiduciary duty because the decedent received no benefit from R paying off his mortgage. The only evidence R has in support of his claim is inadmissible hearsay about what decedent had told him in the past. In addition, previous case law has shown that the "best interest" requirement is not met even if the principal told the agent to do what he pleases with the principal's assets.

Therefore, E's motion for summary judgment is granted and R is required to pay the money back to the estate, with interest.

*In re Liosis*, 33 Misc.3d 1214(A), 2011 N.Y. Slip Op. 51924(U) (Surr. Ct., Queens County, 2011).

**SUMMARY: The six year statute of limitations for claims against a fiduciary begins to run at the time there is an open repudiation of the confidential relationship or when the trust relationship comes to an end, as would occur upon the death of a principal of a Power of Attorney. However, despite this clear statute of limitations and the triggering start of such statute of limitations, it is suspended when there is actual or intentional fraud. Summary judgment in this case is denied because there exist issues of fact as to whether actual or intentional fraud existed so as to suspend the statute of limitations.**

Background: Decedent granted a General Durable Power of Attorney to his brother Nicholas in November, 1998. Nicholas executed a POA authorizing decedent to act on his behalf in Greece. Both of these documents were execution in furtherance of an agreement between the brothers regarding the division of the assets of their father's estate which were located both in the United States and in Greece.

In April, 1999, Nicholas established Strathmore Group, LLC using the POA from his brother, naming himself as 51% owner and decedent as 49% owner. Less than a month later, Nicholas, again acting under the POA, transferred his brother's 49% share to himself and his wife. In November, 1999 Nicholas, the administrator of their father's estate, deeded an apartment building, the estate's largest asset, to Strathmore Group, LLC. Nicholas reported to the bank while obtaining the mortgage, that he and his brother each owned 50% of Strathmore Group, LLC.

Over four years after decedent's death, petitioner Kathy Liosis obtained Letters of Administration for decedent's estate.

History: In April, 2004, upon obtaining Letters of Administration, Kathy commenced a proceeding to compel Nicholas to supply an accounting as administrator of his father's estate. Nicholas subsequently presented an accounting to which Kathy filed objections and commence the present proceeding in September, 2010, compelling Nicholas to provide and accounting for his time as attorney-in-fact for decedent.

Nicholas moves to dismiss claiming that pursuit of damages in the form of an accounting is equivalent to determining monetary damages and is therefore governed by a three year statute of limitations which has run out.

Decision: The court holds that Nicholas' defense is misplaced. An attorney-in-fact has a fiduciary duty to account for all transactions and a proceeding to compel such an account is governed by a six-year statute of limitations. When a fiduciary relationship terminates and there are no further duties for the fiduciary to perform, the statute of limitations begins running. Thefore, the statue of limitations in this case commenced on the day of decedent's death on April 17, 2004.

The presence of actual or intentional fraud on the part of the fiduciary, however, can suspend the statute of limitations. In the present case, it is undisputed that Nicholas engaged in

self-dealing when he used the POA to transfer decedent's interest in their father's estate to himself. Fraud existed after the termination of the fiduciary relationship as well when Nicholas alleged in his account of his father's estate that he had no knowledge of the POA executed by decedent. This is a direct contradiction to his own representation of the facts in the current proceeding.

As a result, Nicholas' motion for summary judgment to dismiss based on the expiration of the statute of limitation is denied.

*In re Johnson*, 46 Misc.3d 1213(A), 2015 N.Y. Slip Op. 50051(U) (Surr. Ct., Broome County, 2015).

**SUMMARY: During this estate proceeding alleging undue influence, Court concludes that Power of Attorney Agent who made gifts prior to the date of the Will being challenged when those gifts were in conformity with the provisions of the new Will were void because they were inconsistent with the decedent's testamentary plan that was in effect at the time the gifts were made. That they were later to be in compliance with a revise Will is not important.**

Background: Decedent had always relied on her husband to handle all financial affairs. Upon his death, decedent's daughter Marjorie (M) took over managing her financial affairs as agent under a POA. M was the only local of three children, lived with decedent, and was decedent's caregiver. Three months after M began living with decedent, decedent executed a new Will. At the time of the execution, the attorney who had worked with decedent and her husband for 40 years, neglected to ask decedent about her liquid assets in excess of $220,000, claiming he was unaware that it was a substantial portion of her estate. It is therefore arguable that decedent was only aware of her real estate assets consisting of a family farm and homestead, similar in value to her liquid assets.

History: Decedent died September, 2012 and her Will executed in 2008 was submitted for probate by M the following month. Decedent's sons, the other distributees, filed objections to probate in February, 2013. M replied moving for a summary judgment on dismissal of the objections. The summary judgment motion was argued before the court in June, 2013 and in September, 2013 was denied because no discovery had taken place yet. After discovery, M renewed her motion for summary judgment to dismiss the objections in March, 2014. Objectants replied and the matter was argued before the court on June 14th, 2014.

Decision: Decedent's sons allege that decedent lacked capacity at the time her Will was executed due to her inexperience in handling financial affairs and her lack of knowledge of her liquid assets. Both her status as agent and residency with decedent placed M in the position to potentially exert undue influence over the decedent. Furthermore, decedent's sons argue that M's use of decedent's funds to purchases a new car, make various home improvements and assist her own daughter financially, demonstrates a clear motive for M to exert undue influence over the decedent.

The court also notes that all transfers made by M under the POA, prior to the execution of the Will are void as they are inconsistent with the testamentary plan in place at the time. The transactions, therefore, breached the fiduciary duty owed to decedent as agent under the POA, lending further support to the claim of potential undue influence.

As a result, the motion for summary judgment is denied and the matter will proceed to trial.

# POWERS OF ATTORNEY –

# COVERING ALL CONTINGENCIES

by

**RICHARD A. WEINBLATT, ESQ.**

Haley Weinblatt & Calcagni, LLP
Islandia, NY

# POWERS OF ATTORNEY
# COVERING ALL CONTINGENCIES

I. Overview

A. Statutory Short Form Power of Attorney and Statutory Gift Rider

1. The Statutory Short Form Power of Attorney (" power of attorney") is an essential part of the estate plan.

2. Combined with a Statutory Gift Rider ("SGR"), it can help to avoid a costly guardianship proceeding, facilitate the receipt of government benefits such as Medicaid and minimize or eliminate gift and estate taxes.

3. Despite all of its benefits, however, a power of attorney combined with a SGR may also facilitate elder abuse.

B. A Durable Power of Attorney Permits Planning to be Effectuated Even after Incapacity

1. A power of attorney is an agency relationship.

2. In a typical agency relationship, the power of the agent terminates upon the incapacity of the principal. In elder law and special needs planning, however, the incapacity of the principal is when the need for an agent becomes most important.

3. The statutory default is that the power of attorney is durable. This means that the incapacity of the principal does not revoke or terminate the power of the agent. GOL § 5-1501A

a. This statutory default may be modified by expressly providing that the power of attorney is terminated by the incapacity of the principal.

C. Proper Planning must be Done Before a Person Becomes Incapacitated

1. Once a person becomes incapacitated, it is too late to execute, amend, revoke or modify a power of attorney. GOL § 5-1501(B) (1)(b).

a. The statute defines capacity 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 the power of attorney, or the authority of any person to act as agent under a power of attorney. GOL § 5-1501(2) (c)

2. To properly advise and assist a client, the elder law and special needs attorney must understand the statutory requirements in order for a power of attorney to be valid, the practical difficulties encountered with acceptance of the power of attorney and anticipate and provide for contingencies.

II. THE CURRENT POWER OF ATTORNEY STATUTE

A. Powers of Attorney are Governed by the Article 5, Title 15 of the General Obligations Law.

1. This statute was significantly changed in September 2009 and amended in September 2010.

2. One of the most significant changes was the addition of the SGR.

a. Prior to September 1, 2009, the statutory short form power of attorney included a power that could be authorized by the principal granting

the agent the ability to make gifts to any person in an amount not to exceed $10,000 per calendar year. The $10,000 limit was the amount of the gift tax annual exclusion at the time the statute was enacted. This amount was routinely increased by elder law and special needs attorneys to facilitate planning for government benefits.

3. The current statute limits an agents gift giving power to a total of $500 per calendar year. GOL § 5-1502I (14)

4. Gifts in excess of $500 per calendar year require the principal to supplement the power of attorney form with a SGR and to initial the power of attorney form indicating that a SGR is attached.

5. Another significant change is the requirement that the agent sign the power of attorney.

6. Although the current statute still uses the term "Short Form" after the changes to the statute that were made in September 2009, the power of attorney form has become a lengthy and complicated document.

   a. The reference to"Short Form" means that the powers that are granted are enumerated on the form by letter with a short description of the power. A full description of the power is found in the construction sections of General Obligations Law § 5-1502.

B. Validity of the Power of Attorney GOL § 5-1501B

1. To be valid, a power of attorney must:

   a. Be typed or printed using letters no less than 12 point in size.

b. Be signed and dated by a principal with capacity. The principal's signature must be acknowledged.

c. Be signed and dated by the agent. The agent's signature must be acknowledged.

(1) The validity of the power of attorney is not affected by a lapse of time between the date that the principal signs the power of attorney and the date that the agent signs it or because the principal becomes incapacitated during such lapse of time.

(2) Despite the requirement that the agent date the document, the form does not provide a space for the date.

(3) The date on which the agent's signature is acknowledged is the effective date of the power of attorney for that agent.

(4) The form can be modified to provide that it takes effect upon the occurrence of a date or a contingency. Thus, it can be modified to be a "springing power of attorney".

d. Contain the exact wording of the "Caution to the Principal" and the "Important Information for the Agent"

(1) A mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type, shall not prevent the power of attorney from being deemed a statutory short form power of attorney. GOL § 5-1501(o)

(2) This exact wording requirement is troublesome since an inadvertent mistake that is not covered by the exception above may leave the client without a valid power of attorney and the attorney with a malpractice claim.

C. Modifications of the Power of Attorney and the SGR are Permitted GOL § 5-1503

1. The power of attorney form and the SGR may both be modified to eliminate powers enumerated in the constructional sections, supplement such powers and specifically list additional powers of the agent.

2. The power of attorney and the SGR may also be modified to make additional provisions that are not inconsistent with the other provisions of the power of attorney or SGR, including a provision revoking one or more powers of attorney previously executed by the principal.

3. The power of attorney may not be modified to grant any authority provided in a SGR. Thus, the power to make gifts can only be granted in a SGR.

a. This provision creates confusion. It may not always be easy to determine whether or not a power grants the authority to make a gift. If a power is granted in the power of attorney that is later determined to be the power to make a gift, such power will be void. Accordingly, if there is any doubt, the power should be included in the SGR.

D. Acceptance of the Power of Attorney GOL § 5-1504

1. The statute provides that no third-party doing business in this state shall refuse, without reasonable cause, to honor a power of attorney, including a power of attorney which is supplemented by a SGR.

2. The statute lists examples of what constitutes reasonable cause for refusal. The examples include the following:

    a. The refusal by the agent to provide an original power of attorney or a copy certified by an attorney.

    b. Actual knowledge of a report having been made to the local Adult Protective Services.

    c. Actual knowledge or reasonable basis for believing that the principal has died, the power of attorney was executed at a time when the principal was incapacitated or that the power of attorney was procured through fraud, duress or undue influence.

    d. Actual knowledge of the termination or revocation of the power of attorney.

3. The statute expressly states that it shall be deemed unreasonable for a third-party to refuse to honor the power of attorney, including a power of attorney which is supplemented by a SGR for the following reasons:

    a. The power of attorney is not on the form prescribed by the third-party. There has been a lapse of time since the execution of the power of attorney. There is a lapse of time between the date of

acknowledgment of the signature of the principal and the date of acknowledgment of the signature of an agent.

b. Despite this provision, it is not unusual for a financial institution to reject the power of attorney on the basis that it is not on their form or that it is too old.

4. If a third party unreasonably refuses to honor the power of attorney or a power of attorney which is supplemented by a SGR, the sole remedy is the commencement of a special proceeding pursuant to GOL § 5-1510.

a. This remedy, however, is not helpful since the only relief that can be granted under GOL § 5-1510 is an order compelling acceptance of the power of attorney. Unlike a lot of states, attorneys fees and costs cannot be awarded by the court.

E. Compensation GOL § 5-1506

1. The statute provides that an agent is not entitled to receive compensation from the assets of the principal but shall be entitled to receive reimbursement for reasonable expenses actually incurred in connection with the performance of the agent's responsibilities.

2. The issue of compensation should be discussed with the client. An independent agent may be reluctant to serve without compensation. On the other hand, permitting a family member to receive compensation may result in family disharmony.

F. Co-agents and Successor Agents GOL § 5-1508

1. The statute permits the principal to designate two or more persons to act as co-agents. Unless provided otherwise in the power of attorney, the co-agents must act jointly.

    a. Some financial institutions refuse to open accounts that require two signatures. This can create a problem where agents are required to act jointly.

2. The statute permits the principal to designate one or more successor agents to serve if the initial or predecessor agent resigns, dies, becomes incapacitated, is not qualified to serve for declines to serve.

    a. The principal may provide for specific succession rules.

G. Appointment of a Monitor GOL § 5-1509

1. The statute permits the principal to appoint a "Monitor". A Monitor is a person who has the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal.

    a. The appointment of a Monitor is rarely used. If the principal does not completely trust the agent, the appointment of that person as agent should not be made.

H. Special Proceedings GOL § 5-1510

1. A special proceeding may be commenced against an agent for failure to provide information to a person entitled to receive such information. The persons entitled to receive information from the agent include the monitor,

co-agents, successor agents, court evaluator, guardian ad litem and the personal representative of the principal's estate.

2. A special proceeding may also be commenced for the following purposes:

a. To determine whether the power of attorney is valid;

b. To determine whether the principal had capacity at the time the power of attorney was executed;

c. To determine whether the power of attorney was procured through duress, fraud or undue influence;

d. To determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;

e. To approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;

f. To remove the agent upon the grounds of the agent has violated, or is unfit, unable or unwilling to perform, the fiduciary duties under the power of attorney

g. To determine how multiple agents must act;

h. To construe any provision of the power of attorney;

i. To compel acceptance of the power of attorney, in which event the relief to be granted is limited to an order compelling acceptance.

I. Powers of Attorney Executed in Other Jurisdictions GOL § 5-1512

1. A power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state. This is true even if the principal is a resident of this state.

2. A power of attorney that complies with the law of this state that is executed in another state or jurisdiction by a domiciliary of this state is valid in this state.

3. A power of attorney executed in this state by a domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of this state is valid in this state.

J. Execution of the SGR GOL § 5-1514(9) (b)

1. The SGR must be signed and dated by a principal with capacity, with the signature acknowledged in the manner prescribed for acknowledgment of a conveyance of real property.

2. The SGR must also be witnessed by two persons who are not named as permissible recipients of gifts. The person taking the acknowledgment may also serve as one of the witnesses.

3. The SGR must be executed simultaneously with the power of attorney.

III. MODIFYING THE POWER OF ATTORNEY AND THE SGR FOR CONTINGENCIES

A. Modifications to the Power of Attorney

1. The power of attorney form may be modified to eliminate one or more of the powers enumerated in one or more of the constructional sections and to add powers.

2. In practice, many of the modifications to the power of attorney grant powers that are already enumerated in the constructional sections of the General Obligations Law. This causes no harm, and may facilitate acceptance of the power of attorney since otherwise the third-party being asked to accept the power of attorney may have to research the General Obligations Law to verify that such power is included in the statute.

3. The power of attorney cannot be modified to grant the agent authority to make gifts or changes to interests in the principal's property. That authority can only be granted in a SGR.

4. The statute does not contain examples of powers that may be added.

B. Modifications to the SGR GOL § 5-1514

1. The authority to make gifts and to change interests in the principal's property must be granted in the SGR.

2. The statute gives examples of powers that may be granted. GOL § 5-1514(3)

3. The agent cannot make gifts to himself or herself unless such authority is expressly granted in the SGR.

C. Avoiding the Appointment of a Guardian

1. A properly executed power of attorney may avoid the necessity for the appointment of a property management guardian.

2. Together with a health care proxy, a properly executed power of attorney may avoid the necessity of the appointment of both a property management guardian and a personal needs guardian.

3. Consider modifying the power of attorney to include a provision nominating a person to serve as guardian. In the event of the guardianship proceeding, such nomination should be respected. Mental Hygiene Law§ 81.17 and 81.19.

D. Medicaid Planning

1. Both the power of attorney and the SGR require modifications in order to grant the agent the powers necessary to plan for and obtain Medicaid benefits.

2. Although it is impossible to list all of the possible powers that may be required, the following are some examples of powers that should be considered as modifications to a power of attorney and/or a SGR (if the power relates to a gift or change to interests in property) in order to enable the agent to engage in Medicaid planning:

a. To make gifts, in any amount.

b. To transfer the ownership of insurance contracts and annuity contracts and to designate and/or change the beneficiaries of any existing contracts.

c. To create, fund, revoke and amend trusts.

d. To join and contribute funds to a pooled community trust.

e. To exercise any or all powers of appointment reserved by the principal or granted to the principal in any trust or deed.

f. To make statutory elections and renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer consistent

with section 2- 1.11 of the New York Estates, Powers and Trusts Law.

g. To create, change or terminate other property interests that the principal has.

h. To modify or terminate any account in the name of the principal and /or other joint tenants.

i. To modify or terminate any bank account in trust form as described in EPTL § 7-5.1, and designate or change the beneficiary or beneficiaries of such accounts.

j. To transfer title to any automobile or other motor vehicle.

k. To act on the principal's behalf with regard to any IRA, retirement plan, insurance policy and/ or trust of which the principal may be a participant or trustee, including the power to make or change beneficiary designations and the power to make distribution elections.

l. To forgive debts owed to the principal.

m. To terminate or assign a life estate interest in property.

n. To purchase a life estate interest in property.

o. To waive any and all benefits, and/or elect out of survivor annuity payments under Section 417 of the Internal Revenue Code and the regulations promulgated thereunder.

p. To make, join, and consent to gifts made by the principal's spouse.

q. To exercise a spousal refusal.

r. To make any of the gifts or other transfers authorized under the power of attorney in cash or in-kind, outright, to an existing trust or a trust established or created by the agent for the benefit of the gift recipient, to a Uniform Transfers to Minors Act account for such beneficiary, or to an Internal Revenue Code § 529 plan.

s. To loan or borrow money on such terms and with such security as the agent may decide in his or her sole discretion and to execute all notes, mortgages and other instruments relating to such loans.

t. To open and remove the contents of any safe deposit box.

u. To represent the principal in all matters before the Social Security Administration, any state Medicaid agency, or any other governmental agency in charge of benefits and entitlement programs, including, but not limited to, the power to make applications for benefits, and appeal the denial, reduction, or discontinuation of benefits.

v. Wave the principal's right of election pursuant to EPTL § 5-1.1A and the right to receive exempt property pursuant to EPTL § 5-3.1.

IV. ACCEPTANCE OF THE POWER OF ATTORNEY

A. Overview

1. Despite the statute's mandate that is unlawful for a third-party to refuse to accept a properly executed power of attorney, the fact that there are no

financial penalties to the third-party who unreasonably refuses to accept the power of attorney allows financial institutions to routinely refuse acceptance.

2. Consider advising clients that they should obtain a power of attorney form from every financial institution that they deal with and use the financial institution's form in addition to the statutory form. Although frustrating, this may be the path of least resistance.

3. In addition, some government agencies may not accept the power of attorney form and others may have their own requirements before a power of attorney form will be accepted.

B. Internal Revenue Service

1. Internal Revenue Service form number 2848 is the official Internal Revenue Service power of attorney form.

2. The Internal Revenue Service will accept a non-IRS power of attorney, but a completed Form 2848 must be attached.

   a. If the non-IRS power of attorney does not contain all of the information required by the Internal Revenue Service but does grant the agent authority to handle federal tax matters, the agent may perfect the non-IRS power of attorney by attaching a statement that the non-IRS power of attorney is valid under the laws of the governing jurisdiction.

   b. Instructions on how to use a non-IRS power of attorney are contained in Internal Revenue Service Publication No. 947.

C. Social Security Benefits

1. Social Security does not recognize a power of attorney.

2. In order to negotiate a manager beneficiary Social Security and/or SSI benefits, your agent must be appointed by Social Security as a representative payee.

D. Veterans Administration

1. The Veterans Administration does not recognize powers of attorney created under state law.

2. In order for a person to become an agent to handle Veterans Affairs, such person must be appointed by the Veterans Administration.

V. POWERS OF ATTORNEY MAY BE A SOURCE OF ELDER ABUSE

A. Matter of Ferrara, 7 N.Y.3d 244

1. Matter of Ferrara, illustrates how a power to make gifts granted in a power of attorney may be misused by an agent. This case involved a power of attorney executed on January 25, 2000. It is the egregious facts of this case that led to the September 1, 2009 amendment to the power of attorney statute requiring that a separate gift rider be attached to the power of attorney form and that such gift rider be acknowledged and witnessed by two persons other than a person who may benefit under the power of attorney.

2. A summary of the facts of this case are worthy of review in this outline.

a. On June 10, 1999, George Ferrara, a retired stockbroker residing in Florida, executed a will leaving his entire estate to the Salvation

Army. On August 16, 1999, George executed a codicil appointing the attorney draftsman of his will as executor.

b. In December 1999, George was hospitalized.

c. On January 15, 2000, Dominick Ferrara, George's nephew, accompanied George from Florida to New York.

d. On January 25, 2000, George signed a power of attorney appointing Dominick and Dominick's father (George's brother) as agents and initialed the form to allow them to act separately. The January 25, 2000 power of attorney authorized the agents to make gifts in unlimited amounts to themselves. The power of attorney was notarized by a friend of Dominick's.

e. Dominick use the power of attorney to transfer $820,000 of George's assets to himself.

f. George died on February 12, 2000.

g. The Salvation Army found out about George's death after a doctor in Florida, learning of George's death, contacted the attorney draftsman of George's will to inquire about an unpaid medical bill.

h. The Court of Appeals held that Dominick was only authorized to make gifts to himself insofar as these gifts were in George's best interest.

i. The Court stated that "[T]he term 'best interest' does not include such unqualified generosity to the holder of a power of attorney, especially

where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the recipient of the gift".

B. Be Alert for Elder Abuse

1. In planning for eligibility for government benefits, we often prepare powers of attorney supplemented by a SGR.

2. Although we are motivated by our desire to provide services that will assist our clients in meeting their objectives, we cannot overlook the fact that the documents we prepare may be misused and result in harm rather than help to our clients.

3. Before we prepare documents, we should thoroughly discuss with our clients not only their goals and objectives but also the composition of the family and any possible conflicts of interests within the family.

4. It is important that we meet and have these discussions with our clients alone without the influence of other family members. We must pay special attention to situations where our client is not providing equally for children, where there is a radical change from the prior plan, or where it is the children who are expressing the wishes of the parents. In all of these situations, our antennas should be up.

C. Consider Joint Agents for the Purpose of Making Gifts

1. Especially in situations where the client has more than one child, consider requiring all of the children to consent to any gifts made by the agent. If this

is not practical, consider having at least one other child consent to any gift made by the agent.

# HOSPITAL DISCHARGE AND NURSING HOME ISSUES

by

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## HOSPITAL DISCHARGE AND NURSING HOME ISSUES

### I. Hospital Discharge

A. Admission:

1. No right to admission to a particular hospital but MUST be provided with care in an emergency.

a. **Federal Law 42 U.S.C. § 1395dd (e)(2)**
*Emergency Medical Treatment and Labor Act a/k/a Anti-Dumping Act*
provides that hospitals participating in the Medicare program that have emergency departments must provide treatment in order to stabilize the patient and can only transfer the patient once stable.

b. **Public Health Law § 2805-b**

expands a patient's rights and provides that "every general hospital shall admit any person who is in need of immediate hospitalization with all convenient speed and shall not before admission question the patient or any member of his or her family concerning insurance, credit or payment of charges, provided, however, that the patient or a member of his or her family shall agree to supply such information promptly after the patient's admission."

1. According to **PHL § 3001 (1),** "emergency medical service" means initial emergency medical assistance including, but not limited to, the treatment of trauma, burns, respiratory, circulatory and obstetrical emergencies.

2. Sources of Admission:
   a. Through the Emergency Room, or
   b. Directly accepted as a patient.

3. Once Admitted as a patient, certain rights commence and the rules and regulations take effect.
   a. Patient's Bill of Rights
      1. **Public Health Law § 2803-c**

   b. Prior to discharge, hospital patients must receive a written notice that the hospital has determined that hospital care is no longer medically necessary and a written discharge plan with the reasons for discharge. The notice must also state that the patient has a right to request a review of this determination. **Public Health Law § 2803-i.**

   c. **NYCRR § 405.9** Outlines all of the particular rules regarding admission and discharge.

   d. The discharge plan must meet the patient's post-hospital care needs. If a patient requires continuing health care services, such services must be secured or determined by the hospital to be reasonably available to the patient. **10 NYCRR § 405.9(f)(1)**

   e. Hospitals must make sure that no person that is admitted for medical care be removed, transferred or discharged based upon his/her ability to pay. **10 NYCRR § 405.9(f)(7)**

B. Discharge:

1. Medical Necessity determines Discharge.
    a. Medicare defines “medical necessity” as services or items reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.

2. Insurance, Medicaid, and Medicare:
    a. place limitations on when services are no longer covered;
    b. determine the # of days that the patient will have coverage;
    c. HINN letter
    (Hospital Issued Notice of Non-Coverage)

3. Financial Motivation to leave

C. Miscellaneous:

1. Guardianships – Hospitals Petition if:
    a. Incompetent/Incapacitated; or
    b. Family member is abusing or misusing power.

2. Elder Law attorneys need to arrange for client’s discharge into a Nursing Home (which will be discussed later), Rehabilitation Facility or to their Home. Need familiarity with:

    a. HIPAA Authorization

    b. Insurance Issues - should be familiar with filing appeals and IPRO

    c. Geriatric Care Manager to assist
        i. PRI – Patient Review Instrument
            a. Score determines your placement, based upon ADL's (activities of daily living)

## II. Nursing Home Issues

A. Admissions Agreement

1. Parties to the Agreement:

a. "Resident" is the individual admitted to and who resides in a nursing home and who is entitled to receive care, treatment and services. **10 NYCRR § 415.2 (m)**

b. "Sponsor" is the agency or person or persons, other than the resident, responsible in whole or in part for the financial support of the resident, including the costs of care in the facility. **10 NYCRR § 415.2 (s)**

c. "Designated Representative" is the individual or individuals designated in accordance with this subdivision to receive information and to assist and/or act on behalf of a particular resident to the extent permitted by State law; it being understood that a designated representative specified in subparagraph (1) (iii) of this subdivision is not a health care agent as defined in Article 29-C of the Public Health Law.

i. Such individual or individuals shall be designated, with such designation noted in the clinical record:
   a. by a court of law when the designation of an individual, committee or guardian has been sought;

b. by the resident if the resident has the capacity to make such designation; or
c. by family members and other parties who have an interest in the well-being of the resident who, after discussion with the facility, identify the individual or individuals most personally involved in the resident's care, if the resident lacks the capacity to make such designation.

ii. The designated representative shall:

a. Receive any written and oral information required to be provided to the resident if such resident lacks the capacity to understand or make use of such information, and also receive any information required to be provided to both the resident and the designated representative; and

b. Participate to the extent authorized by State law in decisions and choices regarding the care, treatment and well-being of the resident if such resident lacks the capacity to make such decisions and choices. **10 NYCRR § 415.2 (f)(2)(ii)**

d. "Responsible Party" and Financial Agent defined by contract as an individual who has legal access to a resident's income or resources available to pay for facility care, to sign a contract, without incurring financial liability, to provide the facility payment from the resident's income or resources.
**10 NYCRR § 415.3 (b)(6)**

e. "Financial Agent" defined by contract – typically limited access to resources.
    (1) Trust
    (2) Power of Attorney
    (3) Joint Accounts or convenience accounts

2. Financial Disclosure:
    a. Identifies the proper parties listed in previous section for purposes of the Admission Agreement.
    b. Confirms sources of payment:
        i. Private pay;
        ii. Insurance or Supplemental Coverage;
        iii. Medicaid recipient:
            a. Need to verify assets and any prior transfers to determine eligibility.
            b. Medicaid planning: residents or potential residents shall not be required to waive their rights to Medicare or Medicaid benefits .... [Nursing Homes] shall not require oral or written assurance that residents or potential residents are not eligible for, or will not apply for Medicare, or Medicaid benefits.

**10 NYCRR § 415.3**

3. Liability for Payment to Nursing Home:
    a. Responsible Party Liability
        i. NY General Obligations Law Fraudulent Conveyance
        ii. Breach of Contract
    b. Third-Party Guarantee Prohibited
        i. A Nursing Home shall not require a third-party guarantee of payment to the facility as a condition of admission, or expedited admission, or continued stay in the facility. **42 U.S.C. § 1396r (c)(5)(A)(ii)**
        ii. [Nursing Home] shall not charge, solicit, accept or receive, in addition to any amount otherwise required to be paid by third-party payors, any gift, money, donation or other consideration as a precondition of admission, expedited admission or continued stay in the facility except that arrangements for prepayment for basic services not exceeding three months shall not be precluded by this paragraph. **10 NYCRR § 415.3 (b) (2)**

B. Bed-Hold Policy: Prior to discharge or transfer, a facility must notify a resident in writing of the facility's bed-hold policy. **42 U.S.C. § 1396r (c)(2)(D); 42 C.F.R. § 483.12(b); 10 NYCRR § 415.3(h)(4)**

1. A private paying resident can hold their bed at the private-pay rate.
2. Medicaid reimburses nursing home up to 15 days (can be extended to 20 days).
3. DOH requires priority to former residents.
4. Nursing Homes may use to dump non-paying

resident.

C. Discharge

1. Definition:
   a. Discharge is defined as movement of a resident to a bed outside of the certified facility. **42 C.F.R. § 483.12(a)(1); 10 NYCRR § 415.3 (h)**

2. Regulations regarding Discharge:
   a. Federal law and regulations provide that a Nursing Home must permit each resident to remain in the facility and must not transfer or discharge the resident unless: **42 USC 1396r(c)(2); 42 C.F.R. § 483.12(a)(2)**

      i. the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
      ii. the discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the facility;
      iii. the safety of the individuals in the facility is endangered;
      iv. the health of individuals in the facility would be otherwise endangered;
      v. the resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility; or
      vi. the facility ceases to operate.

b. According to New York Law a Nursing Home may not transfer or discharge a resident unless: **10 NYCRR 415.3 (h)(1)(i)(a)**

i. the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met after reasonable attempts at accommodation in the facility;

ii. the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility; or

iii. the health or safety of individuals in the facility would otherwise be endangered, the risk to others is more than theoretical and all reasonable alternatives to transfer or discharge have been explored and have failed to safely address the problem.

3. Notice of Discharge

a. Federal law requires before effecting a transfer or discharge of a resident, the nursing home must notify the resident in writing of the discharge and the reasons and must record the reasons in the resident's clinical record. **42 USC 1396r(c)(2)(B)(i); 42 C.F.R. § 483.12(a)(4)**

i. Requirements:

a. If the immediate family member or the resident or legal representative are known they must also be notified.

b. The notice of discharge must be made at least 30 days before the resident's transfer with few exceptions including when the safety of individuals in the facility is endangered. **42 USC 1396r(c)(2)(B)(ii); 42 C.F.R. § 483.12(a)(5)(i)**

c. The written notice of discharge must state the effective date of discharge, the reason for discharge, the location to which the resident is discharged, the right of the resident to appeal the action by a hearing; and the name, address and telephone number of the State long term care ombudsman. **42 USC 1396r(c)(2)(B)(iii); 42 C.F.R. § 431.200(c)(1) and § 483.12(a)(6)**

d. The notice must also cite the specific regulations that support the intended action. **42 C.F.R. § 431.210(c)**

b. New York State law also requires that before effecting a transfer or discharge of a resident, the nursing home must notify the resident in writing of the discharge and the reasons and must record the reasons in the resident's clinical record. **10 NYCRR 415.3 (h)(1)(iii)(a) and (b**)

i. Requirements:

a. If the immediate family member or the resident or legal representative are known they must also be notified.

b. The notice of discharge must be made at least 30 days before the resident's transfer with few exceptions including when the safety of individuals in the facility is endangered. **10 NYCRR 415.3(h)(1)(iv)**

c. The notice must include a statement that the resident has a right to appeal the action to the State Department of Health.

4. Appeal/Hearing

a. Federal regulations require that the state agency must grant an opportunity for a hearing to any resident who requests it because he or she believes a skilled nursing facility has erroneously determined that he or she must be transferred or discharged. **42 C.F.R. §§ 431.200(c)(1), 431.220(a)(3) and 483.204**

i. Requirements:

a. The agency may not limit or interfere, with appellant's right to make a request for a hearing and may assist the appellant with this request.

**42 C.F.R. §§ 431.221(b) and(c)**

b. The agency must allow the appellant a reasonable time, not to exceed 90 days from the date that notice of action is mailed, to request a hearing. **42 C.F.R. § 431.221(d)**

c. The hearing must be held before the Medicaid agency; or to be held as an evidentiary hearing at the local level, with a right of appeal to a State agency hearing. The hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), plus all additional standards established in the federal regulations. **42 USC 1396r(e)(3); 42 C.F.R. § 431.205**

d. The appellant must be given the opportunity to examine the content of the appellant's case file; all documents and records to be used by the State or local agency; bring witnesses; present an argument without undue interference; and question or refute any testimony or evidence, including opportunity to confront and cross examine adverse witnesses. **42 C.F.R. § 431.242**

e. An appellant may represent himself or use legal counsel. **42 USC 1396r(e)(3); 42 C.F.R. §§ 431.206(b)(3) and 431.242**

f. Additional Hearing requirements are outlined in **42 C.F.R. § 431.240**

g. The agency may deny or dismiss a request for a hearing only if the applicant or recipient withdraws the request for the hearing or fails to appear at a scheduled hearing without good cause. **42 C.F.R. § 431.223**

b. New York State regulations provide that the resident of a nursing home has a right to a "pre-transfer appeal determination" under the auspices of the Department of Health. **10 NYCRR 415.3(h)(2)(i)(a)**

i. Requirements:
   a. NYS does not provide for hearings on appeal as required by the federal regulations.
   b. Without requiring a hearing, the state regulations require that the department conduct a review and render a decision on appeal within 15 days of the request. **10 NYCRR 415.3(h)(2)(v)**

5. Notice of Decision in Writing
    a. Federal regulations require that the agency must notify the applicant or recipient in writing of the decision and his right to request a state agency hearing, if the hearing was conducted by the local agency, or seek judicial review, to the extent that either is available to him. **42 C.F.R. § 431.245**

D. Nursing Homes Options to Seek Payment for Services
    1. Hardship waiver
        a. Undue hardship exists when an
            i. Individual is deprived of medical care such that their life or health will be endangered, or an
            ii. Individual is deprived of food, clothing, shelter or life necessities

        b. States are required to institute a process
            i. Notice to recipients that undue hardship exists
            ii. Timely process for determining if waiver will be granted

        c. Facilities may apply for waiver for Resident
            i. Need consent of resident or designated representative
            ii. Hardship is only for hardship to resident, not the facility

2. Fraudulent Conveyances
    a. In **N.Y.S.S.L. § 366** there is a presumption that transfers for less than fair consideration within the look back period, were made to qualify for Medicaid

    b. According to **D.C.L. § 273**, to establish a case of fraudulent conveyance it must be determined whether the
        i. Conveyance was made without fair consideration
        ii. Conveyance was made with intent to defraud creditors
        iii. Conveyance rendered the resident insolvent.

3. Responsible Parties:
    a. Spouse if patient/resident does not have sufficient means
    b. Designated Representative who signed the Admissions Agreement or Power of Attorney but only to the extent he/she has access to the patient/resident's funds

## Table of Authorities

- Federal Law 42 U.S.C. § 1395dd(e)(2)
- Public Health law § 2805-b
- Public Health law § 3001
- Public Health Law § 2803-c
- Public Health Law § 2803-i
- 10 NYCRR § 405.9(f)(1)
- 10 NYCRR § 405.9 (f)(7)
- 10 NYCRR § 415.2 – Definitions
- 10 NYCRR § 415.3 – Resident's Rights
- 42 U.S.C. §1396r (c)(5)(A)(ii)
- 42 U.S.C. § 1396r (c)(2)(D)
- 42 C.F.R. § 483.12(b)
- 42 C.F.R. § 483.12(a)(4)
- 42 C.F.R. § 483.12(a)(6)
- 42 C.F.R. § 431.200(c)(1)
- 42 C.F.R. § 431.210(c)
- 42 C.F.R. § 431.220(a)(3)
- 42 C.F.R. § 483.204
- 42 C.F.R. § 431.221(b)(c)(d)
- 42 U.S.C. § 1396r(e)(3)
- 42 C.F.R. § 431.205
- 42 C.F.R. § 431.242
- 42 C.F.R. § 431.206(b)(3)
- 42 C.F.R. § 431.240
-42 C.F.R. § 431.223
- 42 C.F.R. § 431.245

# NURSING HOME ADMISSIONS AGREEMENTS

- Parties to the Agreement
  - Resident (10 NYCRR § 415.2)
    - Individual admitted.
  - Sponsor (10 NYCRR § 415.2)
    - Agency or person responsible for financial support of the resident.
  - Designated Representative (10 NYCRR § 415.2)
    - Individual(s) designated to receive information and to assist and/or act on behalf of resident.
  - Responsible Party (10 NYCRR §415.3(b)(6))
    - Individual who has legal access to a resident's income or resources to provide payment to the facility.
  - Financial Agent
    - Defined by contract.

# NURSING HOME ADMISSIONS AGREEMENTS

- Financial Disclosure
  - Identifies Proper Parties
  - Confirms Source of Payment
    - Private-Pay
    - Insurance or Supplemental Coverage
    - Medicaid Recipient

# NURSING HOME ADMISSIONS AGREEMENT

- Liability for payment to Nursing Home
  - Residents are liable for care received.
    - A resident with full mental capacity who signs an Admission Agreement that includes a promise on the part of the resident to pay privately for his/her care, or to apply for government benefits is liable for care received.

# LIABILITY FOR PAYMENT TO NURSING HOME

- Liability of Resident's Spouse
  - Doctrine of Necessaries
    - There is a reciprocal duty upon each spouse to furnish the other with reasonable necessaries, including medical care.
      - *Med. Bus. Assoc., Inc. v. Steiner, 183 A.D.2d 86, 87 (N.Y.S.2d 1992)*
    - The spouse who received the necessary goods or services should be primarily liable for payment.
    - A creditor seeking to recover a debt against the non-resident spouse must demonstrate that:
      - The non-resident spouse has the ability to pay for the debt; and
      - That an attempt was made to secure payment from the debtor spouse first.
  - *N.Y. Gen. Oblig. Law § 3-305*
    - A contract made by a married woman does not bind her husband or his property.

# LIABILITY FOR PAYMENT TO NURSING HOME

- Liability of Resident's Spouse
  - The Family Court Act Section 412
    - A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, *may be required* to pay for the support in a fair and reasonable sum, as the Court may determine, having due regard to the circumstances of the respective parties.
  - However, Section 422 of the Family Court Act states that the parties who have standing to assert this claim are not third parties such as creditors.
  - Family Court has exclusive jurisdiction over spousal claims that arise from Section 412.

# LIABILITY FOR PAYMENT TO NURSING HOME

- Third party liability for nursing home bills
  - Federal Nursing Home Reform Act
    - A nursing home is prohibited from requiring a third party to guarantee payment to the facility as a condition of admission of another party.
    - Any child who signs a guarantee can later disavow.
  - Sometimes nursing homes will "require" a child to guarantee payment for the cost of a parent's care in the nursing home.
  - Third parties can have access to resident's funds through:
    - Power of Attorney
    - Joint Bank Account
    - Appointment as Guardian

## LIABILITY FOR PAYMENT TO NURSING HOME

- However, a child can be held responsible for reneging on a written promise to a nursing home to apply the *parent's own assets* towards the cost of the parent's nursing home.
  - *Troy Nursing & Rehabilitation Ctr., LLC v. Naylor* (2012 NY Slip Op. 03243, App. Div. 3rd Dept., April 26, 2012)
    - Daughter signed an agreement wherein she promised, as agent under her father's power of attorney, to use her father's assets to pay for her father's care in the facility.
    - Daughter reneged and the nursing home filed suit against her.
- The court distinguished between a child's guarantee to use her *own assets* to pay for care and a promise to use the *resident's own assets* to pay for care.

## LIABILITY FOR PAYMENT TO NURSING HOME

- Other important case law:
  - *Prospect Park Nursing Home v. Goutier, 12 Misc.3d 1192*
    - Power of Attorney who signed an admission agreement can be held liable to a nursing home for breach of contract if he failed to turn over funds actually received by him that he has the legal authority to use (i.e. under the power of attorney)
    - If Power of Attorney does not have access to sufficient funds belonging to the resident to cover the resident's nursing home bill, the Power of Attorney who signed the admission agreement could not be held liable to the facility.
    - However, it is not enough to have legal access to funds, there must also be income or resources available to pay for the care.
  - *Amsterdam Nursing Home v. Lang, 16 Misc.3d 1138*
    - Proof of access to the resident's funds is a pre-requisite to finding the signer of an admission agreement liable for the resident's nursing home bill.

# LIABILITY FOR PAYMENT TO NURSING HOME

- *Hillside Manor Rehab. & Extended Care Center LLC v. Barnes (Queens)*
  - Mother added daughter's name to bank account prior to admission to nursing home.
  - Mother then became resident of the nursing home before passing away.
  - Following her passing, the nursing home sent bills to daughter for unpaid NAMI. When bills remained unpaid, the nursing home sued the daughter to recover $6,830.40 alleging that she had access to the mother's funds which should have been paid to the nursing home.
    - Daughter used the funds to pay household bills to maintain her mother's home.
    - Daughter never signed a contract with the nursing home to pay bill from the mother's funds.
      - Court found that there was no evidence of an agreement requiring the daughter to pay the nursing home from the joint account or from any of the mother's assets or resources.
      - Even if such an agreement existed, there could be no personal financial liability to defendant because Federal and State regulations prohibit nursing homes from requiring a third party guarantee as a condition to admission.

# LIABILITY FOR PAYMENT TO NURSING HOME

- Third Party Liability Conclusions:
  - An admission agreement can only require the signer to use his/her access to *the resident's funds*
  - *Can also have a clause requiring assistance with* documentation to the resident's Medicaid application
  - If the signer does not have access to *the resident's funds*, that individual may not have liability to the facility under a breach of contract cause of action.

## HOW TO ADVISE FAMILY MEMBERS

## (1) SPEND DOWN

a) Community Medicaid

b) Chronic Care Medicaid

## COMMUNITY MEDICAID SPEND-DOWN

- Allowed income level for a single individual is $825.00 + $20 disregard
- Allowed income level for a couple is $1,209.00 + $20 disregard
- A married person may choose either Spousal Impoverishment Budgeting or regular Community Budgeting, which allows for a pooled trust, whichever is more advantageous.

## COMMUNITY SPEND-DOWN

a) Pooled Trust

b) Pay Towards Care

## POOLED TRUST - HOW IT WORKS

a) After calculating Gross Income less any Deductions, your spend-down may be sent to a Pooled Trust.

b) Pooled Trust can pay any non-medical bills in applicant's name, i.e. utilities, real estate taxes, and rent. Trust may also pay medical bills not covered by Medicare, private insurance, or Medicaid.

c) Each month, the applicant's Spend-Down is sent to the Pooled Trust along with current bills up to your Spend-Down amount (less any monthly fees for the Trust). The Trust pays these bills directly.

*THE TRUST MAY NOT PAY THE APPLICANT DIRECTLY.

## OPTIONS OF POOLED TRUSTS

a) NYSARC, Inc. Trust Services
b) Life's WORC Trusts
c) LIFE, Inc. Pooled Trust
d) The Theresa Foundation Pooled Trust of New York
e) Many more…(See attached list in materials)

## POOLED TRUSTS (FACTORS THAT VARY)

- **Administration Fee** – some have higher "start up" fees than others. Must use a sliding scale based upon the Spend-Down for their monthly fee.)
- **What is allowed** – i.e. can bills be in spouse's name? Will they pay private aides?
- **Consistency** with bill-paying – some have a 3 day turnaround, some have 2 weeks.
  - You need to determine what is best for your client. Each situation may vary.

## PAY TOWARDS CARE

- Applicant or their spouse's medical bills.
- Medical bills of their children, whether they live with you or not.
- Any medical bills not covered by Medicare, private insurance or Medicaid.

## CHRONIC CARE SPEND-DOWN

- Home improvements, a vehicle upgrade or a pre-paid funeral.
- Computer, Television or custom chair or medical equipment
- Hiring of professionals – Attorneys or geriatric care managers

## (2) NET AVAILABLE MONTHLY INCOME ("NAMI")

- Chronic Care Medicaid adds up all of your GROSS non-exempt income (i.e. Social Security, pension, monthly IRA, monthly dividends, etc.)
- Subtracts medical premiums and personal needs allowance
- Long term nursing home residents are allowed to keep $50/month of their income a/k/a personal needs allowance

## COMMUNITY MEDICAID SPOUSE INCOME

**Community Spouse**

The Community Spouse is permitted a Minimum Monthly Maintenance Needs Allowance ("MMNA") and as such may be allowed to keep some of their institutionalized spouse's income.

The Community Spouse Income Allowance ("CSIA") for 2016 is $2,980.50 per month. If the Community Spouse's income is less than the CSIA, the Community Spouse will be allowed to keep the amount of their institutionalized spouse's income that will bring him/her up to that level

## COMMUNITY MEDICAID ENHANCED INCOME

**Enhanced Community Spouse Income Allowance**:

18 NYCRR Section 360-4.10(b) (6) provides that if it is established that the Community Spouse needs income above the level established by Medicaid "…based upon exceptional circumstances which result in significant financial distress…the department must substitute an amount adequate to provide additional necessary income from the income otherwise available to the institutionalized spouse."

## HOW TO ACHIEVE ENHANCED INCOME

- Often will require a Fair Hearing to establish.
- Attorneys may go to Family Court as it was easier to obtain a higher level of support; however this is not often the practice since the Administrative Law Judges at the Fair Hearings now use the same standard.

## (3) PROPER USE OF FUNDS

- Resources in excess of the Medicaid resource level will affect Medicaid eligibility unless the resources are exempt.
- Exempt Resources are those that the Medicaid agency does not take into account when determining eligibility.

## EXEMPT RESOURCES – BURIAL ALLOWANCE

- A Medicaid applicant can have a combination of a cash burial allowance and life insurance that has a face value of less than $1,500.
- Burial space items such as a grave, headstone, engraving, casket, grave opening and perpetual care are also Exempt Resources.
- Medicaid applicants may also pre-pay funeral and burial expenses with an Irrevocable Medicaid Pre-Needs Trust.

## EXEMPT RESOURCES – PERSONAL PROPERTY

- Individual belongings like clothing, jewelry and home items like furniture, paintings, silverware and china are exempt.
- However, in cases of extremely valuable collectibles, Medicaid may attempt to exclude such property from home property that is considered exempt.

## EXEMPT RESOURCES – HOMESTEAD

- The primary residence occupied by an applicant or his/her spouse or minor issue is exempt, up to the value of $828,000 as of 2016.
- The homestead can be a 1,2, or 3 family home, a condominium, a cooperative or a mobile home and may also produce income.
- However, if the homestead produces income, that income is NOT exempt.

## EXEMPT RESOURCES – OTHER

- Other Exempt Resources are:
  - One automobile
  - Nazi Persecution Accounts
  - German and Austrian reparations
  - Relocation restitution to Japanese Americans

# THE END

# List of Pooled SNTs in New York State

This is an unofficial list of non-profit organizations in New York State that offer pooled Supplemental Needs Trusts (or similar services) to people with disabilities. We do not claim that this is an exhaustive list; there may be other pooled trusts in the state of which we are unaware. In addition, the specifics about each trust may not be up to date, so the best source of information is to contact the trust organization directly. Please let us know if you find any corrections.



Posted: 01 Aug, 2008
by David Silva (New York Legal Assistance Group)
Updated: 31 Aug, 2016
by Valerie Bogart (New York Legal Assistance Group)

| Name and Contact Info | Comments | Accepts monthly income to eliminate Medicaid spend-down |
|---|---|---|
| **Adults and Children with Learning & Developmental Disabilities, Inc. (ACLD)**<br>807 South Oyster Bay Road<br>Bethpage, NY 11714<br>http://www.acld.org/<br><br>Colleen Crispino<br>516-822-0028 x 138<br>crispinoc@acld.org | Trust A - third-party trust<br><br>Trust B - self-settled trust | No |
| **AHRC NYC Foundation**<br>83 Maiden Lane<br>New York, NY 10038<br>(212) 780-2690<br>info@ahrcnycfoundation.org<br>http://www.ahrcnycfoundation.org/ | **Community Trust I for Persons with Disabilities**<br>• Third-party trust<br>• Minimum contribution: $10,000<br>• Annual fee of <1%<br><br>**Community Trust II**<br>• Self-settled trust<br>• Minimum contribution: $10,000<br>• Annual fee of <2% | No |
| **Camphill Resident's Trust**<br>317 Church Street<br>Phoenixville, PA 19460<br>(610) 291-5079<br>info@camphilltrust.com<br>http://www.camphilltrust.com/ | The minimum for starting a CRT account is $ 15,000. However, an initial deposit of as little as $ 3,000 may open an account with the remainder of the $ 15,000 to be deposited within two years. Additional contributions, in amounts of $ 100 or more, can be made at any time to an established CRT account. | No |
| **Catholic Family Center**<br>30 N. Clinton Avenue<br>Rochester, NY 14604<br>(585) 232-1840 x4003 / x4022<br>http://www.cfcrochester.org/ | • Formerly Family Service of Rochester<br>• They do not operate a pooled trust, but will serve as trustee for individual SNTs<br>• This might be a good option for individuals under 65 who want to establish an individual SNT, but where the trust corpus is too small to afford a for-profit institutional trustee<br>• They can serve as trustee for lump sums, but also for monthly excess income<br>• The trust agreement must specify that CFC receives the statutory trustee fee<br>• CFC must be contacted by the attorney during drafting of trust<br>• Beneficiaries must have a case manager or other go-between | Yes |
| **Center for Disability Rights, Inc.**<br>497 State Street<br>Rochester, NY 14608<br>CDR Pooled Trust Info & Forms<br><br>Amanda Flannery or | • Self-settled trust<br>• No minimum balance<br>• $240 start-up cost (includes $200 enrollment fee plus $20 monthly fee and $20 minimum deposit)<br>• $20 monthly fee (covers up to 4 disbursements per month; $10 fee for each additional disbursement)<br>• $50 annual accounting fee | Yes |

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| Mirta Arroyo marroyo@cdrnys.org<br>Ph: (585) 546-7510<br>Fax: (585) 546-7567 / (585) 546-7560 | | |
| **Community Living Corporation (CLC)**<br>600 Bedford Road<br>Mt. Kisco, NY 10549<br>(914) 241 2076<br>clcfoundation@optonline.net<br>http://www.clcpooledtrust.org | **Pooled Trust 1**<br>Pooled Trust 1 is a third-party SNT, established with funds provided by a family member or friend.<br>• Minimum Deposit: $10,000<br>• One-time enrollment fee $200<br>• $1,000 annual fee for accounts under $25,000<br>• For accounts over $25,000, annual fee of not less than $1,000 to be negotiated with trustee<br>**Pooled Trust 2**<br>Pooled Trust 2 is a self-settled SNT, established with funds provided by the beneficiary.<br>• Minimum Deposit: $5,000<br>• One-time enrollment fee $250<br>• $1,000 annual fee for accounts under $50,000<br>• For accounts over $50,000, additional annual fee of 1% of balance in excess of $50,000 | Yes |
| **Disabled and Alone / Life Services for the Handicapped, Inc.**<br>61 Broadway, Suite 510<br>New York, NY 10006<br>Ph: (212) 532-6740 / (800) 995-0066<br>Fax: (212) 532-3588<br>http://www.disabledandalone.org/ | • Third-party trust<br>• Minimum deposit: $100,000 | No |
| **Future Care Community Pooled Trust**<br>(A partnership of Al Sigl Community of Agencies, Lifespan and the Arc of Monroe)<br>1000 Elmwood Avenue<br>Rochester, NY 14620<br>T: 585-402-7840 Ext 2<br>http://www.futurecareplanning.org/ | Must Reside in Monroe County or surrounding counties to be able to join this trust<br>**1st Party Lump Sum Pooled Trust**<br>• $200 enrollment fee<br>• $3000 minimum opening deposit ($2000 if on SSI)<br>• 1.235% annually for investment services<br>• 0.75% annually for administrative fee<br>• $50 annual audit fee<br>• $30.00 per month additional fee if trust is used for monthly disbursements<br>**1st Party Spend Down Pooled Trust**<br>• $200 enrollment fee<br>• $100 Minimum balance<br>• $30 per month includes 4 disbursements ($5 per additional disbursement)<br>• $50 annual audit fee<br>**3rd Party Pooled Trust**<br>• $5000 minimum opening deposit<br>• Please call for fees | Yes (1st Party Spend Down Pooled Trust) |
| **KTS Pooled Trust**<br>3011 Avenue K<br>Brooklyn, NY 11210<br>Phone: (718) 475-5000<br>FAX: (718) 475-5010<br>Email: Info@ktstrust.org<br>http://ktstrust.org/ | • $250 enrollment fee<br>• Monthly fee of 10% of required monthly deposit (minimum $30, maximum $200)<br>• Annual renewal fee of $100<br>• Monthly contributions can be made by ACH direct debit from bank account<br>• No minimum balance<br>• No minimum funding | Yes |
| **LCG Community Trust**<br>LCG Community Services, Inc.<br>14 Mount Hope Place<br>Bronx, NY 10453-6102<br>(718) 466-2200<br>Info@lcgcs.org<br>http://www.lcgcs.org/ | **Community Trust I – Self-Directed Asset Trust**<br>• $25,000 minimum contribution within 12 years of enrollment<br>• Enrollment fee of 1% of initial deposit (minimum $250)<br>• Monthly administrative fee of 2% of funds on deposit (minimum $42)<br>• Monthly brokerage fee of 0.042%<br>• Annual renewal fee of $100<br>• Annual audit and tax return fee of $100<br>• Can designate remainder beneficiaries to receive no more than 50% of corpus remaining on disabled beneficiary's death<br>**Community Trust II – Third Party Asset Trust**<br>• $25,000 minimum contribution within 12 years of enrollment<br>• $250 enrollment fee | Yes (Community Trust II and III) |

| | | |
|---|---|---|
| | • Monthly administrative fee of 2% of funds on deposit (minimum $42)<br>• Monthly brokerage fee of 0.042%<br>• Annual renewal fee of $100<br>• Annual audit and tax return fee of $100<br>• Can designate remainder beneficiaries to receive no more than 50% of corpus remaining on disabled beneficiary's death<br>**Community Trust III – Medicaid Spend-Down Trust**<br>• Minimum monthly deposit: $500<br>• $250 enrollment fee<br>• Monthly administrative fee of 8.5% of required monthly deposit (minimum $42.50)<br>• Annual renewal fee of $100<br>• Annual audit and tax return fee of $100<br>• All funds remaining in the trust at beneficiary's death are retained by trustee organization | |
| **Life's WORC** Trusts<br>1501 Franklin Avenue<br>PO Box 8165<br>Garden City, NY 11530<br>516-741-9000 ext. 225<br>516-348-7878<br>Fax: (516) 302-1802<br>Email: trustservices@lifesworc.org<br>http://www.lifesworctrust.org/ | **Self-Settled Trust (Community Trust 1)**<br>• Self-settled trust<br>• Minimum deposit: $500<br>• One-time enrollment fee of $250<br>• Annual fees:<br>◦ Up to $20,000 - 5% of Account Balance;<br>◦ $20,000 to $50,000 - $1000;<br>◦ $50,000 and above - additional 1% of balance over $50,000<br>**Third-Party Pooled Trust (Community Trust 2)**<br>• Third-party trust<br>• Minimum deposit: $10,000<br>• One-time enrollment fee of $250<br>• Annual fees:<br>◦ Up to $20,000 - 5% of Account Balance;<br>◦ $20,000 to $50,000 - $1000;<br>◦ $50,000 and above - additional 1% of balance over $50,000<br>**Surplus Income Pooled Trust (Community Trust 3)**<br>• Excess Income Trust<br>• Minimum deposit: $300<br>• One-time enrollment fee of $250<br>• Double the monthly deposit is required before expenses can be paid, with one month remaining available for bill pay<br>• Monthly administrative fees are based on monthly deposit amounts:<br>◦ Deposits up to $500 - $50 fee;<br>◦ $501 to $3000 - 10% of the monthly deposit;<br>◦ $3001 to $4000 - $300 fee;<br>◦ $4001 and above please contact Life's WORC Pooled Trusts | YES (Community Trust 3 only) |
| **LIFE, Inc. Pooled Trust**<br>(Labor & Industry For Education, Inc.)<br>112 Spruce St<br>Cedarhurst, NY 11516<br>Telephone: (516) 374-4564 ext. 3<br>www.lifetrusts.org | LIFE offers:<br>(i) a self-settled (i.e. established by the beneficiary) monthly spend-down trust<br>(ii) a self-settled asset trust and<br>(iii) third-party asset trusts<br>• $300 one time sign-up fee<br>• $200 annual fee from the second year on<br>• Monthly fee depends on amount of the spend-down (set fee, not percentage)<br>• No minimum deposit<br>• Automated Monthly bill pay.<br>• Trust established in 2 business days guaranteed<br>• Process of bill requests in 3 business days guaranteed (no more late bills)<br>• Dedicated trust counselor assigned to each trust client<br>• Fillable Joinder Agreement | Yes (Trust I) |
| **NYSARC, Inc. Trust Services**<br>393 Delaware Avenue<br>Delmar, NY 12054<br>Telephone: (518) 439-8323<br>Toll Free: (800) 735-8924<br>Facsimile: (518) 439-2670<br>E-mail: trustdept@nysarc.org<br>http://nysarctrustservices.org | Community Trust I<br>• Self-settled trust<br>• $200 one-time enrollment fee - non-refundable<br>• Minimum deposit: $300<br>• $25 annual fee charged every July for accounting<br>• $1/month Allocation Fee<br>• Co-trustee fee of 0.75% annually charged at monthly rate of .0625% based upon balance at end of preceding month | Yes (Community Trust II) |

| | | |
|---|---|---|
| Mailing address<br>NYSARC Inc. Trust Services<br>POB 1531<br>Latham, NY 12110<br>(for Fed Ex & UPS use Delmar address above) | • Plus, the greater of:<br>  ◦ 0.9% annual rate, charged monthly at .075% of average monthly assets OR<br>  ◦ Flat fee of $10/mo.<br>• Intended for lump-sums, not monthly spend-down<br>• Remainder at beneficiary's death is retained by trustee<br><br>**Community Trust II**<br><br>• Self-settled trust<br>• $200 one-time enrollment fee - non-refundable<br>• DOUBLE the monthly spend-down, of which one month is available to pay expenses. The 2nd month must be on deposit like a security deposit<br>• $50 annual fee charged every July for accounting<br>• $1/month Allocation Fee<br>• Pro rata share of annual audit, tax preparation costs for Trust<br>• Co-trustee fee of 0.75% annually charged at monthly rate of .0625% based upon balance at end of preceding month<br>• Plus, the greater of:<br>  ◦ 0.9% annual rate, charged monthly at .075% of average monthly assets OR<br>  ◦ Flat fee ranging from $30-$240 depending upon amount of monthly contribution (for contributions over $4,000, contact NYSARC to determine fee)(Fee schedule posted online)<br><br>**Community Trust III**<br><br>• Self-settled trust<br>• No enrollment fee<br>• Minimum deposit: $250,000<br>• Intended for lump-sums, not monthly spend-down<br>• Monthly fee of 0.06% or 0.075% depending upon balance, plus trustee bank fee not to exceed 0.0625% (0.75% annually)<br>• Remainder at beneficiary's death is subject to Medicaid recovery, but any amount remaining after that goes 25% to NYSARC and 75% to designated beneficiaries<br><br>**NYSARC Chart Comparing 3 Pooled Community Trusts**<br><br>Links to Documents for all 3 Pooled Community Trusts | |
| **SCS Pooled Trust**<br><br>1404 Coney Island Avenue<br><br>Brooklyn, NY 11230<br><br>Telephone: 718-971-2509<br><br>Fax: 844-623-0481<br><br>www.info@seniorcommservice.org<br><br>www.seniorcommservice.org | • $250 Enrollment Fee<br>• Monthly administrative fee of 10% of monthly required deposit (Min. $25/Max. $200)<br>• Unlimited disbursements<br>• No Minimum balance requirement<br>• No Minimum funding requirement<br>• $100 Renewal Fee<br>• Monthly deposits can be made by ACH Direct Debit | Yes |
| **The Rose and Maurice Halpern Lifetime Care Foundation at OHEL**<br>156 Beach 9th Street<br>Far Rockaway, NY 11691<br>718 686 3170<br>http://www.ohelfamily.org/?q=lifetime_care/pooled-trusts<br>lcftrusts@ohelfamily.org | **The Lifetime Care Foundation Community Pooled Trust I**<br><br>• Third-party trust<br>• A portion of the funds can be invested<br>• An initial deposit minimum of $20,000 must be received in order for a client's funds to be invested. The first $10,000 is kept in a liquid account, and the next $10,000 is invested. At a point when the liquid $10,000 reaches a balance of $0, money will be divested from the investment account to the liquid account in increments of $10,000<br><br>**The Lifetime Care Foundation Community Pooled Trust II**<br><br>• Self-settled trust<br>• For those clients wishing to deposit liquid assets into a trust in order to preserve government entitlements, while having a portion of this money invested<br>• An initial deposit minimum of $20,000 must be received in order for a client's funds to be invested. The first $10,000 is kept in a liquid account, and the next $10,000 is invested. At a point when the liquid $10,000 reaches a balance of $0, money will be divested from the investment account to the liquid account in increments of $10,000<br><br>**The Lifetime Care Foundation Community Pooled Trust III**<br><br>• Self-settled trust | Yes |

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|---|---|---|
| | • Can enable disabled individuals and seniors to use their excess income to pay for their own supplemental needs, such as rent, utilities, and medical services not covered by Medicaid and/or other entitlements programs<br><br>**Fees**<br><br>• $900 annual fee (first year's fee due at initiation)<br>• $10 fee per check for any payments in excess of three per month<br>• For Trusts I & II only:<br>  ◦ Investment fees of approximately .75% from Bernstein Global Wealth Management<br>  ◦ 1% investment fund management fee (if placed in investment account)<br>  ◦ Annual investment fees:<br>  ▪ 1.5% for $25,000-$250,000<br>  ▪ 1% for the next $250,000-1 Million<br>  ▪ 0.5% for additional amounts over 1 Million | |
| **The Theresa Foundation Pooled Trust of New York**<br>250 Lido Boulevard<br>Lido Beach, NY 11561<br>(516) 432-0449<br>http://www.theresafoundation.org<br><br>Administered by **The Center for Special Needs Trust Administration, Inc.**<br>4912 Creekside Drive<br>Clearwater, FL 33760<br>(877) 766-5331<br>http://www.centersweb.com<br><br>http://centersweb.com/SNT/types_pooled_state.html | **The Theresa Pooled Trust**<br><br>• Self-settled trust<br>• Annual fee of 2% of trust assets<br>• One-time administrative fee of $2,500<br>• Designed for sheltering lump-sums<br><br>**The Theresa Pooled Income Trust**<br><br>• Self-settled trust<br>• One-time opening fee of $175<br>• Monthly service fee of $25 - $200, depending upon amount of monthly contribution<br>• Monthly maintenance fee of 0.875% of account balance<br>• Designed for sheltering excess income<br><br>**The Theresa Foundation Community Trust**<br><br>• Third-party trust | Yes |
| **UJA-Federation Community Trust Program**<br>Department of Planned Giving and Endowments<br>130 E. 59th street<br>New York, NY 10022<br>http://www.ujafedny.org/<br><br>Stacy Ferber<br>(212) 836-1150<br>ferbers@ujafedny.org<br><br>Case management agency for trust beneficiaries:<br>**F•E•G•S - UJA-Federation Community Trust for Individuals with Disabilities**<br>315 Hudson Street, 6th Floor<br>New York, NY 10013<br>http://www.fegs.org<br>Ph (212) 366-8030<br>Fax (212) 366-8015 | **Community Trust for Disabled Adults**<br><br>• Third-party trust<br>• Minimum deposit: $100,000, with at least $20,000 invested initially with remainder to be deposited within 4 years<br>• Beneficiary is assigned an advocate from a UJA agency<br>• Annual fees: UJA-Federation administrative $1,500/yr. and advocacy $5,000/first yr. then $3,000/yr.<br>• Upon the death of the beneficiary, 100% of the remainder is designated as per the Sponsor<br><br>**Community Trust II**<br><br>• Self-settled trust<br>• Minimum deposit: $50,000, payable over 5 years if necessary<br>• Beneficiary is assigned an advocate from a UJA agency if full advocacy services are selected<br>• Annual fees: UJA-Federation administrative $1,500/yr. and financial only advocacy $2,000/yr. or full advocacy $5,000/first yr. then $3,000/yr.<br>• Upon the death of the beneficiary, 50% shall be maintained in the Trust and the other 50% is first subject to a Medicaid right of recovery. If Medicaid has no claim these funds can be designated by the Sponsor. | No |
| **UCS Disability Pooled Trust**<br>1575 50th Street 3rd Fl<br>Brooklyn, NY 11219<br>Ph: (718) 854-9300<br>Fax: (718) 506-9314<br>trustdept@ucsbp.org<br><br>http://www.ucstrustservices.org/index.html | **Trust A**<br><br>• Self-settled trust<br>• Enrollment fee: $250<br>• Minimum deposit: $1,000<br>• Annual fee of 2.5% of principal for deposits of $1,000 - $30,000; no additional fee for amounts in excess of $30,000<br>• Annual renewal fee: $200<br><br>**Trust B**<br><br>• Self-settled trust<br>• Enrollment fee: $250<br>• Minimum deposit: $100<br>• Monthly fee of 10% of required monthly deposit (minimum $30/mo., maximum of $200/mo.)<br>• Annual renewal fee: $100<br>• Monthly contributions can be made by ACH direct debit from bank account | Yes |

| | | |
|---|---|---|
| **Westchester ARC Foundation**<br>121 Westmoreland Avenue<br>White Plains, NY 10606<br>http://www.westchesterarc.org/<br><br>Anne Sweazey<br>(914) 428-8330, ext. 3336<br>asweazey@westchesterarc.org | Community Trust I - third-party trust<br><br>Community Trust II - self-settled trust | No |
| **Western New York Coalition Pooled Trusts**<br><br>Go to www.wnypooledtrust.org for downloads, and more information<br><br>Contact:<br><br>Rachel Schepart (716) 853-3087 ext. 227<br><br>Trustees:<br><br>**People Inc. & Legal Services for the Elderly, Disabled or Disadvantaged of WNY, Key Bank (fiscal trustee)**<br><br>Only available to Erie, Niagara, Cattaraugus, Chautauqua and Allegany Counties | **WNY Coalition Pooled Medicaid Payback Trust (Trust #1)**<br>• Self-settled trust<br>• Accepts income deposits<br>• No minimum deposit<br>• Initiation fee: $100<br>• Monthly fee sliding scale based on amount deposited<br><br>**WNY Coalition Over 65 Pooled Trust (Trust #2)**<br>• Self-settled trust<br>• Accepts income deposits<br>• Only for individuals aged 65 or older<br>• No minimum deposit<br>• Initiation fee: $100<br>• Monthly fee sliding scale based on amount deposited<br><br>**WNY Coalition Under 65 Pooled Trust (Trust #1) and Over 65 Pooled Trust (Trust #2)**<br>• Self-settled trust<br>• Accepts lump sums without a minimum deposit<br>• Initiation fee: 10% of Deposit not to exceed $1,000<br>• Annual commission:<br>◦ $10.50 per thousand on the first $400,000<br>◦ $ 4.50 per thousand on the next $600,000<br>◦ $ 3.50 on the balance in the pooled trust<br>◦ Plus additional annual commission by bank trustee<br>• Semi-annual accounting fee: $6<br>• Termination fee: 1% of all amounts paid out<br><br>**WNY Coalition Friends and Family Trust**<br>• Third-party trust<br>• Only 25% of balance remainder at the death of the beneficiary is retained by trustees. Remaining 75% can be directed to others.<br>• Initiation fee: 10% of Deposit not to exceed $1,000<br>• Annual commission:<br>◦ $10.50 per thousand on the first $400,000<br>◦ $ 4.50 per thousand on the next $600,000<br>◦ $ 3.50 on the balance in the pooled trust<br>◦ Plus additional annual commission by bank trustee<br>• Semi-annual accounting fee: $6<br>• Termination fee: 1% of all amounts paid out | Yes - but only for Erie, Niagara, Cattaraugus, Chautauqua and Allegany Counties<br><br>Fee Schedule<br>Income Only |
| **YAI / National Institute for People with Disabilities**<br>460 West 34th Street<br>New York, NY 10001-2382<br>http://www.yai.org/<br>(212) 563-7474 | • Serves DD/MR/MI/ Phys Disabled, TBI.<br>• Minimum deposit $25,000 with some flexibility. | No |

This article was authored by the Evelyn Frank Legal Resources Program of New York Legal Assistance Group.

NYLAG
NEW YORK LEGAL ASSISTANCE GROUP

**Attached files**

SNT Outline 2016 3-14-2016 FINAL.pdf (993 kb)
SNTShort .2014 (Sept 2014).pdf (748 kb)
2016-6-7 Pooled Trust Unit Liaison and Contact information.pdf (131 kb)
Pooled Income Trust Contribution Worksheet.xls (42 kb)
Cover Letter to Medicaid with SNT.dotx (53 kb)
Pooled Trust Readiness Checklist.pdf (158 kb)

**Also read**

Overview - Supplemental Needs Trusts
Step-by-step guide to enrolling in a pooled income trust for Medicaid spend-down
Legal Authorities Relating to Supplemental Needs Trusts

Medicaid Disability Determinations - NYS Forms & Procedures (with updated forms July 2012)
Spousal Impoverishment Protections for Married Couples where One Spouse is in a Managed Long Term Care Plan - Pooled Trusts Allowed as an Option

Prev
Advocate's Outline on Supplemental Needs Trusts

Next
How to use a pooled SNT to eliminate the Medicaid spend-down.

# GUARDIANSHIP UPDATE

**by**

**IRA SALZMAN, ESQ.**

Goldfarb Abrandt Salzman & Kutzin

New York, NY

GUARDIANSHIP UPDATE – FALL 2016

PREPARED BY IRA SALZMAN

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**THE DIGITAL ASSETS BILL AS IT AFFECTS ARTICLE 81 GUARDIANS**

The section of the digital assets bill that specifically affects guardians is E.P.T.L. § 13-A-3.8. The key points are as follows:

1. A guardian can only be granted access to digital assets after a hearing concerning the appointment or authority of the guardian.

2. Proposed language that would grant the guardian authority over digital assets is as follows:

> "ORDERED, that, upon request of the property guardian, any 'custodian' (as that term is defined in E.P.T.L. § 13-A-1(g)) shall provide the guardian with access to all digital assets (as that term is defined in E.P.T.L. §13-A-1(i))and 'electronic communications' (as that term is defined in E.P.T.L. § 13-A-1(k))of the incapacitated person, and it is further
>
> ORDERED that, upon request of the property guardian, any custodian shall disclose to the guardian of the property a 'catalogue of electronic communications' (as that term is defined in E.P.T.L. § 13-A-1(d)), sent or received by the incapacitated person, and any other digital assets in which the incapacitated person has a right or interest, and it is further
>
> ORDERED, that the guardian of the property shall have the authority to manage the digital assets of the incapacitated person and may request a custodian of the digital assets of the incapacitated person to suspend or terminate an account of the incapacitated person if the guardian of the property determines that there is good cause to do so."

3. A property management guardian has the right to access any digital assets of the ward which are not held by a custodian or subject to a terms of service agreement.

4. A guardian must comply with the fiduciary duty requirements of E.P.T.L. § 13-A-4.1.

**A09910 Summary:**

| | |
|---|---|
| BILL NO | A09910A |
| SAME AS | SAME AS |
| SPONSOR | Weinstein |
| COSPNSR | Titone, Crespo, Gottfried, Schimminger, Weprin |
| MLTSPNSR | Abinanti, Cymbrowitz, Farrell, Galef, Glick, Jaffee, Markey, Miller, Morelle, Paulin, Peoples-Stokes, Rosenthal, Skartados, Stirpe |

Add Art 13-A §§13-A-1 - 13-A-5.2, EPT L

Provides for the administration of digital assets; defines terms; authorizes a user to use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications; provides that this article does not impair the rights of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user; provides for a procedure for disclosing digital assets; makes related provisions.

**A09910 Actions:**

BILL NO A09910A

04/26/2016 referred to judiciary
05/10/2016 reported referred to codes
05/17/2016 reported
05/19/2016 advanced to third reading cal.717
05/25/2016 amended on third reading 9910a
06/02/2016 passed assembly
06/02/2016 delivered to senate
06/02/2016 REFERRED TO JUDICIARY
06/09/2016 SUBSTITUTED FOR S7604A
06/09/2016 3RD READING CAL.1132
06/09/2016 PASSED SENATE
06/09/2016 RETURNED TO ASSEMBLY
09/20/2016 delivered to governor
09/29/2016 signed chap.354

**A09910 Memo:**

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A9910A

SPONSOR: Weinstein (MS)

TITLE OF BILL:

An act to amend the estates, powers and trusts law, in relation to the administration of digital assets

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Surrogate's Court Advisory Committee.

The wide use of digital assets has created an urgent need for legislation dealing with the administration of these assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick and mortar building. This measure would amend the EPTL to restore control of the disposition of digital assets back to the individual and removes such power from the service provider.

This measure gives fiduciaries authority to gain access to, manage, distribute and copy or delete digital assets. It addresses four types of fiduciaries, namely: a personal representative (executor or administrator) of a decedent's estate; a guardian of a ward or protected person; an agent acting pursuant to a power of attorney; and a trustee.

In the past, where property was mostly in tangible there was little doubt of its ownership and control. Indeed, the law recognizes that when a property owner dies or becomes unable to manage his or her property, such owner may appoint a fiduciary to manage the property. The role of a fiduciary subsumes the duty of loyalty, care and confidentiality. The system has worked well throughout our history. This measure does not break new legal ground, but merely applies the laws governing fiduciaries to a new type of property.

Service providers protect themselves by requiring a user to agree to a Terms of Service ("TOS") agreement prior to creating an online account. In the absence of state laws dealing with the disposition of digital assets, individuals will likely be subject to the service provider's TOS if it has a policy regarding the transfer or disposal of the account and its content. Some service providers have a policy that indicates what will happen upon the death of a user, but most have no explicit policy.

In addition, there are federal laws that criminalize, or penalize, the unauthorized access of computers and digital accounts and prohibit most service providers from disclosing account information to anyone without the user's consent. These laws include the Electronic Computer Privacy Act (the "ECPA"); the Stored Communications Act (the "SCA"), which is part of the ECPA, and the Computer Fraud and Abuse Act ("CFAA"). The CFAA prohibits unauthorized access to computers and protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." The SCA contains two relevant prohibitions. First, the SCA makes it a crime for anyone to "intentionally access without authorization a facility through which an electronic communication service is provided" as well as to "intentionally exceed an authorization to access that facility." Second, the SCA prohibits an electronic communications service from knowingly divulging the contents of a communication that is stored by or maintained on that service unless disclosure is made "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "with the lawful consent of the originator or an addressee or intended recipient of such communication."

The SCA is often the basis on which service providers refuse to release the contents of a deceased user's account. In addition to federal privacy laws, there are state privacy laws. All fifty states, including New York, have enacted criminal laws penalizing unauthorized access to computer systems. Consequently, without legislation, many service providers will likely continue to refuse to provide access or to release content upon the death or incapacity of a user on the basis of privacy concerns or for fear of facing certain liability.

This measure is based largely on a proposal from the Uniform Law Commission namely RUFADAA (Revised Uniform Fiduciary Access to Digital Assets Act) which is a compromise designed to address the serious problems

outlined above and, as well, the concerns of the service providers and civil libertarians. The only changes from such act are those necessary to conform it to existing New York law.

This measure, which would have no fiscal impact on the State, would take effect immediately

2016 LEGISLATIVE HISTORY:

Senate 7604 (Senator Bonacic) (referred to Judiciary)
Assembly 9910 (M. of A. Weinstein) (advanced to 3rd Rdg., Cal. 717

**A09910 Text:**

# STATE OF NEW YORK

9910--A

Cal. No. 717

# IN ASSEMBLY

April 26, 2016

Introduced by M. of A. WEINSTEIN, TITONE, CRESPO, GOTTFRIED, SCHIMMINGER, WEPRIN -- Multi-Sponsored by -- M. of A. ABINANTI, CYMBROWITZ, FARRELL, GALEF, GLICK, JAFFEE, MARKEY, MILLER, MORELLE, PAULIN, PEOPLES-STOKES, ROSENTHAL, SKARTADOS, STIRPE -- (at request of the Office of Court Administration) -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Codes -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the estates, powers and trusts law, in relation to the administration of digital assets

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The estates, powers and trusts law is amended by adding a new article 13-A to read as follows:

ARTICLE 13-A

ADMINISTRATION OF DIGITAL ASSETS

SUMMARY OF ARTICLE



EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD14544-02-6

PART 1. DEFINITIONS

§ 13-A-1 Definitions

In this article the following terms shall have the following meanings:

(a) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(b) "Agent" means a person granted authority to act as attorney-in-fact for the principal under a power of attorney and includes the original agent or any co-agent or successor agent.

(c) "Carries" means engages in the transmission of an electronic communication.

(d) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(e) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(1) has been sent or received by a user;

(2) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(3) is not readily accessible to the public.

(f) "Court" means the court in this state having jurisdiction in matters relating to the content of this article.

(g) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(h) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(i) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(j) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(k) "Electronic communication" has the meaning set forth in 18 U.S.C. section 2510(12), as amended.

(l) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(m) "Fiduciary" includes an executor, preliminary executor, administrator, temporary administrator, voluntary administrator, personal representative, guardian, agent, or trustee. This term includes the successor to any fiduciary.

(n) "Guardian" means a person who has been appointed as a guardian by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law.

(o) "Information" means data, metadata, Internet protocol address, user login information, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

(p) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(q) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity, board and the state.

(r) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(s) "Principal" means an individual who grants authority to an agent in a power of attorney.

(t) "Protective order" means an order appointing a guardian or another order related to management of a ward's property.

(u) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(v) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. section 2510(14), as amended.

(w) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(x) "Trustee" includes an original additional. and successor trustee, and a co-trustee.

(y) "User" means a person that has an account with a custodian.

(z) "Ward" means an individual for whom a guardian has been appointed by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law. The term includes an individual for whom an application of guardianship is pending.

PART 2. APPLICABILITY; PROCEDURE FOR DISCLOSURE; USER DIRECTIONS

§ 13-A-2.1 Applicability

(a) This article applies to:

(1) a fiduciary acting under a will, trust or power of attorney executed before, on, or after the effective date of this article;

(2) an executor, administrator or personal representative acting for a decedent who died before, on, or after the effective date of this article;

(3) a guardianship proceeding commenced before, on, or after the effective date of this article; and

(4) a trustee acting under a trust created before, on, or after the effective date of this article.

(b) This article applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This article does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

§ 13-A-2.2 User direction for disclosure of digital assets

(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under paragraph (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under paragraph (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

§ 13-A-2.3 Terms-of-service agreement

(a) This article does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This article does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 13-A-2.2.

§ 13-A-2.4 Procedure for disclosing digital assets

(a) When disclosing digital assets of a user under this article, the custodian may at its sole discretion:

(1) grant a fiduciary or designated recipient full access to the user's account;

(2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this article.

(c) A custodian need not disclose under this article a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this article some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes

the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:
(1) a subset limited by date of the user's digital assets;
(2) all of the user's digital assets to the fiduciary or designated recipient;
(3) none of the user's digital assets; or
(4) all of the user's digital assets to the court for review in camera.

PART 3. DISCLOSURE OF DIGITAL ASSETS TO FIDUCIARY

§ 13-A-3.1 Disclosure of content of electronic communications of deceased user

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the executor, administrator or personal representative of the estate of the user the content of an electronic communication sent or received by the user if the executor, administrator or representative gives the custodian:
(a) a written request for disclosure in physical or electronic form;
(b) a copy of the death certificate of the user;
(c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order;
(d) unless the user provided direction using an online tool, a copy of the user's will, trust, or other record evidencing the user's consent to disclosure of the content of electronic communications; and
(e) if requested by the custodian:
(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
(2) evidence linking the account to the user; or
(3) a finding by the court that:
(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1);
(B) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. section 2701 et seq., as amended, 47 U.S.C. section 222, as amended, or other applicable law;
(C) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or
(D) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

§ 13-A-3.2 Disclosure of other digital assets of deceased user

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the executor, administrator or personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the executor, administrator or personal representative gives the custodian:
(a) a written request for disclosure in physical or electronic form;
(b) a copy of the death certificate of the user;
(c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order; and
(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
(2) evidence linking the account to the user;
(3) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or
(4) a finding by the court that:
(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1); or
(B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

§ 13-A-3.3 Disclosure of content of electronic communications of principal

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:
(a) a written request for disclosure in physical or electronic form;
(b) a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
(c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains in effect; and
(d) if requested by the custodian:
(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(2) evidence linking the account to the principal.

§ 13-A-3.4 Disclosure of other digital assets of principal

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:
(a) a written request for disclosure in physical or electronic form;
(b) a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
(c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains in effect; and
(d) if requested by the custodian:
(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
(2) evidence linking the account to the principal.

§ 13-A-3.5 Disclosure of digital assets held in trust when trustee is original user

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

§ 13-A-3.6 Disclosure of contents of electronic communications held in trust when trustee not original user

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee;

(c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(2) evidence linking the account to the trust.

§ 13-A-3.7 Disclosure of other digital assets held in trust when trustee not original user

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the trust instrument;

(c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(2) evidence linking the account to the trust.

§ 13-A-3.8 Disclosure of digital assets to guardian of ward

(a) After an opportunity for a hearing concerning the appointment or authority of a guardian, the court may grant a guardian access to the digital assets of a ward.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by a ward and any digital assets, other than the content of electronic communications, in which the ward has a right or interest if the ward gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the court order that gives the guardian authority over the digital assets of the ward; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the ward; or

(B) evidence linking the account to the ward.

(c) A guardian with general authority to manage the assets of a ward may request a custodian of the digital assets of the ward to suspend or

terminate an account of the ward for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

PART 4. FIDUCIARY DUTY AND AUTHORITY, COMPLIANCE AND IMMUNITY

§ 13-A-4.1 Fiduciary duty and authority

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(1) the duty of care;

(2) the duty of loyalty; and

(3) the duty of confidentiality.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) except as otherwise provided in section 13-A-2.2, is subject to the applicable terms of service;

(2) is subject to other applicable law, including copyright law;

(3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(4) may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including this state's law on unauthorized computer access.

(e) A fiduciary with authority over the tangible, personal property of a decedent, ward, principal, or settlor;

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including this state's law on unauthorized computer access.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a copy of the death certificate of the user;

(2) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in item (A).

§ 13-A-4.2 Custodian compliance and immunity

(a) Not later than sixty days after receipt of the information required under sections 13-A-3.1 through 13-A-4.1, a custodian shall comply with a request under this article from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under paragraph (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. section 2702, as amended.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this article.

(d) A custodian may deny a request under this article from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This article does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this article to obtain a court order which:

(1) specifies that an account belongs to the ward or principal;

(2) specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and

(3) contains a finding required by law other than this article.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this article.

PART 5. MISCELLANEOUS PROVISIONS

§ 13-A-5.1 Relation to electronic signature in global and national commerce act

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but does not modify, limit, or supersede section 101(c) of such act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of such act, 15 U.S.C. section 7003(b).

§ 13-A-5.2 Severability

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

§ 2. This act shall take effect immediately.

**Proposed Language to be Placed in Guardianship Orders to Implement Peter Falk's Law**

Mandatory Language

ORDERED, that the following individuals shall receive notice of the incapacitated person's death, the intended disposition of the remains of the decedent, funeral arrangements and the final resting place of the incapacitated person when that information is known or can be reasonably ascertained by the guardian: _____

Optional Language

ORDERED, that the following individuals shall be entitled to notice of the incapacitated person's transfer to a medical facility: _____

Additional Optional Language

ORDERED, that the following individuals shall have the right to visit the incapacitated person if they so choose _____, and it is further,

ORDERED, that the identification in this order of persons entitled to visit the incapacitated person shall in no way limit the persons entitled to visit the incapacitated person.

**S05154 Text:**

# STATE OF NEW YORK

5154--C

2015-2016 Regular Sessions

## IN SENATE

May 5, 2015

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Mental Health and Developmental Disabilities -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report -- recommitted to the Committee on Mental Health and Developmental Disabilities in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the mental hygiene law, in relation to enacting "Peter Falk's law" relating to guardianship duties

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as "Peter Falk's law".

§ 2. Subdivision (c) of section 81.16 of the mental hygiene law is amended by adding three new paragraphs 4, 5 and 6 to read as follows:

4. The order of appointment shall identify the persons entitled to

receive notice of the incapacitated person's death, the intended disposition of the remains of the decedent, funeral arrangements and final resting place when that information is known or can be reasonably ascertained by the guardian.

5. The order of appointment may identify the person or persons entitled to notice of the incapacitated person's transfer to a medical facility.

6. The order of appointment may identify the persons entitled to visit the incapacitated person, if they so choose. However, the identification of such persons in the order shall in no way limit the persons entitled to visit the incapacitated person.

§ 3. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets

[-] is old law to be omitted.

LBD07225-09-6

## § 83.39. Effect of registration

**(a)** Upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property may exercise in this state all powers authorized in the order of appointment *or protective order* except as prohibited under the laws of this state <1> and, if the guardian of the person or guardian of the property is not a resident of this state, subject to any conditions imposed upon nonresident parties.

**(b)** A court of this state may grant any relief available under this article and other law of this state to enforce a registered order.

***(c)*** *Notwithstanding any provision of law to the contrary, upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property, if so authorized in the order of appointment or protective order, may commence and defend actions and proceedings in this state.*

***(d)*** *Upon registration of a protective order from another state, the guardian of the property, if so authorized in the protective order, may petition the court pursuant to article seventeen of the real property actions and proceedings law, for permission to dispose of the real property, or an interest in the real property, of the protected person.*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X

| | |
|---|---|
| In the Matter of<br><br>_____,<br><br>An Incapacitated Person.<br>----------X | **AFFIRMATION IN SUPPORT OF <u>REGISTRATION</u>**<br><br>Index No.: _____ |

_____, an attorney-at-law duly admitted to practice in the courts of the State of New York, makes the following statements under the penalties of perjury:

1. I am an _____ with the law firm of _____, the attorneys for _____, the Guardian of the Person and Property of _____.

2. I make this Affirmation in support of the filing, pursuant to §§ 83.35, 83.37 and 83.39 of the New York Mental Hygiene Law ("MHL") (via a procedure analogous to the New York Civil Practice Law and Rules ("CPLR") § 5402), of an Order of the _____ Court of the State of _____ dated _____ (the "State of _____ Order") and letters of office appointing _____ as Guardian of the Person and Property of _____ with the New York County Clerk in the State of New York.

3. Under MHL §§ 83.35, 83.37, and 83.39, an out-of-state guardianship order for the person or the property may be registered in New York by filing the order and letters of office as a foreign judgment, which authorizes the guardian to exercise the powers granted in the out-of-state order within New York State.

4. MHL § 83.35 provides that:

> If a guardian of the person by whatever name designated has been appointed in another state and a petition for the appointment of a guardian of the person is not pending in this state, the guardian of the person appointed in the other state, after

> giving notice to the appointing court of an intent to register, may register the guardianship of the person order in this state **by filing as a foreign judgment in a court, in any appropriate county of this state, certified copies of the order and letters of office.** MHL § 83.35 (emphasis added).

5. MHL § 83.37 provides that:

> If a guardian of the property has been appointed in another state and a petition for a protective order[1] is not pending in this state, the guardian of the property appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in this state **by filing as a foreign judgment in a court of this state, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.** MHL § 83.37 (emphasis added).

6. MHL § 83.39(c) provides that:

> Notwithstanding any provision of law to the contrary, upon registration of an order appointing a guardian of the person or protective order from another state, the guardian of the person or guardian of the property, if so authorized in the order of appointment or protective order, **may commence and defend actions and proceedings in this state**. MHL § 83.39(c) (emphasis added).

7. Both provisions require that the guardian(s) file the order(s) as a foreign judgment, which is defined by CPLR as "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, except one obtained by default in appearance, or by confession of judgment." CPLR § 5401.

8. CPLR § 5402 requires that:

> A copy of any foreign judgment authenticated in accordance with an act of congress or the statutes of this state[2] may be filed within ninety days of the date of authentication in the office of any county clerk of the state. The judgment creditor shall file with the judgment an affidavit stating that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid, and that its enforcement has not been stayed, and setting forth the name and last known address of the judgment debtor. CPLR § 5402(a) (internal citation added).

[1] Pursuant to MHL § 83.03(i), a "'[p]rotective order' means an order appointing a conservator guardian of the property or other order related to management of an adult's property."
[2] See CPLR § 4540.

9. While a guardianship order differs from the judgments that this statute may have been intended to address in that there is generally no creditor and no debtor in a guardianship, clearly, MHL Article 83, which was enacted later in time, referenced foreign judgments so that upon the filing of an out-of-state guardianship order as such, said guardianship order would be given full faith and credit and treated "in the same manner as a judgment of the supreme court of this state." CPLR § 5402(b).

10. Accordingly, it is respectfully requested that this Court accept the State of _____ Order for filing pursuant to CPLR § 5402 and MHL §§ 83.35, 83.37 & 83.39.

**WHEREFORE**, it is respectfully requested that this Court file the State of _____ Order and letters of office, and for such other and further relief as may be just and proper under the circumstances.

Dated: New York, New York
_____, 20__

_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X
In the Matter of

_____,

An Incapacitated Person.

**AFFIDAVIT AS TO FILING OF SISTER STATE JUDGMENT**

Index No.: _____
----------X
STATE OF _____)
) ss:
COUNTY OF _____)

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF _____:

_____, being duly sworn, deposes and says:

1. I am the Guardian of the Person and Property of _____, having been appointed by Order of the _____ Court of the State of _____ dated _____ (the "State of _____ Order"). See Certified State of _____ Order and letters of office attached hereto as Exhibit "A". Under that Order, there is no bond required to be filed.

2. I make this Affidavit in support of my application for the filing of the State of _____ Order and letters of office with the New York County Clerk in the State of New York.

3. The State of _____ Order was not obtained by default for _____'s failure to appear. _____ was represented by court-appointed counsel throughout the proceeding to appoint me as guardian.

4. The State of _____ Order was not obtained by confession.

5. The enforcement of the State of _____ Order has not been stayed in the State of _____.

6. The State of _____ Order is not a monetary judgment, and therefore there are no judgment debtors whose names and last known addresses can be submitted at this time.

7. I am also submitting a copy of the notice that I provided to the appointing court, informing the court of my intent to register its Order in the office of the New York County Clerk in the State of New York. See notice attached hereto as Exhibit "B".

8. My understanding is that by filing the State of _____ Order, I will be authorized to act as _____'s guardian in the State of New York.

9. There is no petition for the appointment of a guardian of the person and property of _____ and no petition for a protective order pending in this state.

**WHEREFORE**, it is respectfully requested that this Court file the State of _____ Order and letters of office, and for such other and further relief as may be just and proper under the circumstances.

_____

Sworn to before me this ____
day of _____, 20__

_____
NOTARY PUBLIC

## OUT OF STATE GUARDIANSHIP CASES

PRE-ADJUDICATION ISSUES

**In Re: Trust Agreement of D. Robert Sykes, A14-2076, August 10, 2015 (Minn. Ct. App.)**

**SUMMARY:** In a conservatorship proceeding brought for the father of Sykes, Sykes and his father's wife petitioned the court for reimbursement of attorney's fees from the conservatorship but by agreement the parties each accepted a reduced fee. Sykes thereafter used funds from a trust established by his father of which he was the trustee to essentially reimburse himself for additional attorney's fees he owed his attorneys for bringing the conservatorship proceeding. The court determined that this was a breach of fiduciary responsibility and, removed him as trustee and ordered him to repay all funds.

**ANALYSIS:** The appellate court affirmed the decision of the trial court.

The court determined that Sykes was using trust funds to pay his own personal obligation. It determined that the trust was not a party to the conservatorship proceeding and the attorney's fees did not benefit the trust. It further determined that utilization of the trust funds to pay the attorney's fees violated the settlement agreement.

MULTI-JURISDICTIONAL ISSUES

**Barnhart v. Bridgeport Probate Court, 61 Conn. L. Rptr. 441 (Super. Ct. 2015)**

**SUMMARY:** Connecticut, which has adopted the U.A.G.P.P.J.A., declined to defer to guardianship orders from Florida because Connecticut was the home state of the wards and Florida has not adopted the U.A.G.P.P.J.A. The Connecticut statute which is the basis for this decision is substantially identical to Mental Hygiene Law § 83.29. The Connecticut court also held that the Florida order appointing guardians was not entitled to full faith and credit.

**FACTS:** Antoinette and Pasquale Varrone resided in Connecticut for 66 years. They had four children. Ann Marie Barnhart, John Varrone, Darlene Kapshire, and Linda Varrone. The chronology of the case is as follows.

| | |
|---|---|
| January 13, 2014 | Antoinette Varrone files a voluntary petition for the appointment of her daughter Linda Varrone as her conservator. |
| January 27, 2014 | Linda Varrone advises the probate court that she will not be able to appear for her scheduled hearing because of a family emergency. She also advises that Antoinette will not be able to appear either. |

| | |
|---|---|
| January 27, 2014 | Antoinette and Pasquale Varrone begin residing in the state of Florida. |
| March 24, 2014 | The Connecticut probate court issues a decree stating that a hearing has been held, the petitioner did not appear and the voluntary petition was therefore denied without prejudice. |
| March 27, 2014 | The Florida court appoints daughter Ann Marie Barnhart, as temporary emergency guardian of Antoinette and Pasquale. |
| June 3, 2014 | After hearing in which all children were present the Florida court issues an order appointing Barnhart as the plenary guardian of Antoinette and Pasquale. |
| June 9, 2014 | The Connecticut probate court holds a hearing on the petition for the appointment of a voluntary conservator for Antoinette. |
| June 12, 2014 and July 27, 2014 | Linda Varrone files petitions for the appointment of involuntary conservators for Antoinette and Pasquale. |
| July 21, 2015 | The probate court holds a hearing on the voluntary and involuntary conservator petitions pertaining to Antoinette. |
| September 2, 2014 | The probate court holds a hearing on the involuntary conservator petition regarding Pasquale. |
| October 14, 2014 | The probate court issues an opinion denying motions to dismiss both Connecticut conservatorship proceedings. The probate court holds that Connecticut was the home state of both Antoinette and Pasquale. It further holds that it does not have to defer to the Florida court because the Florida court has not enacted a guardianship jurisdiction act that is similar to the U.A.G.P.P.J.A. |

**ANALYSIS:** On appeal to the Superior Court, Barnhart and two of her siblings argued that under the U.A.G.P.P.J.A. the Connecticut court should have deferred to the guardianship orders in Florida. They also argued that the Florida orders are entitled to full faith and credit. The Superior Court determined that Connecticut has jurisdiction because Antoinette and Pasquale were present in Connecticut for at least 6 consecutive months that ended within the 6 months prior to the filing of the involuntary petitions in Connecticut. Connecticut was therefore the home state for both of them.

The Connecticut court further determined that it was not required to defer to Florida under the U.A.G.P.P.J.A. The court cited Section 45a-667o(1) for the proposition that when conservatorship proceedings are filed in two states:

(if) the court of probate has jurisdiction under Section 35a-667i, it may proceed with the case unless a court in another stated acquires jurisdiction under provisions similar to those in Section 45a-667i before the appointment or issuance of an order.

This statute is substantially identical to Mental Hygiene Law § 83.29. It basically states that a guardianship court must defer to the order of a court of another state if that state has adopted a guardianship jurisdiction statue that is substantially identical to those in U.A.G.P.P.J.A. Thus, the issue before the court was whether Florida, which has not adopted the U.A.G.P.P.J.A., has jurisdictional provisions which are substantially identical to it.

After extensive review of Florida guardianship law the court determined that the Florida statute is not similar to the U.A.G.P.P.J.A. and therefore the Connecticut court does not have to defer to the Florida orders even though they were issued before the involuntary proceedings in Connecticut were commenced and all of the children of Antoinette and Pasquale were present in participating in the Florida hearing.

The Connecticut court further determined that based on case law from United States Supreme Court and in other states the Florida guardianship order is not entitled to full faith and credit. The Superior Court therefore affirmed the decision of the probate court.

**Guardianship of Harold Sanders 2016 Me. 99 (2016)**

**Summary:** The trial court lacked jurisdiction to appoint a guardian of the person for Harold Sanders because at the time of the appointment Maine was neither his home state nor a significant-connection state and the guardianship appointment was not based on the emergency provisions of the statute.

**Facts:** Harold Sanders spent most of his life in California. In 2012 he suffered a stroke that left him partially paralyzed and confined to a wheelchair. Sanders left California and after passing through a number of states came to Maine with the goal of entering Canada, where he holds dual citizenship, in order to seek treatment for his paralysis.

After he arrived in Maine on October 15, 2013 he checked into a hotel in Portland, Maine where he relied on staff to assist with his transfer from his wheelchair for toileting and to bed.

On November 22, 2013 the Maine Department of Health and Human Services petitioned the court for a temporary guardianship and the court granted the petition the same day. The actual hearing on the petition for the guardianship did not occur until July 7, 2014. On September 23, 2014 the court issued an adjudication of incapacity and appointed the Maine Department of Health and Human Services as his public guardian. The court noted in its decision that Sanders had no family or friends in Maine and wished to return to California.

The actual Findings of Fact and Conclusions of Law did not issue until August 21, 2015. There the court specifically found that Sanders has been diagnosed with multiple physical and mental conditions including paranoid schizophrenia, dementia, hypothyroidism, congestive heart failure, atrial fibrillations, seizure disorder, chronic obstructive pulmonary disease, partial incontinence, left-side paralysis, and insomnia. It also determined that he was not independent with any of his activities of daily living. It further determined he is periodically noncompliant with his medication and did not have a credible plan for care. He said he would return to California and rely on friends to provide his care. The court found that he was divorced and that neither of his two adult children expressed interest in serving as his guardian.

**Analysis:** In the Supreme Judicial Court of Maine, Sanders argued that the trial court did not have jurisdiction to appoint a guardian for him because Maine was neither his home state nor a significant-connection state. On appeal the Maine Department of Health and Human Services conceded both of these points. Instead, it argued that the trial court had jurisdiction because under the Maine version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act the court would have jurisdiction if

> "The respondent's home state and all significant-connection states have declined to exercise jurisdiction because this state is the more appropriate forum and jurisdiction in this State is consistent with the constitutions of this State and the United States."

The court rejected that argument because in order to have jurisdiction under that section of the law Maine would have to be a significant-connection state and it had been conceded that this was not the case.

The court further determined that there was no basis for sustaining the appeal based on the emergency jurisdiction of the court. Under the Maine version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act there would have been authority for Maine to appoint a guardian of the person for a term not exceeding 6 months for a person who is physically present in the state. The court determined that this was not a basis for jurisdiction because the appointment did not take place on that basis and Sanders had already been held for much longer than 6 months.

The court therefore vacated the judgment but gave the petitioner 45 days to seek a temporary guardianship under the emergency statute or ask a court to determine whether Sanders's circumstances warrant any other form of state intervention.

**Ella Nora Denny v. Ohana Fiduciary Corporation**
**No. 70312-9-1 (Wash. App. 2016)(Unpublished)**

**Summary:** Based in part on language in the UAGPPJA, the trial court was not divested of jurisdiction to continue to manage a guardianship while an appeal of a prior order of the guardianship court appointing a guardian was pending. There were no interstate issues involved in any of the orders of the court.

**Facts:** Richard Denny, a party to a guardianship proceeding with regard to his mother, appealed the ruling of the trial court establishing a limited guardianship. Thereafter, while this appeal was pending, the trial court issued additional orders concerning the accountings of the guardian and other administrative matters. None of the issues decided by the court were interstate in nature.

Richard Denny appealed all of the administrative orders of the trial court. One of his arguments on appeal was that under State of Washington Procedural Rules, the trial court was divested of jurisdiction to manage the guardianship during the pendency of the appeal.

**Analysis:** The appellate court rejected the arguments of Richard Denny relying, in part, upon language in the UAGPPJA. The court noted that the Washington version of this statute states:

> "A court that has appointed a guardian or issued a protective order consistent with this chapter as exclusive and continuing jurisdiction over the proceeding until it is terminated by the court or order expires by its own terms."

**New York Notes:** There are a number of provisions of the UAGPPJA that could apply to cases with no interstate issues. Perhaps most significant of these is Mental Hygiene Law § 83.11 which authorizes the taking of testimony using electronic means from witnesses located in another state. Arguably this provision of law applies to all guardianship proceedings not just guardianship proceedings with an interstate component.

RIGHTS OF INDIVIDUALS

**In re: Interdiction of Thomas Milton Benson, JR., 2016 WL 756708, No. 2015-CA-0874(LA.CT.APP.4th Dist. 2016)**

**Summary:** In a Louisiana proceeding that is the equivalent of a guardianship proceeding, the appellate court held that a proposed interdict has a right not to testify at a trial on interdiction. In doing so the court relied on New York law.

**Facts:** A petition was brought for the interdiction of Thomas Milton Benson, Jr. Prior to the hearing he was examined by 3 medical professionals two of whom determined that he did not meet the requirements for interdiction and one of whom determined that he did.

Benson filed a motion in the trial court to exclude his own testimony and petitioners filed a motion to compel his testimony.

The trial court granted the motion of Benson to exclude his testimony and after an 8-day trial denied petitioner's request for an interdiction. There was a resulting appeal on multiple issues. One of which was whether the trial court correctly granted the motion of Benson to exclude his own testimony.

**Analysis:** The appellate court focused on the harshness of an interdiction and the need for clear and convincing proof in order to grant such a petition. It quoted prior 1963 case law for the proposition that "a judgment of interdiction is, in the final analysis, a pronouncement of civil death without the dubious advantage of an inscription thereof on a tombstone." The court looked to In re: Allers, 948 N.Y.S. 2d 902, 906 (N.Y. Sup.Ct.2012) and for the proposition that an alleged incapacitated person is not required to testify against himself. It quoted Abrams, Guardianship Practice in New York State, Chapter 12, Section VI at 583 for the proposition that "simply put, the burden is on the petitioner to prove incapacity, not on the AIP to disprove it." It then looked to In re: United Health Servs. Hosps. Inc., 785 N.Y.S. 2d 313, 316 (N.Y.Sup.Ct. 2004) that petitioner could not shift the burden of proof to the AIP by forcing the AIP to testify and that due process requires nothing less than granting the AIP's right to remain silent and refuse to testify.

**New York Note:** There is arguably a split in authority in New York with regard to whether an AIP has a Fifth Amendment privilege not testify. The court in Allers distinguished a case decided by the Fourth Department, Matter of Heckl, 66 A.D.3d 1344 (4th Dept. 2009), which specifically holds that there is no Fifth Amendment privilege in an Article 81 proceeding.

**James B. Nutter & Co. v. Black, 225 Md.App. 1,123 A3d 535 2015**

**Summary:** Where lender entered into a reverse mortgage with an adjudicated incapacitated person without the knowledge of the guardian of her property, the court denied all of the lender's requests for recovery of the proceeds of the reverse mortgage.

**Facts:** In 1989 a guardian of the property was appointed for Edwina Black. In 1994 the guardian purchased a home for Ms. Black. To purchase the home he borrowed $119,200.00 and executed a deed of trust which was ultimately assigned to the Bank of America. The filed deed made specific reference to the existence of the guardianship.

In 2009 Ms. Black, without the knowledge of her guardian, entered into a reverse mortgage with Nutter. At closing Nutter paid off the Bank of America loan and transferred $57,132.01 to Black.

When the guardian learned of this transaction he withdrew $34,106.00 from Black's personal bank account, advised Nutter that the whole transaction was void and that he had no duty with regard to any of the proceeds.

Nutter commenced a proceeding against the guardian asking that funds be returned to it based on three theories.

A. The guardian had had a duty to ratify their reverse mortgage.
B. Unjust enrichment and
C. Nutter was subrogated to the rights of Bank of America.

On a motion for summary judgment the trial court determined that the reverse mortgage transaction was void rather than voidable. It determined that Nutter was on constructive notice of the existence of the guardianship. The guardian therefore had no legal duty to repay Nutter. It further held that Nutter was not subrogated to the rights of Bank of America because it had no legal duty to pay Bank of America.

**Analysis:** On appeal the appellate court affirmed the decision of the trial court.

The court determined that a void contract is a contract that never existed. Any party to the contract can void it. In contrast, a voidable contract is one in which parties have the right to avoid the relations created by the contract or ratify it.

The court determined that a contract entered into by a person who has a guardian of the property is void rather than voidable. Therefore neither Ms. Black nor the guardianship had any obligations under the contract.

The court further determined that the claim for unjust enrichment was not preserved for appeal.

The appellate court further determined that Nutter was not subrogated to the rights of Bank of America. Because the contract was void from the beginning, Nutter never had any legal duty to the Bank of America. It was therefore never under any obligation to pay Bank of America. That therefore gained no subrogation rights.

MISCONDUCT BY FIDUCIARIES

**People v. Mattos, C076743 (CAL. CT. APP. Jan. 13, 2016)(unpublished)**

**Facts:** A caregiver was convicted of second degree murder and embezzlement in California for failure to use funds entrusted to him to adequately care for a developmentally disabled person for whom he had assumed responsibility.

**Facts**: When the police found Cecil he was an emaciated unresponsive 70-pound developmentally disabled 67-year-old man lying on his side in a filthy room with flies buzzing around. All he was wearing was a full diaper. He had feces running down his leg. They brought him to the hospital where it was determined he was covered with bed sores, was severely dehydrated, had been malnourished for weeks and a dangerous low body temperature. His penis had sores and was emanating pus a sign of urethro infection. He had multiple lesions on his hands and feet. He was suffering from acute renal failure apparently caused by dehydration and an inflammation of the liver. The admitting physician opined that the extent of the bed sores and the degree of malnutrition indicated a lengthy period of neglect. He opined that this was something that would occur over weeks and more likely many months.

Although he put on 50 pounds after admission, Cecil died 2 weeks later.

Cecil had been residing with defendant James Mattos prior to his hospitalization and death. Mattos admitted he was negligent in failing to care for Cecil for whom he had assumed responsibility.

The evidence at trial showed that Cecil's great-uncle by marriage had established a trust for his support and care to be utilized after the great-uncle's death.

At his death the great-uncle bequeathed his house to the mother and father of Mattos on the condition that they continued to care for Cecil. After defendant's father died, his mother, Darlene Mattos became Cecil's conservator. By 2008 defendant's mother could no longer care for Cecil. She bought her son, the defendant, a trailer and he agreed to care for Cecil.

Wells Fargo was the trustee of the trust established by the uncle. Pursuant to a budget submitted by defendant's mother but prepared in part by the defendant it distributed $2,500.00 per month to defendant's mother who in turn transferred that money to defendant for the care of Cecil. Defendant and his brother were the two remainder beneficiaries of the trust which at the time of Cecil's death had a balance of approximately $260,000.00.

Based on this evidence a jury found defendant James Mattos guilty of second degree murder and embezzlement.

**Analysis**: The Appellate Court affirmed the decision of the Trial Court.

Under California law, murder is the "unlawful killing of a human being with malice." Under California law malice may be implied when the killing is proximately caused by "an act, the natural consequences of which are dangerous to life, which act was deliberately performed

by a person who knows his conduct endangers the life of another and who acts with conscious disregard for life." Under California law the omission of a duty is in law the equivalent of an act.

Based on the assumption of the duty of care by Mattos the Appellate Court affirmed a conviction of second degree murder.

The Appellate Court also affirmed the conviction for embezzlement. The Court held that even though the mother of defendant was the actual conservator there was abundant evidence that the defendant had assumed responsibility for Cecil's care and that his mother remained conservator in name only. The Court found that the jury could reasonably and inferred that funds were entrusted to the defendant because he was caring for Cecil and it was believed that he would use the funds to provide for Cecil's basic needs. There was thus substantial evidence to support the jury's finding that the defendant had defrauded the bank and embezzled the money from Cecil.

POST-ADJUDICATION ISSUES

**Moya v. Aurora Healthcare, Inc., 874 N.W.2d 336 (Wi. Ct. App. 2015)**

**Summary**: Under Wisconsin law a personal injury attorney is not a "person authorized by the patient" to acquire medical records and therefore must pay the fees established by the healthcare institution.

**Facts**: Plaintiff was in a car accident and hired a personal injury attorney. The personal injury attorney asked her medical provider to produce medical records and provided a HIPAA authorization. The personal injury attorney was charged fees for this. Under Wisconsin law, a person authorized by the patient can obtain records without a fee. The lower court held that an attorney acting with a HIPAA authorization could not be charged fees.

**Analysis:** The appellate court reversed and held that a personal injury attorney is not a person specifically listed in the statute as someone who is exempt from fees. However, it appears from the holding that a guardian acting on behalf of his or her ward would be exempt from these fees.

**New York Note:** There is similar litigation pending in New York, see Carter v. Healthport 822 F.3d 47 (2nd Cir. 2016). The court determined that the complaint in a class action on this and unrelated issues stated a cause of action. See the second section 18 of the New York Public Health Law which provides that healthcare institutions must provide copies of records to Article 81 guardians for a reasonable fee that does not exceed the costs incurred by the provider. Personal injury attorney's in New York are currently being charged a fee that exceed the cost of providing the records.

**NEW YORK GUARDIANSHIP CASE SUMMARIES**

#1 Pre-adjudication Issues

**In re Verdugo, 29 N.Y.S.3d 173(1st Dept. 2016)**

**SUMMARY**: Where there is medical evidence that a person has a mental illness or defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing a document possessed the requisite mental capacity.

**FACTS:** The incapacitated person suffered from a mental defect as a result of being hit on the head in 2003 by a piece of plywood which fell from the fiftieth floor of a building. In 2007 and 2008 the incapacitated person entered into funding agreements payable against a pending personal injury action. In 2009 a guardian was appointed for the incapacitated person and thereafter the guardian moved to void the funding agreements.

At a hearing, the incapacitated person's treating physician testified with regard to the mental status of the incapacitated person. Thereafter the trial court held that there was insufficient proof that the incapacitated person lacked capacity to enter into the funding agreements.

**ANALYSIS:** The appellate court reversed. It held that there was adequate proof that the incapacitated person suffered from a mental defect at the time he entered into the funding agreements. It further held that the testimony of the treating physician with regard to his mental capacity was ambiguous. It therefore determined that the funding agreements were void because when a person suffers from a mental illness or defect the burden of proof shifts to the opposing party to prove by clear and convincing evidence that the person executing the document possessed the requisite mental capacity. There was not adequate proof of mental capacity in this case.

**In the Matter of Daniel B., 134 A.D. 3d 1103 (2nd DPT. 2015)**

**SUMMARY:** Recipients of gifts from a donor with whom they have a confidential relationship have a duty to prove by clear and convincing evidence that the donee intended to give the gift to the recipients. They need to prove the transactions were fair, open, voluntary, well-understood and therefore free from undue influence.

**FACTS:** A guardian was appointed for Daniel B. Thereafter the guardian commenced turnover proceeding pursuant to Mental Hygiene Law section 81.43 to obtain the return of $206,538.60 from two

individuals who had received the gifts from an incapacitated person prior to the appointment of the guardian. The trial court entered judgment against the donees and in favor of the guardianship.

**ANALYSIS:** The trial court determined that the donees had a fiduciary and confidential relationship with the incapacitated person. That court therefore determined that the donees had the burden of proving by clear and convincing evidence that the incapacitated person intended to make the gift and that the transaction was fair, open, voluntary and well understood and therefore free from undue influence. The Appellate Court affirmed the decision of the trial court.

***Preden v. Bruce*, 129 A.D.3d 506 (1st Dept. 2015)**

**SUMMARY:** Defendant did not meet its initial burden of showing that there was a question of capacity of the principal at the time a power of attorney was executed. The burden therefore did not shift to the recipient of the power of attorney to prove the competency of the donor of the power.

**FACTS:** Ericka Spinner, age 21, was diagnosed with a brain tumor and gave her mother a power of attorney. Her mother used the power of attorney to commence a malpractice action against medical providers. A medical provider argued that Spinner was not competent to execute a power of attorney. However it failed to submit any evidence concerning Spinner's competence at the time she executed the power of attorney other than the document itself.

**ANALYSIS:** The Court held that since the medical provider failed to submit any evidence concerning Spinner's competence at the time the power of attorney was executed it did not meet its initial burden in support of the motion. The burden therefore did not shift to the grantee of the power of attorney to demonstrate competence. The application to void the power of attorney was denied.

**Matter of *Harold W.S., 134 A.D.3d 724 (2nd Dept. 2015)***

**SUMMARY:** The inability of a person to arrange for payment of his nursing home bill is a proper basis for the commencement of the guardianship proceeding.

**FACTS:** Petitioner in this case was the administrator of the nursing home where the alleged incapacitated person resided. He was not capable of arranging for payment of his nursing home bill. The nursing home commenced a guardianship proceeding.

**ANALYSIS:** The court determined that a nursing home is an entity which is permitted by law to commence a guardianship proceeding. The court further determined that the inability of a person to pay for his nursing home bill is an appropriate basis to bring an Article 81. It rejected the argument of the appellant that the court was deprived of subject matter jurisdiction in this case.

***Matter of K. B.*, 50 Misc. 3b 1219(a)**

**SUMMARY:** A trial court granted a motion to dismiss a guardianship proceeding because the petition did not set forth any meaningful facts pertaining to the functional level of the alleged incapacitated person.

**FACTS:** The petition for the appointment of a guardian in this case set forth the following allegations with regard to the condition of the alleged incapacitated person. It alleged that she:

> Does not have the physical or mental ability to manage her role in the divorce action and property, and having suffered from mental illness earlier in her life and cannot understand the nature and consequences of such inability. The AIP does not have the physical or mental ability to obtain, administer, protect and dispose of real or personal property, intangible property, benefits or income. In addition, she does not have the ability to budget or allocate resources for herself or for her family, nor does she have the ability to direct others to do the same on her behalf. She has no knowledge of her existing debts, her bank account balances, income or her resources.

**ANALYSIS**: The Court expressed concern that the petition contains no medical information concerning the alleged mental illness suffered by the alleged incapacitated person earlier in her life and its relevance to her current property management powers. It also expressed concern that the petition did not contain specific factual allegations as to personal actions or financial transactions which would illustrate that she is likely to suffer harm because of her inability to understand and appreciate the nature of her actions. The court stated that conclusory allegations without specific factual allegations of incapacity are insufficient in a petition and warrant dismissal. It therefore dismissed the petition in this case.

**In the Mattter of Jaar-Marzouka 2016 NY Slip Op 50824(U) (S. Ct. Dutchess 2016)**

**Summary:** The Court held that Article 81 authorizes a court to issue an order of protection

**Facts and Analysis:** It was alleged in a guardianship petition that the AIP was subject to physical and other abuse by someone with whom she was living. The court determined that an order of protection is akin to an injunction and therefore Article 81 authorizes a guardianship court to issue an order of protection. The court promulgated the form of order of protection below to be used when orders of protection are issued in Article 81 proceedings.

At a Term of the Supreme Court

County of , State of New York,

, New York.

PRESENT:

In the Matter of an Application of **ORDER OF PROTECTION**

,

Index No.

For the Appointment of a Temporary Guardian of the Person and Property of

,

An Alleged Incapacitated Person.

**NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY SUBJECT YOU TO MANDATORY ARREST AND CRIMINAL PROSECUTION**.

**THIS ORDER OF PROTECTION WILL REMAIN IN EFFECT EVEN IF THE PROTECTED PARTY HAS, OR CONSENTS TO HAVE, CONTACT OR COMMUNICATION [*8] WITH THE PARTY AGAINST WHOM THE ORDER IS ISSUED. THIS ORDER OF PROTECTION CAN ONLY BE MODIFIED OR TERMINATED BY THE COURT. THE PROTECTED PARTY CANNOT BE HELD TO VIOLATE THIS [**3] ORDER NOR BE ARRESTED FOR VIOLATING THIS ORDER**.

A petition under **Article 81** of the Mental Hygiene Law, verified on , having been filed in this Court in the above-entitled proceeding, and the Court having set the matter down for a hearing for the appointment of a Temporary Guardian, pursuant to MHL §81.23, and thereafter having determined that good cause has been shown for the issuance of this Order, pursuant to MHL §81.23(b)(1),

**NOW, THEREFORE, IT IS HEREBY ORDERED** that [specify first name, middle initial and last name]: must observe the following conditions of behavior:

(Check Applicable Paragraphs and Subparagraphs):

[1] Stay away from:
[A] [name of protected person]: ,

and/or from the:

[B] home of: ,

[C] other [specify location[s]] ,

[2] Refrain from communication or any other contact or by mail, telephone, email, voice-mail or other electronic or any other means with [name of protected person]: ;

[3] Refrain from assault, stalking, harassment, aggravated harassment, menacing, reckless endangerment, strangulation, criminal obstruction of breathing or circulation, disorderly **[*9]** conduct, criminal mischief, sexual abuse, sexual misconduct, forcible touching, intimidation, threats, identity theft, grand larceny, coercion or any criminal offense against [name of protected person]: ;

[4] Refrain from intentionally injuring or killing without justification the following companion animal(s) (pet[s]) [specify type(s) and, if available, name(s)]: ;

[5] Permit [specify individual]: to enter the residence at [specify]:

during [specify date/time]: with [specify law enforcement agency, if any]: to remove personal belongings not in issue in litigation [specify items]: ;

It is further **ORDERED** that this order of protection shall remain in force until further order of the Court.

Dated:

Justice of the Supreme Court

Check Applicable Box(es):
Party against whom order was issued was present in Court and advised in Court of issuance and contents of Order

Order personally served in Court upon party against whom order was issued

Service directed by other means [specify]:

**Matter of Mitchell, 2016 NY Slip OP 50853(U) (S.Ct. Kings, 2016)**

**Summary:** In a Mental Hygiene Law § 81.43 turnover proceeding, the court ordered that the former healthcare agent and attorney in fact of the alleged incapacitated person to return $122,000.00 to the guardianship. Because the donee of the gifts had a confidential relationship with the incapacitated person at the time the gifts were made he had the burden of proving by clearly convincing evidence that the gifting process was free of undue influence.

**Facts:** In a Mental Hygiene Law § 81.43 turnover proceeding, the property guardian produced witnesses whom the court determined credibly established that the incapacitated person was a woman who, despite extraordinary intellectual gifts, never left her parents' home, had no friends, had little or no social life, had a limited work life and was financially victimized. It further determined that at the time the gifts were made she would sign anything that was put in front of her.

In opposition, the donee of $122,000 in gifts presented the testimony of an attorney who had prepared a will for a incapacitated person which named the donee of the gifts as executor. The court found that the attorney had failed to make elementary inquiries as to the actual size of the estate of the incapacitated person, her medical condition or her social and familiar history. The attorney allowed an unrelated person to orchestrate the completion and execution of the will.

**ANALYSIS**: The court cited case law for the proposition that a person who has a fiduciary relationship with the donor of a gift has the burden of proving by clear and convincing evidence that the gifting process was free of undue influence. The court determined that both being an attorney in fact and being a healthcare agent were separate and independent fiduciary relationships. Based on the testimony and the burden of proof upon the donee of the gifts the court determined that the donee of the gifts should return the funds. The court did not determine the validity of the will but it rejected testimony of the attorney as evidence of her capacity to make gifts.

It also issued an injunction which enjoined the donee of the gifts from transferring, using, spending or hypothecating any of his assets for any purpose other than necessary until the judgment to be entered was paid to the property guardian.

#2 Guardian's action's

***David v. Cohen & Gresser LLP*, 51 Misc. 3(d) 1203(a)(S. Ct. New York County 2016**)

**SUMMARY:** The court determined that the authority of a guardian to continue ongoing litigation terminated on the death of the incapacitated person. Therefore the statute of limitations with regard to a malpractice action against the attorney for the guardian commenced to run on that date.

**FACTS:** The estate of the incapacitated person commenced a malpractice action against the former attorneys of the guardian for the decedent more than 3 years after the date of death of the incapacitated person. The attorneys asserted a defense of statute of limitations.

**ANALYSIS:** The court held that the cause of action against the attorneys for malpractice accrued on the date of death of the incapacitated person because the authority of the guardian to continue the litigation ceased as of that date. The court considered language in Mental Hygiene Law § 81.21(a)(20) which permits a guardianship court to authorize a guardian to maintain a judicial action until an executor has been appointed. The court determined that this section of the law must be read in tandem with Mental Hygiene Law § 81.36(a)(3)(a) which explicitly states that the death of an incapacitated person terminates the guardianship. The court therefore held that in order for the attorney-client relationship to continue after the date of death of the guardian the court would have had to specifically authorize the guardian to continue to act after the incapacitated person's death. For these and other reasons the defendant's motion to dismiss the complaint was granted.

***Matter of Alan G.W.,*** **2016 NY Misc Lexis 834 (S.Ct. Cortland 2016)**

**SUMMARY:** The court determined that the resignation document of an Article 81 guardian and that Article 81 guardian's final accounting could be signed on behalf of the Article 81 guardian by her attorney in fact.

**FACTS:** The mother of Alan G.W. was appointed his Article 81 guardian in 1995. The sister of Alan G.W. was appointed as a standby guardian. In 2013 the guardian granted a general power of attorney to her daughter, the standby guardian. In 2015 the daughter submitted a letter of resignation as guardian on behalf of her mother as well as an accounting. The letter of resignation indicated that the guardian was no longer capable of serving.

**ANALYSIS:** The legal issue the court considered with regard to this matter was whether or not an attorney in fact can sign a resignation of a person who is acting as guardian and sign an accounting on her behalf. The court noted that there is case law that says a fiduciary cannot fully delegate fiduciary powers by granting a general power of attorney. It noted that there is case law that an agent under a power of attorney cannot obtain a divorce for the principal. Nevertheless the court held that utilization of the power of attorney to sign the accounting and the resignation was proper in this case. It noted that the actions taken by the agent were not for her own financial benefit and so not contrary to applicable fiduciary standard for an agent. The court noted that the actions taken by the agent do not adversely affect or enhance the personal financial rights or obligations of the principal. It held that signing these documents was no more personal or discretionary than executing a waiver and consent in a probate proceeding or a right of election. It therefore held that the actions taken by the attorney in fact fall within the scope of the "estate transactions" section of the power of attorney pursuant to which an agent is authorized to "represent and to act for the principal in all ways and in all matters effecting any estate of an . . . incompetent . . . with respect to which the principal is a fiduciary."

#3 Fees for Guardian's and attorneys

**In re Hultay, 136 A.D.3d 572 (1st Dept. 2016)**
**Matter of Yoland T.M., 137 A.D.3d 1280 (2nd Dept. 2016)**
**Fairley v. Fairley, 136 A.D.3d 432 (1st Dept. 2016)**
**Matter of Zofia, 136 A.D.3d 818 (2nd Dept. 2016)**

In all of these cases the court remanded the fee applications to the trial court because the court had not set forth in a written decision the reasons for its denial of the fee requests.

***Matter of Uriel R.*, 133 A.D.3d 859 (2nd Dept. 2015)**

**SUMMARY**: In this case, the trial court denied the application of the guardian for fees he rendered in his capacity as attorney without explanation. On appeal the guardian asked that the case be remanded so that the trial court could explain its decision. The appellate court recited the usual rule that a trial court must explain its decision with regard to attorney's fees. However it held that in this particular case the record was clear with regard to the reason for denial and it denied the attorney's fee application.

***Matter of Sidney W.V.*, 133 A.D.3d 596 (2nd Dept. 2015).**

**SUMMARY:** Article 81 does not permit a court to award an attorney's fee for services rendered by a party in opposing a petition for the appointment of a guardian.

**FACTS:** The trial court awarded the attorney for a party who was objecting to the appointment of a guardian the sum of $52,635.00.

**ANALYSIS:** The appellate court reversed. It held that Article 81 does not permit award of attorney's fees for services rendered in opposing a guardianship application. The court therefore held that the trial court erred in awarding an attorney's fee to the attorney for such a party.

**Matter of Jean C., 136 A.D.3d 632 (2nd Dept. 2016)**

**SUMMARY**: The trial court properly denied an attorney's application for attorney's fees because the services rendered by the attorney were for the benefit of the grandson of the incapacitated person and not for the incapacitated person herself.

**FACTS:** The grandson of the incapacitated person was sent to jail because he fraudulently obtained mortgages on two pieces of real property owned by her. These events occurred after she had suffered a stroke. Upon his release from jail the grandson visited the incapacitated person with an

attorney. The attorney had the incapacitated person sign a power of attorney naming the grandson as agent, a new will naming the grandson as executor and residuary beneficiary and a retainer letter to the attorney. The retainer letter authorized the attorney to provide representation with regard to "all estate matters concerning the interests of the incapacitated person and those of her grandson".

Thereafter a guardianship proceeding was commenced and a guardian was appointed for the incapacitated person. Thereafter the attorney applied to the court for payment of fees in accordance with his retainer. The services rendered included services that were provided to represent the grandson in an eviction proceeding.

The trial court denied the application for attorney's fees.

**ANALYSIS:** The appellate court affirmed the decision of the trial court. It held that the Supreme Court has broad discretion with regard to the determination of attorney's fees in a guardianship proceeding and inherent power to supervise any fees charged by an attorney even in the absence of any party's objection. The Court held that the record supported the finding of the trial court that legal services were performed on behalf of the grandson and not on behalf of the incapacitated person. Under these circumstances the denial of the fee application was proper.

***Application of Lawrence H.*, 28 N.Y.S.3d 271 (County Ct., Nassau 2016)**

**SUMMARY:** In an Article 81 guardianship proceeding, if an application for the appointment of a guardian is withdrawn the court has the authority to award attorney's fees on the same basis as if a proceeding was denied or dismissed. In this case the court required the petitioner to pay all of the fees of a court evaluator and court-appointed counsel because it determined that the motives of the petitioner in bringing the proceeding were not altruistic.

**FACTS:** The petitioner in this guardianship proceeding was the spouse of the alleged incapacitated person. At the time the petition was brought there was also a pending divorce proceeding and a complicated trust dispute between the parties in the surrogate's court. The court evaluator issued an extensive report in which he concluded that the alleged incapacitated person was not incapacitated. The court found that the petitioner was in a far better financial position than the alleged incapacitated person and that the guardianship proceeding was not brought for altruistic motives.

The parties entered into a stipulation of settlement pursuant to which the petitioner agreed to withdraw the guardianship petition. In addition the stipulation provided that the court would determine the compensation of the court evaluator and court-appointed counsel for the alleged incapacitated person. The parties agreed that a maximum of $50,000.00 would be set aside by petitioner from a trust fund as a source of payment of any fee award. The parties left it to the court to determine to what extent the fees should be payable by the petitioner and to what they should be payable by the alleged incapacitated person.

**ANALYSIS:** The court noted that Article 81 of the Mental Hygiene Law contains no provisions with regard to the award of fees when a guardianship petition is withdrawn. However it does provide that

when a petition is denied or dismissed the court can allocate fees between the petitioner and the alleged incapacitated person as it deems appropriate. The court then held that the withdrawal of a guardianship petition is the functional equivalent of a denial or dismissal.

It further determined that all of the fees of the court evaluator and the court-appointed counsel should be paid by the petitioner up to the stipulated amount. The court based its decision on its determination as to the improper motives for the commencement of the proceeding. It rejected the argument of the petitioner that it could have proved incapacity based on the medical records of the alleged incapacitated person because there had been no waiver of the physician-patient privilege and the incapacitated person had not placed her medical condition in issue.

#4 Rights of individuals

***Matter of Banks*, 28 N.Y.S.3d 321 (1st. Dept. 2016)**

**SUMMARY:** The Appellate Court reversed the decision of the Trial Court and remanded for a new hearing because the hearing for the appointment of a guardian was conducted without the presence of the alleged incapacitated person.

**FACTS:** Prior to the hearing for the appointment of a guardian, the alleged incapacitated person had advised the court evaluator that she intended to appear at hearing. Just prior to the hearing she advised her counsel that she would not be able to appear because she was not feeling well. The trial court conducted a hearing in the absence of the alleged capacitated person finding that she had notice of the hearing and had "waived" her attendance at the hearing. The court appointed a guardian for the alleged incapacitated person.

**ANALYSIS:** The Appellate Division reversed the decision of the trial court and remanded for a new hearing. The court cited Mental Health Law §81.11(c) for the proposition that a hearing for the appointment of a guardian must be conducted in the presence of the person alleged to be incapacitated, and at that person's residence if necessary. The court stated there is an overarching value in having the court have the opportunity to observe first-hand the alleged incapacitated person. The court, therefore, remanded for a new hearing in which the alleged incapacitated person could be given an opportunity to be present.

**Matter of Regina L.F. , 132 A.D.3d 1344 (4th Dept. 2015)**

**SUMMARY:** In its order appointing guardian, the trial court determined that comfort care for the incapacitated person "shall always include food and hydration, whether orally or artificially, including comatose conditions." Based on contrary instructions in a healthcare proxy executed at the time when the incapacitated person was competent, the appellate court reversed this determination. The appellate court also maintained Catholic Family Center as guardian because there was no application

before the court asking that the guardian be discharged. Furthermore, there had been no hearing with regard to the termination of that guardianship.

**FACTS:** In an order appointing guardian for Regina L.F., the trial court ordered that comfort care for her "shall always include food and hydration, whether orally or artificially, including comatose conditions." The trial court had appointed Catholic Family Center as the personal needs guardian. At a time when she had capacity, Regina L.F. had executed a healthcare proxy in which she stated "if I should have an incurable or irreversible condition that is likely to cause my death within a relatively short period of time, … no artificial administered nourishment or liquids shall be furnished to me unless necessary for my comfort or to alleviate pain." The healthcare proxy also stated that should Regina L.F. be in a state of permanent consciousness or profound dementia, all nourishment or liquids not necessary for comfort to alleviate pain "are to be withheld or withdrawn."

**ANALYSIS:** The appellate court reversed the decision of the trial court. It held that a competent adult generally has the right to make healthcare decisions including the right to refuse life-sustaining treatment and that these wishes must be respected if that person becomes incompetent. Because the determination of the Court with regard to artificial nutrition and hydration conflicted with the healthcare proxy the Court vacated that portion of the trial court's order.

The Court further determined that Catholic Family Center should remain as guardian because there was no properly pending application before the Court requesting that it be discharged. It further stated the guardianship can be terminated without a hearing.

#5 Capacity

**MATTER OF CAROLE L., 136 A.D.3d 917 (2nd Dept. 2016)**

**SUMMARY:** The petitioner failed to prove by clear and convincing evidence that the alleged incapacitated person lacked capacity.

**FACTS:** Without providing factual details, the Appellate Court determined that the petitioner in this guardianship proceeding had failed to prove that the alleged incapacitated person is incapacitated by clear and convincing evidence. The court determined that the testimony had failed to show that the alleged incapacitated person was unable to provide for her personal or financial needs and that she was unable to adequately understand and appreciate the nature and consequences of any such inability. Therefore the Court erred below in granting the petition.

**ANALYSIS:** The Court gave a detailed explanation of what needs to be proved in order to appoint a guardian under Article 81 of the Mental Hygiene Law. In particular it determined that the Court is required to use the following analytical framework.

1. The Court must first determine that the appointment of a guardian is necessary to provide for personal needs and/or property management.

2. The Court must determine that the person agrees to the appointment or that the person is incapacitated.

3. A determination of incapacity consists of determination that a person is likely to suffer harm because the person is unable to provide for his or her personal needs and/or property management and the person cannot adequately understand and appreciate the nature and consequences of that inability.

4. In reaching its determination the Court must give primary consideration to the person's functional level and functional limitations including an assessment in the person's ability to manage the activities of daily living related to property management and his or her understanding and appreciation and the nature and consequences and inability.

5. The must consider his or her preferences, wishes and values concerning management of these affairs.

6. It must consider the nature and extent of the person's property and finances in the context of his ability to manage them.

7. It must consider the extent of the demands placed on the person by the nature and extent of the person's property and financial affairs.

8. It must consider any mental disability and the prognosis of the disability.

9. It must consider any medications which the person is being treated with and their affect on the person's behavior, cognition and judgment.

10. It must consider other relevant facts and circumstances.

The Court also pointed out that determination of incapacity must be based on clear and convincing evidence.

**Matter of Deborah P., 133 A.D. 3d 602 (2d Dept. 2015.)**

**SUMMARY:** The appellate court reversed the decision of the trial court which had appointed a successor guardian. The appellate court determined that the record lacked a showing of clear and convincing evidence that there was a continuing need for a guardian.

**FACTS:** In 2006 appellate Deborah P. consented to the appointment of her sister Marie F. to serve as her guardian for the limited purpose of establishing a special needs trust. Approximately 8 years after Marie's appointment as a guardian Deborah P. filed a petition to terminate the guardianship, alleging that she was fully capable of managing her own affairs, and that Marie did not want to be her guardian any longer. The trial court held a hearing at which Deborah P. and Marie F. testified. Marie asked to be removed from her position as guardian and requested that a new guardian be appointed. The court

appointed examiner did not oppose the termination of the guardianship. The trial court accepted the resignation of Marie and appointed a successor guardian.

**ANALYSIS:** The appellate court reversed the decision of the trial court. It determined that Marie F. the only person arguing for the need for the appointment of successor guardian failed to meet her burden of proving by clear and convincing evidence that Deborah P. was incapacitated. The hearing testimony demonstrated that Deborah P. managed her own checking account, paid bills relating to her apartment with her Social Security Disability income and was taking steps to challenge a Medicaid lien. Marie F. testified that appellant had delusions and difficulty maintaining employment. However the court determined her testimony was unsupported by additional evidence that did not rise to the level of clear and convincing evidence. Marie F. testified as to Deborah P.'s spending habits but failed to demonstrate that Deborah P.'s expenditures over the years were improper and thereby indicative of any ability to provide her own property management. The appellate court therefore determined that a guardian was no longer necessary. The appellate court did not pass on the continued validity of the supplemental needs trust because the issue was not raised on appeal.

**Matter of Edward S., 130 A.D.3d 1043 (2nd Dept. 2015)**

**SUMMARY:** The appellate court reversed the trial court's decision to appoint a guardian. It determined that there was not adequate evidence of incapacity.

**FACTS:** The trial court appointed a guardian to the alleged incapacitated person after determining that he suffered from dementia.

**ANALYSIS:** The appellate court reversed the decision of the trial court because it determined that the conclusion of the trial court that the alleged incapacitated person suffers from dementia was not supported by the record. The appellate court pointed out that the petitioner's medical expert testified that the alleged incapacitated person had not "evidenced … dementia" and was "capable of impressive cognitive functioning."

#6 Misconduct

**Matter of *Brancato*, 2016 NY Slip Op 03734 (2nd Dept. 2016)**

**SUMMARY:** When a guardian's bond was reduced from $500,000.00 to $207,000.00, the bonding company was liable for damages up to $500,000.00 for the period of time that the bond was for that sum and up to $207,000.00 for the period of time when the bond was for that sum. The maximum liability of the bonding company was capped at $500,000.00.

**FACTS:** The guardian of the AIP was appointed on February 4, 2002 and obtained a bond in the sum of $500,000.00. On July 22, 2004 the court directed the guardian to file a reduced bond in the sum of $207,000.00. In 2006 the guardian was relieved as guardian and in 2008 the incapacitated person died.

Thereafter the Supreme Court found that the guardian had breached his fiduciary duties as guardian and entered judgment against the guardian in the sum of $664,388.00. The executor of the estate of the incapacitated person was given leave to commence an action against the bonding company in the Surrogate's Court.

The surrogate found that the bonding company was liable for damages incurred on the original bond up to a maximum of $500,000 until the date that the reduced bond was issued and was thereafter liable on the reduced bond up to a maximum of $207,000 for damages that occurred after the issuance of the new bond. The Surrogate further held that the total liability of the bonding company would not exceed $500,000.00.

**ANALYSIS:** The Appellate Division affirmed the decision of the trial court. Significantly, the Appellate Division cited no guardianship cases in reaching its decision. Its decision was based on the Surrogate's Court Procedure Act and estate cases decided under that statute and its predecessor.

***Matter of Helen S.*, 130 A.D.3d 834 (2ND Dept. 2015)**

**SUMMARY:** The court granted the application of the incapacitated person to have her guardian removed because of the abusive behavior of guardian.

**FACTS:** A guardian was appointed for Helen S. Thereafter Helen S. moved for the removal of her guardian. At the hearing Helen S. testified that her guardian "yelled" and "screamed" at her and threatened her. She further testified that when she sees the guardian she gets "very nervous, very upset. My stomach hurts. My body shakes all over and I have to throw up." She testified unequivocally that she did not want her guardian to continue to serve in that capacity. The trial court granted the application to remove the guardian.

**ANALYSIS:** The appellate court affirmed the decision of the trial court. It cited Mental Hygiene Law § 81.35 which authorizes the removal of a guardian when "the guardian fails to comply with the order, is guilty of misconduct or for any other cause which to the court shall appear just." The court cited authority for the proposition that the trial court is accorded considerable discretion in determining whether a guardian should be replaced and that overarching concern is the best interest of the incapacitated person. The appellate court determined that the trial court properly exercised its discretion in this case.

#7 Post-Adjudication issues

**Matter of Thomas J., 10 A.D.3d 1043 (2nd Dept. 2015)**

**SUMMARY**: The trial court improvidently denied the application of the landlord of the incapacitated person for permission to commence a holdover proceeding against the incapacitated person nunc pro tunc.

**FACTS**: A guardian was appointed for the incapacitated person in 2002. In 2012 the landlord of the incapacitated person commenced a holdover proceeding against the incapacitated person without first obtaining permission from the guardianship court. The guardian thereafter moved in the guardianship court for an order dismissing the holdover proceeding and enjoining the landlord from commencing any subsequent holdover proceedings without first obtaining permission from the guardianship court. The guardianship court granted those applications and denied the application for landlord for permission to commence the holdover proceeding nunc pro tunc.

**ANALYSIS**: On appeal the appellate court reversed. It held that once a guardian is appointed for incapacitated person, litigation against the incapacitated person and against the guardian should not proceed without the permission of the guardianship court. However, the court further held that such permission can be granted nunc pro tunc. In this case the guardian had notice of the pending holdover proceeding as well as of prior holdover proceedings. The guardian was named, in part, to defend an earlier holdover proceeding. The court held that under the circumstances of this case and the absence of prejudice the trial court should have granted permission to commence the 2012 holdover proceeding nunc pro tunc. It further held that it was improper to enjoin the landlord from commencing any subsequent holdover proceedings without first obtaining leave of the guardianship court.

**In Re Barbara Hultay, 2016 NY Slip Op 04674 (1st Dept. 2016)**

**SUMMARY:** The First Department affirmed a decision of the trial court which restrained respondent from any written, telephone or in person contact, howsoever initiated, with the incapacitated person, without first obtaining written consent from the guardian. The respondent was also enjoined from publically disclosing certain information concerning the health and finances of the incapacitated person.

**FACTS:** The order appointing guardian in this case gave the guardian the authority to limit the incapacitated person's social environment, including who may contact him, as permitted by Mental Hygiene Law § 81.22(a)(2). The respondent visited the incapacitated person without obtaining consent from his guardians. The record reflected that court appointed counsel for the incapacitated person stated that the incapacitated person did not desire to have contact with respondent. Respondent admitted in engaging in these acts.

The court issued an injunction restraining respondent from having any contact with the incapacitated person including written, telephone or in person contact howsoever initiated without the written consent of the guardian. It did this without conducting a hearing.

**ANALYSIS:** The appellate court affirmed the decision of the trial court. It held that the issuance of such an injunction is permitted by Mental Hygiene Law § 81.23(b)(1). It held that a hearing was not necessary because the respondent admitted that he engaged in the acts in question. The sole issue before the court was therefore the authority of the guardian. The court further held that the confidentiality restrictions under the order were appropriate.

***Terry v. County of Suffolk*, 2016 U.S. App. LEXIS 10237 (2ND Cir.2016) (unpublished)**

**SUMMARY:** The Second Circuit held that a New York guardian is not a state actor within the meaning of 42 U.S.C. § 1983. The court further held that the claims against the guardian were properly dismissed because the plaintiff had not obtained permission to sue the guardian from the state court that appointed the guardian.

**FACTS:** Plaintiff in this proceeding sued a guardian appointed by the courts of the State of New York. The plaintiff resided on property owned by the ward of the guardian. The plaintiff alleged violations of 42 U.S.C. § 1983.

**ANALYSIS:** The appellate court affirmed the dismissal of the case by the trial court because a court appointed guardian is not a state actor. The guardian is not a state actor because the guardian has a duty to act in the best interest of the ward with no obligation to the mission of the state. The court further held that it is necessary to obtain the permission of the guardianship court in order for a third party to bring a proceeding against a guardian in federal court.

**In the Matter of Beatrice R.H, 2016 NY Slip Op 04415 (2nd Dept., 2016)**

**SUMMARY**: The appellate division affirmed the decision of trial court which denied the application of the son of the incapacitated person to direct her independent guardian to change the place of abode of the incapacitated person.

**Facts and Analysis:** The son of the incapacitated person petitioned the court for an order requiring the independent guardian to change the abode of the incapacitated person from a skilled nursing facility in Manhattan, where she resided, to her former residence in Jericho. In the alternative he requested an order to move her to either of two certain skilled nursing facilities on Long Island. The daughter of the incapacitated person opposed the motion.

The trial court denied the motion. It cited extreme discord between the two children. In an affirmation the independent guardian opined that returning the incapacitated person to her former residence which was owned by the son would not be in her best interests. The independent guardian believed that the acrimonious relationship between the son and the daughter would create safety and care issues. The independent care manager testified that the nursing facility in Manhattan had policies and structures which shielded the incapacitated person from conflict between her children. The

independent geriatric care manager further testified that the incapacitated person suffered from moderate to severe dementia and that she was accustomed to her environment. She testified that change can sometimes be traumatic for individuals suffering from dementia.

The appellate division affirmed the decision of the trial court.

**Application of DC v. Hon. Andrea Masley, 2016 NY Slip Op 04662 (1st Dept. 2016)**

**SUMMARY:** The Appellate Division First Department denied an application of the Mental Hygiene Legal Service for an order prohibiting a trial judge from conducting further proceedings with regard to a guardianship matter.

**FACTS:** The trial court granted the application of the incapacitated person to discharge her guardian in a consent guardianship. Thereafter the court reappointed the court evaluator and ordered a further hearing even though neither the guardian nor the original guardianship petitioner objected to the motion to discharge the guardian. The Mental Hygiene Legal Service applied to the Appellate Division for an order prohibiting the trial court from conducting further proceedings with regard to the guardianship matter.

**ANALYSIS:** The Appellate Division denied the application for a writ of prohibition. It determined that the petitioner had failed to identify any arrogation of power infringing on a clear right. The appellate court further determined that even if petitioner was correct that the court erred in ordering the hearing when there were no objections to the motion to discharge the guardian, these claims of legal error could be raised on direct appeal and were insufficient to warrant a writ of prohibition.

# ETHICS IN ELDER LAW:
# CONSIDERING THE MOST COMMONLY ASKED – QUESTIONS

by

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# ETHICS IN ELDER LAW:
# Considering the Most Commonly Asked Questions

Materials Prepared and Presented by Sheryl L. Randazzo
For New York State Bar Association's Intermediate Elder Law, November 2016

## I. Introduction

### a. Sources of Professional Ethics

1. Common Sense
   * trust your instincts

2. Respected Peers
1. Business Affiliations
2. The Value of Association

   (1) Professional Ethics Committees - SCBA and NYSBA
   (2) Committees re: Substantive Practice Areas

3. Rules of Professional Conduct - Title 22 NYCRR Part 1200

   * Disciplinary Rules promulgated as joint rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, replacing the Disciplinary Rules of the Code of Conduct

   Full text found at www.nysba.org/**professionalconduct**

### B. Professional Ethics and Law Practice Management

1. Rules of Professional Conduct Establish Minimum Standards of Law Practice Management

2. Intended Goals of Law Practice Management

   Every law practice must be organized for two purposes –
   (1) to provide legal services to our clients, and
   (2) for its internal management.

3. Sound business practices are necessary in order to practice law in an ethical and professional manner, and law practice management is about relevant business practices as they relate to the practice of law.

4. Developing good management practices is vital to the success of a law practice.

5. Maintaining good management practices can reduce the risk of professional failure, lower the likelihood of malpractice or disciplinary measures, increase the longevity of a practice and enhance personal satisfaction of a practitioner.

## II. Who is the Client?

### 1. Vital Importance in Answering this Question Correctly

1. The Starting Point for All Matters of Professional Ethics

Identifying who your client is must be the first step in every representation. Who your client is must also be clear to your client and all interested parties.

2. Initial Contact vs. Initial Consultation

3. Necessity of Maintaining Focus Throughout Representation

### 2. Statutory Guidance

1. Rule 1.4 - "Communication," which provides:

*1. A lawyer shall:*
*1. promptly inform the client of:*
*1. any decision or circumstance with respect to which the client's informed consent … is required by these Rules;*
*2. any information required by court rule or other law to be communicated to a client; and*
*3. material developments in the matter including settlement or plea offers.*
*4. reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
*5. keep the client reasonably informed about the status of the matter;*
*6. promptly comply with a client's reasonable request for information; and*
*7. consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.*
*8. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

9. "Informed Consent," which is defined at 1.0(j) as follows –

*…denotes the agreement by a person to a proposed course of conduct after a lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.*

10. Rule 2.1 – "Advisor," which states as follows –

*In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation.*

**3. Practical Considerations and Direction**

1. Communicate, communicate, communicate.

2. 2/3's of communication should be listening, particularly at the commencement of representation.

3. Consider if written communication and confirmation is necessary or appropriate.

4. Providing for sufficient time with clients throughout a representation is essential for effective communication.

5. Your client should almost always be "the first to know."

## III. How Do You Identify and Handle Conflicts of Interest?

### 1. Statutory Guidance

1. Rule 1.7 "Conflict of Interest: Current Clients," which provides –

*1. Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:*
   *1. the representation will involve the lawyer in representing differing interests; or*
   *2. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.*

*2. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:*

*1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*

*2. the representation is not prohibited by law;*

*3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*
*4. each affected client gives informed consent, confirmed in writing.*

1. "Differing Interests" defined at 1.0(f) as follows –

> *Include every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest.*

2. Self-dealing is also a conflict to be avoided, and it is provided for in Rule 1.8-

"Current Clients: Specific Conflict of Interest Rules," as follows -

*1. A lawyer shall not entered into a business transaction with a client if they have differing interests therein or if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:*
    *1. The transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*
*2. The client is advised in writing of the desirability of seeking, and is given reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and*
    *3. The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction….*

4. Stay mindful of the definitions of "reasonable," and "informed consent."

### 4. Practical Considerations and Direction

1. Remember the unique function of elder law representations.

    1. family matters, presumed by some to mean there should be no conflicts
    2. multiple parties often want the same attorney, whether or not appropriate
    3. mutual history of interested parties
    4. dysfunction is the norm
    5. extra challenges in second marriage situations

6. It is impossible to appropriately represent multiple parties if those multiple parties each expect your conversations with each of them to be confidential respectively.

7. If retained by multiple clients, have all clients sign the retainer agreement.

8. Give "clients" the opportunity to separately get back to you ***after*** discussing potential conflicts collectively and ***before*** signing the retainer agreement.

9. Conflict considerations apply to attorneys acting as fiduciaries (and attorneys designated as beneficiaries) as well.

10. Avoid any conflict if you can, or document it well if you can't.

## IV. When Does the Attorney-Client Privilege Apply?/Who has the Right to Know What?

### 1. Statutory Guidance

Rule 1.6 - "Confidentiality of Information," provides as follows:

*1. A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:*

*(1) the client gives informed consent, as defined in Rule 1.0(j);*

*(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or*

*(3) the disclosure is permitted by paragraph (b).*

*"Confidential information" consists of information gained during or relating to the Representation of a client, whatsoever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential…*

*2. A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:*

*1. to prevent reasonably certain death or substantial bodily harm;…*

*(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed to be relied upon by a third party, where the lawyer has discovered that the opinion or representation was based upon materially inaccurate information ….*

### 2. Practical Considerations and Direction

1. As an attorney, whether or not in an attorney-client relationship with someone, you are always perceived as a lawyer. Play it safe and treat all communications accordingly.

1. It (almost) never hurts to ask your client if you can share information on his or her behalf.

2. Respect your client's sense of propriety and privacy.

## V. How Do You Represent a Client with Diminished Capacity?

### 1. Statutory Guidance

1. Rule 1.2 - "Scope of Representation and Allocation of Authority Between Client and Lawyer," which provides -

*1. Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4 ["Communication"], shall consult with the client as to the means by which they are pursued. …*

*1. A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.*

2. Rule 1.14 - "Client with Diminished Capacity," provides as follows:

*1. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.*

*2. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.*

*3. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 ["Confidentiality of Information"]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.*

3. The requirement of "Knowingly" - "Knowingly," "known," "know" or "knows" is defined at 1.0(k) as follows –

*…denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.*

4. Also keep in mind the definitions of "Reasonable" and "Informed Consent."

### 4. Practical Considerations and Direction

1. What you think is best for your client is not necessarily the position you should be taking.

2. Clients are presumed to have capacity, and they are free to make bad decisions.

3. Article 81 capacity and testamentary capacity are not the same thing.

5. As a lawyer you are not expected to make a medical determination as to your client's competence.

## VI. How Do I Get Paid?

### 1. Statutory Requirements

1. Generally speaking, Rule 1.5 - "Fees and Division of Fees," provides –

*1. A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense…..*

2. *A lawyer shall communicate to a client the scope of the representation …. and shall be in writing where required by statute or court rule….*

2. NYCRR Part 1215 (effective March 4, 2002) requires client engagement letters for all matters in which fees are expected to total $3,000.00 or more. In such instances, the letter must include -

*… [an] explanation of the scope of the legal services to be provided; explanation of attorney's fees to be charged, expenses and billing practices; and where applicable, notice of the client's right to arbitration of fee disputes [pursuant to Part 37 of the Rules of the Chief Administrator of the Courts]."*

### 3. Practical Considerations and Direction

1. Spend time in your consultation fully explaining all of the potential pitfalls of commencing or otherwise representing a client in any elder law representation, particularly if it is contentious, unique or challenging.

2. Discuss fees from the onset. There should be no surprises.

3. Always have a written retainer agreement – it protects both you and the client.

4. Keep contemporaneous time records.

4. Never bill for someone else's time.

5. Bill consistently, ideally monthly, and in accordance with your retainer agreement.

## VII. Conclusion

### 1. Critical Skills in Law Practice Management

1. There are eight critical skills of sound law practice management - time management, financial management, organization, leadership and supervision, communication, technology, rainmaking, and substantive legal skills.

2. Staying mindful of and honing these skills within your practice will help you avoid ethical dilemmas and achieve greater professional satisfaction.

### 2. Creating Good Habits

1. Consistent ethical behavior and sound management of your law practice is about creating good habits (and breaking bad ones if necessary).

2. Good habits can be created at any stage of your life and practice.

3. Some (but not all) of the most helpful law practice management "habits" you can make that will support consistent and relatively stress-free ethical conduct for you and your practice are –

1. Maintain one master to-do list (that you make after considering all of your various roles, setting your goals with respect to each role, and identifying the tasks necessary to accomplish those goals).

2. Maintain one good and complete calendar/scheduling system. Then refer to it constantly.

3. Be reasonable in planning your day.

4. Uni-task; learn how to concentrate on one thing at a time.

5. Don't procrastinate.

6. Create and utilize systems for tasks you do repeatedly. Communicate those systems to your staff.

7. Respond to all client contact within the same business day, if possible; if not, respond within 24 hours.

8. Leave time in your day for unscheduled client contact. Availability is vital.

9. Accurately communicate your availability with clients, or with those who are communicating with your clients on your behalf.

10. Develop a system to capture and retain all client and related communications.

11. Stay mindful of whom you are communicating with and maintain focus throughout all communications.

12. Communicate with clarity and remember your audience.

# MEDICAID TOPICS 2016

by

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**Medicaid Topics 2016**
**NYSBA Intermediate Elder Law CLE**

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# Topics covered

1. What is MAGI Medicaid under the Affordable Care Act?
   A. What is MAGI and who is eligible? How is household size calculated
   B. Who has a CHOICE of MAGI or NON-MAGI and how to choose?
   C. Can a MAGI person get Long Term Care – Home care or Nursing Home?
   D. Transitions Issues – When a MAGI person becomes eligible for Medicare – What Happens? What if She was receiving Home Care?
2. Update on MLTC and FIDA – Status and issues in 2016

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# AFFORDABLE CARE ACT: HOW DOES IT AFFECT YOUR PRACTICE?

- Affordable Care Act expanded Medicaid Eligibility for SOME categories, and Subsidizes Private "Qualified Health Plans" for Those with More Income – what are pros and cons and who can qualify?
- Transitions from "MAGI Medicaid" or QHPs When Clients Become Enrolled in Medicare

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## Medicaid Expansion – ACA – "MAGI"

- **WHO gets MAGI Medicaid**:
  - People **under age 65** who **do not have Medicare**
  - Medicare beneficiaries of any age and people 65 + caring for children < 18 or 18 and full time secondary school student
- Everyone else who is 65+ or younger with Medicare are "**Non-MAGI**" under old rules for income and assets
- **PRO: Higher Income limit** - 138% of Federal Poverty Level. Some MAGI categories have even higher income limits – children < 18 or 19-20 living with parents, pregnant women**. See** GIS 15 MA/021
- **PRO: MAGI HAS NO Asset limit**! But interest and dividends count as income.

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## Main Medicaid Categories – 3 sets of rules

| | MAGI | Non-MAGI | |
|---|---|---|---|
| | "Obamacare" - Affordable Care Act | (Disabled-Aged-Blind)("DAB") | SSI (Supplemental Security Income) |
| Who | • **< 65 and not on Medicare** OR<br>• any age on Medicare and caring for minor child/ grand-child | **Age 65+** OR<br>**Disability** – any age | |
| Asset limit (exclusions apply) | NONE<br>(but interest, dividends count as income) | $14,850-Single<br>$21,750 Couple | $2,000- Single<br>$3,000 - Couple |
| Income limit Monthly | **$1,367** – single<br>$1,843 – couple<br>138% FPL - Higher if pregnant, young children<br><br>MAGI = Modified Adjusted Gross Income | **$ 845** –Single<br>$1,229-Couple | $ 840 – single<br>$1,224 - Coue |

## More benefits of MAGI

1. **Quick online applications** – https://nystateofhealth.ny.gov/ or through Navigator (locate on same site). Quick approvals.
   - Rules complicated – best to refer to Navigator! (find online)
   - No proof needed unless reported income different than IRS database, and immigrant status documentation
2. **12 continuous months of coverage**, regardless of whether income increases.
   - Exception – People who turn 65 cannot keep MAGI Medicaid. GIS 15 MA/022 - Continuous Coverage for MAGI Individuals (more later)
3. **Covers full Medicaid benefits including home care**, and nursing home care, subject to 5 year lookback.
   - BUT requires transfer of administration of case from Marketplace to DSS for NH and MLTC!

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## More MAGI benefits - some income doesn't count

- MAGI uses federal income tax rules for Adjusted Gross Income, with some modifications – hence called **MAGI Medicaid**.
- Modified Adjusted Gross Income =
  - Adjusted Gross Income (AGI) from Tax Return
  - + Untaxed foreign income
  - + Tax exempt interest
  - + Non-taxable part of Social Security benefits (means ALL of the Social Security counts)
- Some income that counts for both MAGI and Non-MAGI:
  - Earned income – though Non-MAGI has better rules – disregards > 1/2
  - Social Security
  - Alimony
  - Unemployment
  - Net Rental Income

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## Some Income NOT Counted toward MAGI

| Type of income | Explanation |
|---|---|
| **Gift or inheritance** | Not taxable, therefore not counted. Not even cash gift. Taxed to the donor of the gift, or to the Estate, not to the recipient or beneficiary. |
| **Personal injury settlement** | Not taxable - see IRC 104(a)(2). Not MAGI income even if receive as structured settlement in monthly payments. Example below. Note that some lawsuit awards are taxable – discrimination/employment, business, punitive damages. See IRS Publication 525, IRS Rev. Ruling 85-97. |
| **Veteran's benefits** | MAGI - Don't count as income – both disability and pension benefits. Non-MAGI Disabled/65+ counts VA benefits except for Aid & Attendance. Military retirement pay IS counted. |
| **Income of child or tax dependent** | Income of a child or tax dependent who is not required to file a tax return is not included in the household income.<br>GIS 15-MA-08 (includes child's Social Security) |
| **Workers Comp** | Not Counted |

See 13 ADM-04, Attachment 4 (revised 8/5/2015) for additional examples of income not counted towards MAGI.

## Lump Sums and MAGI – 12 mo. continuous coverage

- **Lump sums** do not affect eligibility even if taxable (e.g. lottery or employment discrimination award), because they only count as income in the month received. Medicaid can't be cut off during the 12-month continuous eligibility period (unless client turns age 65 during the 12-month period). GIS 15 MA/022 - Continuous Coverage for MAGI Individuals
- The lump sum becomes a resource in later months – but resources are not counted in MAGI.
- Strategy tip: If lump sum is taxable, best to receive it in one payment or multiple payments payable during the 12-month continuous eligibility period. If it is not taxable, like a PI award, can receive it for years.
- WARNING: Taxable lump sums DO count for the Advance Premium Tax Credit and Cost-Sharing subsidy for Qualified Health Plans bought on the Exchange. Those use MAGI budgeting but eligibility is based on annual income, not monthly. So a lump sum, if taxable, is income (e.g. lottery).

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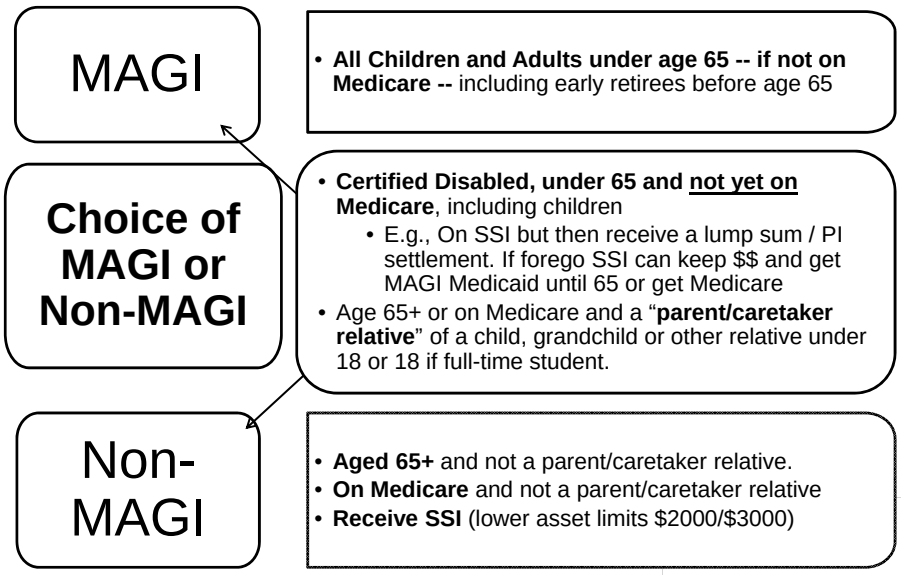
## Medicaid Eligibility Categories



# EXAMPLE: Mary

FACTS: Mary, age 55, lives alone and just won SSD benefits. – $1300/month. Won't have Medicare for 2 years. Has been living on some savings – has $50,000 and an IRA of $50,000.

1. What are her options for Medicaid? MAGI or Non-MAGI. MAGI is better for her:
   - Savings of $50,000 exceed non-MAGI limit of $14,850.
   - Must start taking distributions from IRA with non-MAGI.
   - She is income eligible since SSD under MAGI limit $1,367/mo., while she'd have a spend-down of $455/mo. with non-MAGI.
2. How would she apply for MAGI Medicaid? Find a navigator to help apply online through Exchange.
   http://info.nystateofhealth.ny.gov/IPANavigatorSiteLocations

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# EXAMPLE: Mary *con'd.*

FACTS: Mary, age 55, lives alone and just won SSD benefits. – $1300/month. Won't have Medicare for 2 years. Has been living on some savings – has $50,000 and an IRA of $50,000.

3. What happens when she gets Medicare in 2 years? At the end of her 12 months of continuous coverage, she will be non-MAGI. Will have to bring her assets down to $14,850, take IRA distributions, and will have a spend-down – may require pooled trust. She will receive a notice telling her how to renew Medicaid with the local DSS. Beware of problems!
4. What if she has a 14-year old child who lives with her? Mary can stay on MAGI even after Medicare starts, until child turns 18 (or 19 if in school full time). Child's social security doesn't count here.
5. What about the child? Child is MAGI and will keep MAGI Medicaid even after Mary is transitioned to non-MAGI Medicaid after child reaches 18 or 19. Mary's income may still count for the child, but they are separate cases.

## EXAMPLE: Mary *con'd.* – Lump Sum

FACTS: Mary, age 55, receives SSD $1300/month. Won't have Medicare for 2 years. Has savings $50,000 and IRA of $50,000.

6. If Mary settles a lawsuit, how does this affect her MAGI Medicaid eligibility?
   - A lump sum settlement would not affect her eligibility, during her 12 months of continuous coverage. It does not matter if it is taxable or not taxable. After the 12 months, if interest or dividends bring income above MAGI limit - she would need to spend down the excess resources and transition to Non-MAGI Medicaid.
   - If she received a structured settlement:
     - If the settlement isn't taxable, i.e. personal injury [IRC 104(a)(2)], it would not be counted as income for MAGI.
     - If it is taxable, then payments after 12-month period could disqualify her for MAGI Medicaid. Once she transitions to Non-MAGI Medicaid, a structured settlement payment could be placed in a pooled trust.

## Example: Sara

Sara, age 35, is disabled but lacks sufficient work quarters for SSD. She is on SSI. She receives a PI lawsuit recovery of $1,000,000. What are her options to keep Medicaid?

1. She can put it all into an SNT and keep SSI and Medicaid.
2. If she retains the money, she'd lose SSI. It will generate $20,000/year income at 2% return, or $1,667/mo. Will she be eligible for Medicaid under MAGI Medicaid if she's single? No. The income exceeds the MAGI limit of $1367.
3. If she gives away the money, will she lose MAGI Medicaid for home care benefits? No transfer penalty for home care.

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## Example: Sara con'd.

What is Sara's option with a Structured Settlement of the $1 million?

- If she chooses a structured settlement:
  - $500,000 annuity that will provide $3,000/month, and a
  - $500,000 lump sum with interest $833.33/month

Will she be eligible for MAGI Medicaid?

- Yes. Her only countable income is $833.33/month in interest. The $3,000 monthly payments under the annuity set up as part of the settlement agreement are not taxable so are not MAGI income. IRS Rev. Ruling 85-97; IRS Publication 525.
- But – when she reaches 65 or obtains Medicare, whichever happens first, she will be non-MAGI and payments will count as income and the lump sum will be a resource.

## Which to Choose if One has a Choice

| Factors | What to do |
|---|---|
| Is MAGI income under 138% FPL? | Pick MAGI! No asset limit, easy quick application. If client will need MLTC or FFS homecare, must apply at LDSS using "MAGI-LIKE Budgeting." |
| Is client working? | Non-MAGI has better EARNED income disregards<br>• 50% of gross earned income "disregarded" – while MAGI counts all gross income.<br>• If < 65 - Medicaid-Buy-In for People with Disabilities – income limit is 250% FPL (using DAB budgeting) |
| Is spouse's income too high? | If Spouse's income brings income above MAGI limit, choose non-MAGI with option for **spousal refusal** |
| Look at types of income | Workers comp, VA benefits, child support, gifts, PI settlement, lump sums not count as income for MAGI, unlike non-MAGI. If MAGI income >138% MAGI limit, Non-MAGI can you use **spend-down** or **pooled trusts** (not available in MAGI) |
| Excess assets? | No Asset test for MAGI! |
| Age/Medicare status | If close to 65 or to receiving Medicare, must plan for transition to Non-MAGI – Medicaid planning for resources, income. |

# DETERMINING COUNTABLE INCOME - MAGI

- What is "household size?"
- Whose income is counted toward eligibility?

See NHELP Household Size Quick Reference - http://www.healthlaw.org/issues/health-care-reform/MAGI-quick-reference

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## Income limit increases with Household Size

**138% FPL for various household sizes (for adults)**

| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|---|---|---|---|---|---|---|
| $1,367 | $1,843 | $2,319 | $2,795 | $3,271 | $3,747 | $4,224 |

- Compare to Non-MAGI for Disabled/Age 65+/Blind (DAB), where household size can only be **ONE or TWO**.
- MAGI uses **tax rules** - Who is in the household depends on whether the applicant is a:
  A. Filing taxpayer, not claimed as a dependent by another, or
  B. Tax Dependent, or
  C. Non-tax filer and non-dependent
- **Spouses** – Spouses who live together are in each other's household, regardless of whether they file taxes jointly. **NO SPOUSAL REFUSAL**!

42 CFR 435.603(f); 13 OHIP/ADM-0

## 1. Tax Filers Not Claimed As A Dependent

Household =

- Taxpayer
- + Spouse (even if filing separately)
- + Tax Dependents:
  - Qualifying Children
  - Qualifying Relatives

Special rule for Pregnant Women: Always count woman + number of babies expected.

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## 2. Tax Dependent

- Household = Same as the Taxpayer's, BUT
- Three Exceptions → Use Non-Filer/Non-Dependents household rules for:
  1. Dependent who is not taxpayer's child or spouse (e.g., child claimed as dependent by grandmother, or grandmother claimed as dependent by her grown son)
  2. Children living with both parents, who do not expect to file taxes jointly (e.g., minor children living with unmarried parents)
  3. Children claimed as dependents by non-custodial parent

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## 3. Non-Filer and Non-Dependent Rule

- Household depends on person
  - Adult's Household = Individual + Spouse and Children with whom they live
  - Child's Household = Individual + Parents and Siblings with whom they live
- Step- and adoptive parents, children and siblings count
- Children/siblings count if they are under 19, or full-time students under 21

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## Household Composition Example

- Joe and Mary are married and live with their 2 children, Abby and Bill, as well as Joe's Uncle Matt, who does not file taxes.
- Joe and Mary file a joint tax return, claiming the 2 children and Uncle Matt as dependents.

| | Household Size | Rule |
|---|---|---|
| Joe | 5 | Tax Filer – count spouse, dependents |
| Mary | 5 | Tax Filer – count spouse, dependents |
| Abby | 5 | Dependent rule – same as Tax Filer |
| Bill | 5 | Same as Abby |
| Uncle Matt | 1 | Non-Filer – just count self (see next slide) |

## Multi-Generation and Not-traditional Households

If a grandparent, uncle, grandchild, niece other relative or friend living with a taxpayer is:

- **claimed as a dependent** by the taxpayer but
- **is not a child or spouse of the taxpayer**

**The dependent's household is just HIM/HER** and -- if they are living with him -- his spouse, and his children/siblings < 19 (or <21 if a student)

- In the prior **Household Composition Example**, because Uncle Matt is claimed as a dependent, he is counted in Joe's, Mary's and their kids' Medicaid households. But Uncle Matt's MAGI household is just him. If Uncle Matt's Spouse and children < 19 (or <21 if a student) live with him, his household includes them too.
- Note: Uncle Matt can be claimed as a dependent & counted in Joe's and other's MAGI households even if Uncle Matt is non-MAGI (e.g., 65+)
- This rule helps low-income families with multi-generations living together.

## Determining Countable Household Income

To determine each applicant's household income, add up the MAGI income for each member of the household who is required to file taxes.

- Children's and other dependents' income is not counted unless the person is required to file a tax return
  - Even if voluntarily file, but not required to, income not counted
- Children's and dependents' social security benefits are not counted unless the child/dependent has an independent obligation to file taxes based on earned income and other types of unearned income.

GIS 15 MA/08

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# LONG TERM CARE & MAGI

- 15 OHIP/INF-1 (10/2015) (Q&A -Long Term Care and MAGI)
- GIS 14 MA/16, (Long Term Care Eligibility Rules and Estate Recovery Provisions for MAGI Individuals)
- 13 ADM-31
- 10 OHIP/ADM-1
- Department Regulations: 360-2.3, 360-4.4,
- MLTC Policy 14.01: Transfers from Medicaid Managed Care to Managed Long Term Care – at MRT 90 policies page http://www.health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policies.htm

# MAGI & Home Care

- All Medicaid community-based Long Term Care services are part of the MAGI benefit package.
- Most MAGI Medicaid recipients must receive home care services from their **mainstream Medicaid managed care plan** (plan that serves 4.5 million Medicaid recipients without Medicare). These include personal care (PCS), Consumer-Directed Personal Assistance (CDPAP), certified home health agency (CHHA), & private duty nursing.
- Members of mainstream plans may switch to MLTC only if they need a service not covered by the plan: social adult day care, environmental mods, home delivered meals. **MLTC Policy 14.01** - **Transfers from Managed Care to MLTC.*** Their Medicaid case must be transferred from the Marketplace to the LDSS for input of needed eligibility codes.

* http://www.health.ny.gov/health_care/medicaid/redesign/mrt_90.htm

# MAGI & Nursing Home Care

- MAGI includes Nursing Home care if "**medically frail**." Need for NH care alone meets that definition.* Does not require a disability determination UNLESS income > 138% FPL so not MAGI 15 OHIP/INF-1 #20 - 22.
- **Transfer of Assets** – If need NH care > 29 days, must submit 5-year lookback and normal transfer penalty/ exceptions apply. **GIS 14 MA/16**,
  - A MAGI individual is "otherwise eligible" if income < 138% FPL. 15 OHIP/INF-1
- **NO LIEN** on homestead.* But **home equity** limit applies to single individuals. 15 OHIP/INF-1 Q. #11.
- Must transfer case from Exchange to LDSS just like home care .
- **MAGI income limit** in NH = 138% FPL for single person, even if married - $1,367/month. If income under that limit, eligible and **no NAMI**. If over that limit, must qualify under Non-MAGI – regular rules.
- Cannot use spousal impoverishment unless switch to Non-MAGI budgeting.

***GIS 14 MA/16**, "Long Term Care Eligibility Rules and Estate Recovery Provisions for MAGI Individuals" and l Q& A **15 OHIP/INF-01 -** 15 OHIP/INF-1 (10/29/2015)

# Estate Recovery and MAGI

Estate Recovery applies to a MAGI Medicaid recipient for cost of:

- nursing home care or other home and community-based services received on or after 55th birthday,
- related hospital and prescription drug services received on or after the MAGI individual's 55th birthday
- Same exclusions apply for Non-MAGI Medicaid recipients – no recovery if there is a surviving spouse, disabled children, etc. SSL 369, GIS 14-MA/016, 15 OHIP/INF-1 Q. 12

(For non-MAGI, estate recovery of ANY Medicaid expenses after 55th birthday)

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# TRANSITIONS: MARKETPLACE TO LOCAL DSS

What happens when the MAGI recipient reaches age 65, or becomes eligible for Medicare?

Or had Medicare with a dependent child who is now over 18, so parent is no longer MAGI.

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## When a MAGI Medicaid recipient turns 65 or becomes eligible for Medicare

• 3 THINGS HAPPEN if no longer eligible for MAGI due to age:

1. MAGI Medicaid will be discontinued and will need to transition to "regular" Non-MAGI Medicaid, with asset limits and lower income limits. More details below.
2. The individual was likely in a Medicaid Managed Care plan that provided all Medicaid benefits. Once obtaining Medicare, client will be disenrolled from that plan and will have Medicare + Medicaid Fee For Service.
3. If client is on Medicare and received personal care or Consumer Directed Personal Assistance from the Medicaid managed care plan, needs to enroll in MLTC.
   Be alert for disruptions in care.
   Some tips below.

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## Transition (1) Termination of MAGI Medicaid

1. Two populations transfer to LDSS when no longer MAGI Medicaid eligible:
   a. Under 65 and begin receiving Medicare → Continue Marketplace MAGI Medicaid until end of 12-month continuous coverage period or until turn 65, whichever comes first. Then transfer to LDSS
   b. 65+ → cannot keep MAGI Medicaid. Must immediately transition to LDSS when turn 65.
2. Marketplace will:
   a. Identify individual who is no longer eligible for MAGI Medicaid due to age or Medicare and notify them that they are no longer MAGI Medicaid eligible.
   b. Make a referral to the LDSS to start a renewal process. LDSS sends the individual a renewal Medicaid application to apply for Non-MAGI Medicaid.
   c. Continue Medicaid on the Marketplace until the LDSS puts up temporary coverage.

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## Transition (1) Termination of MAGI Medicaid

3. The LDSS will put up temporary Medicaid coverage for several more months. Consumers must respond to requests for information from the LDSS to continue to receive Medicaid – proof of assets, income.
   - Should receive Notice with Aid Continuing rights if determined not eligible for Non-MAGI Medicaid GIS 15 MA/022 - Continuous Coverage for MAGI Individuals
4. Be alert for people age 65+ or on Medicare who are still entitled to MAGI Medicaid – if they are a caretaker for child/relative < 18 or < 19 in school. If MAGI is more advantageous, advocate for that option.

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## Transition (2) Leaving Medicaid Managed Care

If client is now eligible for Medicare, she will be automatically disenrolled from "mainstream" Medicaid managed care plan.

- Options for Medicare:
  1. **Original Medicare + enroll in Part D plan** + Medigap plan (optional)
  2. **Medicare Advantage** plan with prescription drug coverage.
  3. May be marketed to by her mainstream Medicaid managed care plan to enroll in their **Medicaid Advantage** product – this is a combo-plan which combines a Medicare Advantage plan with a Medicaid plan - covers both Medicare and Medicaid. If client had doctors already in the Medicaid managed care plan's network it may be ok as the network is likely to be the same. And obviates the need to buy a Medigap plan.

## Transition 3. What if client had home care from Medicaid managed care plan?

- People without Medicare must access personal care, CDPAP, and nursing services from their mainstream managed care plan – not from their local DSS.
- But.. When they get Medicare they are automatically disenrolled from the managed care plan! That means their home care STOPS. To prevent this disruption, DOH issued -
- **MLTC Policy 15.02*: Transition of Medicaid Managed Care to MLTC** (June 2015) - Members turning 65 who receive home care should be automatically transferred to an MLTC plan, if they don't select their own, preferably one owned by the same insurance company, which should continue the same care provided by mainstream plan. BUT no procedure if obtain Medicare based on disability, rather than on turning 65

*http://www.health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policies.htm

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# MANAGED LONG TERM CARE UPDATE

1. **FIDA UPDATE**
2. **NEW 7-Day Medicaid Application if Immediate Need for Home Care**
   - Spousal Impoverishment Budgeting available with Application
3. **Challenges for Current MLTC members**
   - Reductions in Hours of Home Care
   - Strategies to Increase hours - New 24-hour Care Definition
   - New Overtime Requirements

## MLTC now mandatory statewide

- Statewide, most adult "dual eligibles" (21+) who need community-based long-term care – personal care services (PCS), Consumer Directed Personal Assistance (CDPAP), certified home health care, adult day care, or private duty nursing must enroll in an MLTC plan.
- The **last 14 upstate counties became mandatory** in mid-2015.
- **Exceptions** –MLTC not mandatory if client is in hospice, if need only 8 hrs/week of housekeeping, or if in OPWDD, NHTDW/ TBI waivers. Can still apply at LDSS for PCS.

## FIDA status (Fully Integrated Dual Advantage)

- Still only a demo in NYC & Nassau County
- Expansion to Westchester and Suffolk Counties indefinitely delayed. No other expansion planned.
- FIDA = MLTC plan + Medicare Advantage Plan all in one plan – includes all Medicare and Medicaid services, including prescription drugs, home care, hospital, tests, etc. Must use all providers in-network.
  - MLTC members, in contrast, keep their own Medicare coverage, whether Original Medicare + Part D + Medigap or Medicare Advantage
- When FIDA started, MLTC members were "passively enrolled" in FIDA but had the right to opt out. In January 2017 State stopped passive enrollment.
- 8/2016 FIDA Enrollment - 5,090 vs. 160,000 MLTC

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## NEW FAST TRACK MEDICAID APPLICATION IF "IMMEDIATE NEED" FOR HOME CARE

- Solves delays in Applying for Medicaid and then Enrolling in an MLTC plan
- Immediate Needs Requests to LDSS.
- CAN USE Spousal Impoverishment Protections

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# MLTC - Delays in Enrollment

Statewide, an adult Medicare beneficiary 21+ who needs community-based long-term home care encounters long delays applying for Medicaid and then enrolling in an MLTC plan:

1. **Apply** for Medicaid at the County DSS/HRA — 45 days
2. Get a "**Conflict Free Eligibility**" assessment from Maximus (NY Medicaid Choice) — 15 days
3. **Pick a plan** - MLTC, Medicaid Advantage Plus, PACE or FIDA plan (Nassau/NYC only) –
   a. Schedule an in-home assessment with plan — 15 days
   b. Pick a plan and enroll.
   c. Enrollment paperwork must be submitted by 19th of month for enrollment to start 1st of next month. No mid-month pick-up dates. — 30-60 days

**TOTAL 3-5 months**

# TIPS to Expedite Medicaid Approval and MLTC Enrollment

Enrollment in MLTC can be held up by mysterious "coding issues" stemming from NY's antiquated Medicaid WMS computer system. Codes may wrongly show client is **ineligible** – leading MLTC to deny enrollment. Take these **Preventive Measures**:

1. Submit **Supplement A of Application** w/ bank statements, etc. to prove resources – do not just "attest" to resources. Otherwise not coded to enroll in MLTC - DOH-4495A except in Suffolk, Albany, or Schoharie Counties - there use Form DOH-5178A)
2. **If will have a SPEND-DOWN** - ask for "Provisional Medicaid" approval with Code 06 per GIS 14 MA/010 – so Medicaid activated even though spend-down not yet met.
3. **In NYC – apply only at HRA--HCSP Central Medicaid Unit**
   785 Atlantic Avenue, 7th Floor, Bklyn NY 11238 T: 929-221-0849
4. **Advocate with MLTC if refuses to enroll -**Give MLTC the DSS Notice approving Medicaid with a spend down. Ask to speak to supervisor.
   - Ask MLTC to request LDSS for "*conversion*" of eligibility to full Medicaid. NYC HRA has "conversion" form HCSP-3047a (updated 1/2015)*.

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## New Expedited Medicaid Application if in Immediate Need for Personal Care or CDPAP

- April 2015 - NYS law required DOH to create procedures for local DSS to process a Medicaid application in **SEVEN DAYS** for any applicant **with an immediate need** for personal care (**PCS**) or consumer-directed personal assistance (**CDPAP**) services & approve PCS/CDAP in 12 days. NY Soc. Serv. L. §366-a(12).
- July 2016 – new regulations effective. 18 NYCRR 505.14(b)(7) and (8) and 505.28(k);
- **DOH 16-ADM-02** - Immediate Need for Personal Care Services and Consumer Directed Personal Assistance Services

[1]42 USC Sec 1396a(a)(8); 42 C.F.R. Sec. 435.911; 18 NYCRR 360-2.4; NYS Medicaid Reference Guide pp. 487-488.

## New Regs & ADM for Expedited 7-Day Medicaid Applications – Effective July 6, 2016

**16-ADM-02 --**Who can use the new procedures?

1. **New Applicants** - or those with a **Medicaid application pending**,
2. **Individuals who already have Medicaid but not coverage of community-based long term care** (they "attested" to the amount of their assets and did not submit "Supplement A" with the application [alternate languages and formats of forms posted at this link)
3. **Individuals who have a MAGI Medicaid** case at NY State of Health ("Marketplace" or "Exchange"), who are *not* in a managed care plan. Their Medicaid must be transferred from NYSOH to the LDSS through procedures described in pages 5-6 of the ADM - the transfer can only be initiated with an email to hxfacility@health.ny.gov.

**Includes people applying from hospital or nursing home**.

See **Attestation Form**, attachment to 16-ADM-02.

## Procedures for New Medicaid Applicants with Immediate Need for PCS or CDPAP

1. DSS must determine **Medicaid eligibility within 7 calendar days** of receipt of complete Application.
   a. If application incomplete, DSS must request missing documents within 4 calendar days after receipt of physician's order & Attestation of Immediate Need.
2. Within **12 calendar days** of receiving complete Medicaid app, Attestation form and Physician's order, DSS must:
   a. Conduct social & nursing assessments
   b. Determine eligibility for & **authorize PCS/CDPAP and Number of hours**
   c. "Promptly notify" the recipient of the amount authorized
3. DSS arranges for services to be provided "as expeditiously as possible." 18 NYCRR 505.14(b)(8)(ii). (NOTE: no time limit!!)
   - DSS contracts with home care agencies to provide care or approves CDPAP

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## What to Include in Application for Immediate Need Medicaid

1. **In NYC – Cover Sheet / Transmittal Form (**will be posted when available at http://www.wnylc.com/health/entry/203/)
2. **COMPLETE Medicaid application (or approval Notice if already have Medicaid)**
   a. May "attest" to value of real property & assets – but better to verify
   b. May request Spousal Impoverishment budgeting if favorable
3. **Physician's order** for personal care (M11q in NYC) per 18 NYCRR 505.14(b)
4. Signed "**Attestation of Immediate Need**" Form – posted at https://www.health.ny.gov/health_care/medicaid/docs/ohip_form-0103.pdf - - and attached to 16-ADM-2 -described on next slide.
5. **HIPPA RELEASE** - OCA Form No. 960 - Authorization for Release of Health Information Pursuant to HIPAA
6. **Cover letter** describing Immediate need circumstances

[1]505.14(b)(7), 505.28(k), 16 ADM 02

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# New Attestation Form – Immediate Need

**"Attestation of Immediate Need"** Form –OHIP-0103. Attached to 16-ADM-2 & https://www.health.ny.gov/health_care/medicaid/docs/ohip_form-0103.pdf - which states you:

a. **Have no informal caregivers** available, able and willing to provide or continue to provide care;

b. Are **not receiving *needed* help from a home care services agency;**

c. Have no adaptive or specialized equipment or supplies in use to meet your needs; and

d. **Have no third party insurance or Medicare benefits available** to pay for ***needed*** help.

(NOTE – arguably, even if Medicare, hospice or private services in place, explain why they are not enough to provide "NEEDED" help, or that can't continue etc.)

- Form says may be submitted while hospitalized or in nursing home.

# Transition from Immediate Need to MLTC

- **Immediate Need PCS or CDPAP is only temporary.**
- **AUTO-ASSIGNMENT** - after 120 days receiving the temporary Immediate Need services, Maximus/ NY Medicaid Choice will send individual a letter that if she doesn't select & enroll in an MLTC plan in 60 days, she will be auto-assigned to a plan.
  - TIP - Use that time to select a plan – find plan that contracts with same home care agency, if client wants to keep aides.
- MLTC plan should continue the DSS Plan of Care for a **90-Day Transition Period.** MLTC Policy 13.10.* (DOH has not confirmed this but see FH **7214923Z** (Erie Co. ).
  - After 90 days, plan may reassess hours but under *Mayer v. Wing*, may reduce only if alleges and proves change in circumstances. See more later re REDUCTIONs. Must give advance notice with right to request hearing with aid continuing.

http://www.health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policies.htm

## NEW: Spousal Impoverishment available on application for IMMEDIATE NEED Medicaid

- Before DOH issued 16 ADM-02, a married person applying for Medicaid in order to enroll in MLTC had to initially apply using regular Medicaid rules – combining both spouse's income using couple level of $1209/mo. or using Spousal Refusal. Soc. Serv. L. § 366.3(a).
- This is because NYS sees Spousal Impoverishment as a "post-eligibility" budgeting methodology. GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act.
- **Under 16 ADM-02, married person may request Spousal Impoverishment budgeting with Medicaid application based on IMMEDIATE NEED for personal care or CDPAP**.

# ISSUE 3: CHALLENGES FOR MLTC MEMBERS

(1) Reductions in Home Care Hours

(2) New Definition of 24-hour care and other strategies to increase or keep hours

(3) New Overtime Requirements

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## Plans reducing hours of home care

- Since 2015 pattern of some MLTC plans reducing hours of personal care services and CDPAP, especially Senior Health Partners, VNS Choice, Centerlight.
- Medicaid Matters NY and NAELA NY released "**Mis-Managed Care"**
  - Report analyzed 1000+ MLTC FH decisions on reductions for 7 months June – Dec. 2015. See NYT Story July 21, 2016. Report posted at http://tinyurl.com/nytimes-FairHearing. Even DOH recognized increase in Fair Hearing requests for MLTC in 3rd quarter 2015.*
- Most people win hearings because plans fail to give any written notice or fail to give adequate notice with justification for reduction. But many lack the wherewithal to request or attend a hearing or get a lawyer, or they agree to accept a reduction without knowing their rights.

*http://www.health.ny.gov/health_care/medicaid/redesign/docs/partnership_plan_2015_annual_rpt.pdf p. 16

## Plans reducing hours - Strategies

1. **Request a hearing**. https://otda.ny.gov/hearings/
   a. Must request before effective date of notice to get **AID CONTINUING**, usually within 10 days of notice. But if notice not timely or adequate – can argue for Aid Continuing even if miss effective date. #7165494N
   b. Entitled to advance notice & Aid Continuing, even if plan mischaracterizes action as "denial" -- not a reduction. #7331553Q
   c. Must request FH even if request Internal appeal – No Aid Continuing on internal appeal – only hearing.
   d. Request **evidence packet** from plan to see assessments
2. If you can't rep, refer to ICAN – Statewide Ombudsprogram for MLTC - takes referrals of cases statewide. 1-844-614-8800 www.icannys.org
3. **Class action *Caraballo* lawsuit against one plan – Senior Health Partners** challenging systematic reductions of hours. Contact Ben Taylor at btaylor@nylag.org.

## Plans reducing hours – Review Plan's NOTICE

- Notice must state specific **change in medical condition or circumstances,** such as increased availability of family to help, justifying reduction. Not enough just to recite that not "medically necessary." Mayer v. Wing, 922 F. Supp. 902 (SDNY 1996)
  - 18 NYCRR 505.14(b)(5)(c)(2) was amended in 2015 to require more specific description of change - see FH # 7284013H (5/27/2016), 7224444Y (4/26/16), 7208804Q (Tompkins Co**);**
- Use **defects in notice** to win – and to request tolling of statute of limitations to appeal past reduction # 7060609N (NYC 8/11/2015)(notice not timely – must be 10 days in advance); FH# 7068290Q (NYC 9/29/2015)(notice inadequate); #7165494N (3-year old notice found defective so hearing request not barred)

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## Helping Clients Defend Reduction or Get More Hours

Strategies for advocacy with plan or at a hearing.

1. **Task-based assessment** --Task times are not set in stone – add time for unscheduled needs, individual traits, .. #7298776Z (NYC 8/8/2016), 7085459Y(NYC 9/16/2015) ("these maximum [task] times are not found in the regulation" and can be overridden).
2. **DEMENTIA/ Safety monitoring** – must authorize time to ensure safe performance of activities, which includes verbal cueing not just hands-on assistance. DOH GIS 03 MA/003 , FH # 7242238K
3. **Plan must cover SPAN OF TIME in which needs arise**. NYS DOH GIS 03 MA/003 --"… a care plan must … [meet] the patient's scheduled and unscheduled day and nighttime personal care needs." FH 7297626N , 7311117H

## More Strategies to keep or get more hours

4. **Informal Help must be Voluntary** - 18 NYCRR 505.14(b)(3)(ii)(b); 12 OHIP-ADM-01 -"…informal caregivers …support cannot be required but should be evaluated and discussed with the patient and the potential caregivers.");
   - GIS 97 MA/033 ("…contribution of family members or friends… cannot be coerced or required in any manner whatsoever." FH #: 7085459Y (9/16/2015); 7111878L (10/16/2015).
   - Have family member state clearly in writing the times they are available and willing to provide care.
5. **Mayer -3:** If client has 24-hour needs, even if family covers one shift, the plan my NOT use "task based assessment" to calculate the number of hours. They must cover the full span of time family is not available. 18 NYCRR 505.14(b)(5)(v)(d); GIS 97 MA 033, FH 7145223P and 7254996Z.

## New Definitions 24-hour Care - 12/2015

2015 amendments to regs defining two types of 24-hour care for those who, because of medical condition, need assistance daily with toileting, walking, transferring, turning or positioning. No longer need "total" assistance.

1. **Split Shift** – "uninterrupted care, by **more than one personal care aide**, for more than 16 hours in a calendar day for a patient who …needs assistance with such frequency that a live-in 24-hour PCA would be unlikely to obtain, on a regular basis, **5 hours daily of uninterrupted sleep** during the aide's eight hour period of sleep."
2. **Live-in** – "care by **one personal care aide** for a patient …whose need for assistance is sufficiently infrequent that a live-in 24-hour personal care aide would be likely to obtain, on a regular basis, **five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.**"

GIS 15 MA/024, Dec. 2015, 18 NYCRR 505.14(a), (b)(3)(ii)(b) at https://www.health.ny.gov/health_care/medicaid/publications/pub2015gis.htm

## Aides entitled to Overtime

- Federal labor regulations used to exempt home care aides from the Fair Labor Standards Act overtime requirements.
- Eff. Oct. 13, 2015, Aides must be paid overtime if work over 40 hours/week or Live-In aides working over 3 days in a work week.
- **Travel time** between different clients of the same employer/ home care agency must be paid. Travel to and from aide's home is not paid.
- **Live-in** – Must be paid for 13-hour day, and more if aide reports that 3 meal periods or 8 hours of sleep time are interrupted by a client's needs. Chronic problem of plans not paying 13 hours.
- http://www.health.ny.gov/health_care/medicaid/redesign/2015-11-09_flsa_decision.htm
- Fallout for clients – aides limited to 40 hours per week, wage cuts

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## Useful Contacts

- New York Medicaid Choice (888) 401-6582
- CFEEC scheduling (855) 222-8350
- DOH MLTC Complaints (866)712-7197 mltctac@health.state.ny.us
- Conflict free Assessment complaints - CF.Evaluation.Center@health.ny.gov
- DOH Mainstream Managed Care Complaints
  - (800) 206-8125
  - managedcarecomplaint@health.state.ny.us
- SEE SEPARATE LIST OF RESOURCES in materials.

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**1-844-614-8800**
www.lcannys.org
ican@cssny.org

# INDEPENDENT CONSUMER ADVOCACY NETWORK (ICAN)

State-funded Ombudsprogram for:

Managed Long Term Care, Long Term services in Managed Care Plans, FIDA

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**Intermediate Elder Law Update CLE**
**November 2016**
**IV. Community Medicaid**
**[Immediate Need]**



*New York Elder Law* by David Goldfarb & Joseph Rosenberg (Lexis/Matthew Bender, 2016)

Chapter 9
§9.02 [3] Immediate Need and Emergency Needs

If it shall appear that a person is in immediate need, emergency needs assistance or care must be granted pending completion of an investigation by the local agency.[25] Additionally, services may be available under "presumptive eligibility" (see § 9.02[1], *above*) and retroactive reimbursement is available (see § 9.02[5], *above*). In *Coleman v. Daines*,[26] plaintiffs asserted the right to emergency services pursuant to Social Services Law Section 133. The Appellate Division reversed the lower court's dismissal, reinstated the petition, and remitted for further proceedings; the Court of Appeals affirmed. Social Services Law Section 133 has since been amended in 2015 by adding, "Nothing in this section shall be construed to require the social services district or any state agency to provide medical assistance, except as otherwise required by title eleven of this article."[27] There is still no provision for medical care prior to an eligibility determination.[28] The Department of Health has adopted "Immediate Need for Personal Care Services (PCS) and Consumer Directed Personal Assistance (CDPA)" regulations which

[25] SSL § 133. However, SSL § 364-i *amended by* 2012 N.Y. Laws 56 and 2015 N.Y. Laws 57 to provide that, notwithstanding SSL § 133:

> where care, services, or supplies are received prior to the date an individual is determined eligible for assistance under this title, medical assistance reimbursement, regardless of funding source, shall be available for such care or, services, or supplies only (a) if the care, services, or supplies are received during the three month period preceding the month of application for medical assistance and the recipient is determined to have been eligible in the month in which the care or, service , or supply was received, or (b) if provided during a period of presumptive eligibility. pursuant to this section.

[26] Coleman v. Daines, 19 N.Y.3d 1087, 955 N.Y.S.2d 831, 979 N.E.2d 1158 (2012), *aff'g* Coleman v. Daines, 79 A.D.3d 554, 913 N.Y.S.2d 83 (1st Dep't 2010). *See also* Konstantinov v. Daines, 101 A.D.3d 520, 956 N.Y.S.2d 38 (1st Dep't 2012) and Konstantinov v. Daines, 2014 N.Y. Misc. LEXIS 1137 (Sup. Ct. New York County Mar. 12, 2014) (court refused to dismiss as moot due to 2014 legislative change to SSL § 364-i(7)). *Konstantinov* was also decided based on the federal and state constitutional grounds and the Appellate Division dismissed an appeal and remanded for further proceedings in light of 2015 legislative changes (June 2, 2015).

[27] 2015 N.Y. Laws 57 Part B § 35.

[28] GIS 14 MA/006 (03/13/2014) provides, "Finally, districts are reminded that, with the exception of Presumptive Eligibility programs, there is no legal authority to provide Medicaid coverage prior to a determination of eligibility."

add 18 NYCRR § 505.14(b)(7) and (8) and § 505.28(k) and (l).[29] These regulations meet the requirement for the Department of Health to develop expedited procedures for determining medical assistance eligibility within seven days rather than 45 days.[30] However they do not address the statutory provision that the Department of Health must require managed care providers and, managed long-term care plans and other long-term service programs to adopt expedited procedures for approving personal care services for medical assistance recipient who require immediate personal care or consumer directed personal assistance services or other long-term care, and provide such care or services as appropriate, pending approval by such provider or program.[31] Instead they provide for local agencies to provide these services.

Social Service Districts must provide expedited procedures for determining both Medicaid eligibility and eligibility for personal care services for applicants with immediate needs for personal care services. This includes new Medicaid applicants and recipients who are not authorized for long term care services. These applicants or recipients must present the district with a physician's order for personal care services and a signed attestation (on a Department of Health form) that they have an immediate need for personal care services and that they have no informal caregivers, are not receiving personal care services from a home care agency, have no adaptive or specialized equipment to meet their needs, and have no third party insurance or Medicare coverage that will pay for the needed assistance.[31.1]

An applicant must also submit a complete Medicaid application. However the applicant may attest to the value of real property and the current value of bank accounts. If the agency later has information indicating an inconsistency with the attestation, it can request documentation to verify resources.[31.2] The district must determine if the application is complete, or request additional documentation within four days.[31.3] When the application is complete, the district then has seven days to determine Medicaid eligibility and notify the applicant.[31.4] Simultaneously to processing the application and within twelve days the district should obtain a social assessment, nursing assessment and assessment of other services and determine eligibility for personal care services and the amount and duration of those services.[31.5]

There are similar provisions for existing Medicaid recipients who have an immediate need for personal care services. They may be exempt or excluded from managed long term care or not yet enrolled in a plan. And in addition they have been determined eligible as an immediate need applicant under the above provisions for new applicants or they are a recipient eligible for Medicaid coverage of community-based long term care services and provided the district with a physician's order for personal care services

[29] New York State Register, May 25,2016 at p. 14 (effective 07/06/16). See also 16ADM-02 (07/01/2016).
[30] SSL § 366-a(12) *added by* 2015 N.Y. Laws 57 Part B § 36-c.
[31] SSL § 364-j(31) *added by* 2015 N.Y. Laws 57 Part B § 36-b.
[31.1] 18 NYCRR §505.14(b)(7)(i)(a). The attestation form is an attachment to 16ADM-02 (07/01/2016).
[31.2] 18 NYCRR §505.14(b)(7)(i)(b).
[31.3] 18 NYCRR §505.14(b)(7)(ii); See 16ADM-02 (07/01/2016) which provides, "The four-day period starts the day after receipt of the three documents (application/request, physician's order, and signed attestation form). A complete Medicaid application means a signed Medicaid application and all documentation necessary for the district to determine the applicant's Medicaid eligibility. If the applicant has not submitted a complete Medicaid application, the district must notify the applicant of the additional documentation that the applicant must provide and the date by which the applicant must provide the documentation."
[31.4] 18 NYCRR §505.14(b)(7)(iii); See 16ADM-02 (07/01/2016) which provides that the seven-day period starts the day after all documentation is received.
[31.5] 18 NYCRR §505.14(b)(7)(iv); 16ADM-02 (07/01/2016) notes that no referral to the local professional director is required in 24-hour cases or in any other case in which the regulations otherwise require such referrals to the LPD.

and the signed attestation of immediate need on the required form,[31.6] In such cases the district must perform the assessments for personal care services and determine the amount and duration of services to be authorized within twelve days. If the recipient is not exempt or excluded from enrollment in a managed care entity, the district must authorize services until the person is enrolled.[31.7]

There are similar regulations governing the consumer directed personal assistance program.[31.8] The amended regulations also permit the nursing assessments to be performed by registered professional nurses under contract with the local districts.[38.9]

New York City Human Resources Administration has advised of the following procedures to obtain immediate need services:

The immediate need home care request must have: (1) a fully completed M11-Q form annotated with "Immediate Need - Emergency Home Care Request" on top of the first page; (2) for new applicants, a fully completed Medicaid Application with required income documentation; and (3) a cover letter providing details of the reason for the immediate need, other relevant information (a contact person would be helpful to expedite processing but not required).

The request should be faxed to (917) 639-0665. The fax cover sheet should be addressed to: "Immediate Need Emergency Home Care Liaison – Ms. Donna Jones". Subject: Immediate Need - Emergency Home Care Request.

[31.6] 18 NYCRR §505.14(b)(8).
[31.7] 18NYCRR §505.14(b)(8)(iii)(a).
[31.8] 18 NYCRR §505.28(k) and (l).
[38.9] 18 NYCRR §505.14(b)(3) and §505.28(d)(3).

# SSI, SSD AND SOCIAL SECURITY

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**ELDER LAW AND SPECIAL NEEDS SECTION:**

**NYSBA INTERMEDIATE CLE: NOVEMBSER, 2016**

# SSI, SSD AND SOCIAL SECURITY

**Steven P. Lerner**

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## I. INTRODUCTION

The Social Security Act provides an economic cushion for seniors and those with disabilities. The following is an overview of the Social Security benefits available to children and adults with disabilities, i.e., SSI, SSD and Adult Disabled Child's Benefits. These materials also discuss Social Security benefits available to Dependents and Survivors of wage earners who are deceased, retired or disabled. Lastly, the materials touch on the timing of taking Social Security retirement benefits for single individuals and married couples.

## II. PLANNING FOR THE JONES FAMILY

GRANDMA and GRANDPA JONES come in to meet with you along with DAUGHTER DEBBIE. GRANDMA is 64 and GRANDPA is 66. DEBBIE is 45.

DEBBIE's husband just passed away and she wants to know what benefits, if any, might be available to her through Social Security. She has two sons, SON SAM is 19 and SON SAUL is 15.

SON SAM is no longer in school. He had been in special education classes and received a local diploma. Although the school would have allowed him to stay until 21, he decided not to. He has been working at the local supermarket, earning $10/hour for a 20 hour week. They originally hired him to stock the shelves and serve as a cashier for 30 hours/ week, but after the first week he asked his hours to be reduced. The anxiety of working was too much, and he was not sleeping or eating. He seems to do okay with the shelf stocking but never got the hang of the cash register.

SON SAUL is still in school. He receives special services through the resource center and is in mainstream classes. He has extended time to take his exams and is allowed to take his exams in the resource room, where he gets extra time and an aide can read the tests to him. He answers the questions on his own. He doesn't work and has never worked. This is the first time that he will take a Regents exam, and DEBBIE is very nervous that he won't be able to pass any Regents.

DAUGHTER DEBBIE wants to know whether she will be able to get benefits as her husband's widow. She has not been working, having been the "stay at home Mom" to her two sons. She hasn't worked since SAM was born 19 years ago. Her last job was as an administrative assistant, earning $20,000/year. She has an Associate's degree from her local community college and is in good health.

DAUGHTER DEBBIE also wants to know what would happen if she did go back to work or even remarries (though it is hard for her to imagine that, given her husband's sudden and recent death) . They had been married for 22 years. HUSBAND HARRY had been a carpenter, proudly belonging to the union.

GRANDMA and GRANDPA want you to prepare their estate plan. They want to make sure that if they leave money to DEBBIE, their only child, that an inheritance won't affect her benefits or the benefits of the children. They also want to know what would happen if, God forbid, DEBBIE predeceased them – how should they provide for their grandchildren? And, lastly, GRANDMA and GRANDPA want some guidance on what would happen if they took their Social Security now? GRANDPA still goes into work as an insurance adjuster, and he has no plans on "being put out on the farm". GRANDMA doesn't work and hasn't worked outside of the home since her "baby" (45 year old DEBBIE) was born. They also want to know about Medicaid planning if one or both of them should need long term care.

## III. SSI: THE FEDERAL ENTITLEMENT PROGRAM FOR THOSE WITH DISABILITIES UNABLE TO WORK

### A. Introduction to Supplemental Security Income

The Supplemental Security Income (SSI) program, 42 U.S.C. 1381 et seq. was signed into law in 1972 by President Nixon in order that the "worthy poor" receive a standard monthly income paid by the federal government and administered by the Social Security Administration. The SSI program is a needs based program. The federal program provides a monthly cash stipend to the aged, blind and disabled whose available resources and income do not exceed the maximum income and resources standards of the program.

The statute addressed gaps in federal benefit coverage for the aged, blind, and disabled who had not been able to work sufficiently to be currently insured so as to receive disability benefits that existed under the Social Security Act and who were poor. 42 U.S.C. 1381. Prior to the enactment of the SSI program, only state welfare programs were available to provide

monthly income to this group of "worthy poor". The federal benefit amount is $733 in 2016. States have the option of adding an optional state supplement "OSS" to the federal benefit amount That amount is $87/month for 2016 in New York for those residing in their own households. As of 2014, New York State has paid this Optional State Supplement separately from the federal SSI check paid to the recipient.

SSI uses the same definition of disability as does the Social Security Disability Insurance program. A person with a disability is someone whose inability to perform substantial gainful employment is expected to last for 12 months. 20 C.F.R. § 416.905. A blind person has central visual acuity of 20/200 or less in the better eye with the use of correcting lens. 20 C.F.R.§ 416.981. An "aged" person is one over the age of 65.

**B. Children's Benefits**

Until a child reaches 18, the financial eligibility of a child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child through the month of his/her 18th birthday. 20 C.F.R. 416.1202(b)(1). A two parent household may have no more than $3000 in countable assets, while a one parent household may have only $2000.00. The parents' income must be at the poverty level. If the child does not have his/her own assets through a lawsuit recovery or inheritance, most estate planning attorneys will not encounter families with minor children on SSI who come in for planning.

After 18, however, the parents' assets and income will not be counted when an application is made for the "adult" child's own SSI benefits. Only his or her own assets and income will count. Many clients consult counsel in preparation for the child's application for

SSI and to review existing assets and documents to prepare for the future of their son or daughter.

**C. Resource Transfer Rules for SSI**

An SSI recipient may have no more than $2,000 in countable assets. If a child is under age 18 and lives with one parent, $2,000 of the parent's total countable resources is exempt. If the child lives with 2 parents, $3,000 of the parent's total countable resources will not count. SSI will count amounts over the parents' resource limits as part of the child's $2,000 resource limit. In general, the uncompensated transfer of resources will result in a period of ineligibility for SSI. The wait is calculated by dividing the amount of resources transferred by the monthly SSI benefit. There is a 36 month look-back, and the ineligibility period is capped at 36 months, no matter how great the transfer. 42 U.S.C. § 1382b(c)(1)(A). If $820/month is the monthly benefit, and $8,200 is transferred, there will be a 10 month ineligibility for SSI. If $82,000.00 is transferred, there will be a 36 month ineligibility. No ineligibility period will be assessed to transfers into a trust by someone under the age of 65 which provides a payback to the State for the lifetime of Medicaid provided pursuant to 42 U.S.C. § 1396p(d)(4)(A) or to a pooled income trust pursuant to 42 U.S.C. § 1396p(d)(4)(C). 42 U.S.C. 1396p(c)(2)(b)(IV**)**. There is no payback for SSI benefits. 42 U.S.C. § 1382b(e)(5).

**SO: WHEN THE CHILD HAS SAVINGS BONDS OR A CUSTODIAL ACCOUNT, OR GERBER'S LIFE INSURANCE, WHAT TO DO?**

1. A Special Needs Trust may be established for bonds.

2. There has been a problem with some contracts for Gerber's life insurance, that automatically convert the ownership to the former child who is the beneficiary upon his/her reaching the age of 18. If the child doesn't have capacity, legal guardianship is needed to affect

the transfer of the ownership of the insurance, and that would be a disqualifying transfer for SSI purposes if a payback SNT will not own the insurance.

**3.** UTMA ACCOUNTS: These become vested in the child upon his reaching the age of 21. ISSUE: May the custodian/parent establish and fund a "payback" SNT prior to the child's reaching the age of 21? In the New York Region, an opinion e-mail issued by SSA Regional Office advised that parents holding UTMA and UGMA accounts may establish an SNT with UTMA and UGMA funds. This e-mail referenced Section 12b of UTMA Act, which has fewer limitations on investments than do other statutes concerning fiduciaries, and Section 13a, which gives the custodian all of the rights that an unmarried adult would have as to those assets.

### D. Deeming of Income and Assets from Parent to Child

#### 1. Overview

Until a child reaches 18, the financial eligibility of a child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child through the month of his/her 18th birthday. 20 C.F.R. § 416.1202. After 18, however, the parents' assets and income will not be counted when an application is made for the "adult" child's own SSI benefits. Only his or her own assets and income will count. Id.

#### 2. Deeming of Resources

When there is one parent living with the child with a disability, even if there are other children, the parent may have only $2,000 in countable resources. 20 C.F.R. § 416.1202(b). If the custodial parent has remarried, the resource level is $3000. See id. A parent's home, a car, household furnishings and goods and retirement funds, such as

IRAs, KEOUGHS or tax sheltered annuities, do not count as resources that are deemed available to the child. 20 C.F.R. § 416.1202(b)(1)(i).

The assets and income of a noncustodial parent are not deemed available to the child. See 20 C.F.R. § 416.1851(c), referring only to the deeming of assets of a parent living with the child. The assets and income of a stepparent are, however, deemed available for the support and maintenance of a child with a disability for SSI purposes. 20 C.F.R. § 416.1202(b)(1). A stepparent means the spouse of a natural or adoptive parent living in the same household with the parent. Id.

When a parent who does not receive SSI transfers assets, there is no penalty for the child's SSI caused by the parent's transfer of assets. "[T]he provision [of transfer of resources] does not apply to a resource transfer made by a parent who is a deemor (unless the eligible child and parent are co-owners of the resource." POMS SI 01150.110E. **See Attachment 1.** The SSI caseworker may not be aware of this provision.

This provision is particularly important in a personal injury context where the parent has a received a loss of services award for a child who will place his/her funds into an SNT. This provision is also important if the parent receives an inheritance. If the parent retains the funds, the child will lose SSI, notwithstanding the SNT. If the parent transfers the funds, and s/he is not a disabled person, the parent's transfer of assets to another who is not a member of the household will not affect the child's ongoing eligibility for SSI.

**3. Deeming of Income**

A parent's earned and unearned income is deemed available to a child for SSI purposes. Earned income includes wages and salary or income from self-

employment. 20 C.F.R. § 416.1110. Gross income, not net earned income is counted. 20 C.F.R. § 416.1110(a)(1). Unearned income, such as interest, dividends or annuity payments or monthly maintenance (alimony) is also counted. 20 C.F.R. § 416.1102.

**a. Child Support as Income**

SSI defines child support as payments from the parent to or for the child to meet the child's needs for food and shelter. It may be voluntary or court-ordered. POMS SI 00830.420(A)(1). Child support is considered income of the child, not of the parent for SSI purposes. Id. When child support is paid to the custodial parent for a minor child with disabilities, i.e., one who is under the age of 18, **2/3 of the child support** will count as unearned income of the child that reduces the SSI payment dollar for dollar. POMS SI 00830.420(B)(1).

**b. Application of Deeming**

The following is the process in which to compute the deeming of income from parent to a child with a disability: If the parent has earned income, the first $85 is disregarded. Then ½ of the remaining income is deemed available to the child LESS the adult federal benefit level, currently $733/month. If the parent has only unearned income, the first $20 is disregarded. Then all of the remaining income is deemed available to the child LESS the adult disregard of $733/month. The resulting figures are deducted from the child's SSI amount. Because the SSI program is intended to encourage individuals to work, only approximately half of earned income is deducted from one's SSI, while almost all unearned income is deducted.

SO assume a parent earns $2,500/month gross income and has only one child, a minor, with a disability. The SSI amount for the child is $733/month. How will the parent's earned income affect the SSI amount?

1. Deduct $85 from $2,500 = $2,415. Deduct half of that amount = $1207.50. LESS the federal benefit level for an adult (parent not applying for SSI herself) $1207.50 - $733 = $474.50. That is the amount deducted from the child's SSI. Child will receive $258.50.

2. HOWEVER, if the income of the parent is all UNEARNED INCOME, i.e., Social Security, a pension or an immediate annuity, etc. bringing in the same $2,500/month, the figures change. Deduct only $20 (first $20 income disregard) = $2,480. Deduct the federal benefit level for an adult (parent not applying for SSI) $2,480 – 733 = $1,747. That is the amount deducted from the child's SSI. $733 - $1,747 = $0. The child will not receive any SSI.

**SO IN OUR SCENARIO:**

1. Is 15 year SAUL disabled? Under Social Security guidelines, a child under age 18 will be considered disabled if he or she has a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of at least 12 months.

An important factor that is considered in the determination of disability is the maturation and development of the child and is it significantly less than other children his age. School source material is critically important here. The child's performance in

school, coupled with his social interaction with other students and with his teachers, his behavior, his following instructions, etc. are all considered, as whether he is in mainstream classes, mainstream classes with accommodations or self-contained special education classes. In addition, IQ testing, reports from the School's Committee on Special Education and school counselors and psychologists are important evidence in the disability process.

2. If he has no money or income of his own, and Debbie has no income and assets, he would qualify for SSI if he were found to be disabled.

3. If she worked and earned about $2,500/month, he would still qualify for some SSI. ($2,500 LESS $85 LESS HALF OF THE REMANDER LESS FEDERAL BENEFIT LEVEL FOR AN ADULT IS DEDUCTED)

4. If she inherited assets from her husband other than the house and retirement accounts, SAM would not receive SSI due to her assets UNLESS she gave them away to GRANDMA and GRANDPA OR invested them in a home (paying off a mortgage or buying a home).

5. If DEBBIE inherited income from her husband, such as an annuity or pension, that UNEARNED income would preclude eligibility for SAUL's SSI if it were more than approximately $1,500/month.

### E. Applying for SSI Upon the Child's Reaching the Age of 18

#### 1. Definition of Household

The SSI program pays a higher amount to those who live in their own household than to those who live with others or in another's household. An SSI recipient is residing in his/her own household if he or she has an "ownership interest or a life estate interest in the home," 20 CFR §

416.1132(c)(1), or pays the shelter costs in a business arrangement, id. at (c)(3), or pays "at least a pro rata share of household and operating expenses." Id. at (c)(4). In the context of a family, when the SSI applicant cannot pay a pro rata share of household and operating expenses, then the Social Security Administration considers a rental subsidy provided by the parents as income that will reduce the SSI monthly payment by 1/3.

**2. Effect of Pro Rata Share Rule**

The pro rata share standard in determining household living arrangements thus results in a reduction in SSI benefits for the 18 year old child whose SSI is not sufficient to pay his pro rata share of the monthly household expenses. Assuming a middle class home with two parents and one 18 year old son, with a mortgage and taxes of $2,800/month and utilities of $500/month and food of $600/month, the total household expenditures are $3,900/month. The son's pro rata share of the household expenses would be $1,300/month. However, the SSI maximum payment is $820/month. The SSA will impute the discount given by the parents to their son's portion of household expenses as income to him.

The SSI payment will be reduced to reflect the household living subsidy, called in-kind support and maintenance, provided by the parents who are not (cannot) charge their child his/her pro rata share of the household expenses.

**3. But NOT in the Seventh Circuit: Fair Market Value of Rent is Presumed if the Rent is at Least 1/3 of the federal SSI Benefit Monthly Payment**

When the SSI recipient pays for room and board in a business arrangement, there is a presumption that the landlord has charged the fair market value for room and board. 20 C.F.R. § 416.1130 (b). Hence there is a presumption that the SSI recipient has not received a subsidy resulting in in-kind support and maintenance and a reduction of SSI monthly payments. In the

Seventh Circuit, a business arrangement is presumed to exist when the rent charged is at least 1/3 of the SSI monthly benefit amount. 20 C.F.R. § 416.1130 (b), codifying Jackson v. Schweiker, 673 F. 2d 1076 (7th Cir. 1982), but only in the Seventh Circuit.

**4. And not in the Second Circuit: Ruppert v. Bowen and the Actual Economic Benefit Rule**

In the Second Circuit, pursuant to Ruppert V. Bowen, 871 F.2d 1172 (2d Cir. 1989) and the Ruppert Acquiescence Ruling, AR 90-2(2), www.ssa.gov , no in-kind support and maintenance is being provided to an SSI recipient whose parent is charging at least 1/3 of the federal benefit monthly payment plus $20 as a flat fee for room and board. So long as the parent charges at least one third of $733/month plus $20 for room and board, or $265/month, there should be no reduction in the monthly SSI benefit amount.

**5. A contract for necessities may be implied rather than written.**

When the now adult child with a disability cannot enter into a written lease agreement due to cognitive impairments, the contract may be implied rather than written if it is providing a necessity (room and board) to the person with a disability. Ruppert v. Bowen, 871 F.2d 1172( 2d Cir. 1989). Hence no formal written lease need be presented to the Social Security Administration with the application.

**6. Loans are not income for SSI purposes**

Proceeds of a loan are not considered income for SSI purposes. 20 C.F.R. § 416.1103(f). Food and shelter provided as a loan do not count as in-kind income reducing the SSI benefit. Hickman v. Bowen, 803 F. 2d 1377 (5th Cir. 1986). SSR 92-8p. It is the donor's intent, not the intent of the adult child, whether the provision of room and board is a loan to be repaid or a gift. Ruppert v. Bowen, 871 F.2d 1172( 2d Cir. 1989).

Thus, during the period of time when the application is pending, the parent providing food and shelter to his child without being paid monthly for the room and board is not providing in-kind support and maintenance to reduce the SSI benefit, so long as the parent intends to be reimbursed from the retroactive SSI.

**7. Tips to the Parents Applying for SSI for their 18 Year Old Son/Daughter**

1. The Social Security Administration should NOT ask the parent about household expenses on the application. Answer: Not Applicable.

2. Parents MUST charge and collect the room and board in order to comply with the rules. "Cash must pass hands".

3. The contract/lease may be written but may also be an implied contract for necessities. **See Attachment 2**: Ruppert v. Bowen, 871 F. 2d 1172 (2d Cir. 1989).

4. The parents will charge a flat fee for room and board.

5. When asked to list everyone in the applicant's household, list only the applicant. For household living arrangements, the child is living alone, i.e. in his own fiscal household.

6. When asked how the child is paying for the room and board while the application is pending, the parent will be making a loan of the food and shelter.

7. When the child receives the SSI payment, s/he must pay back the parent for the outstanding loan of the room and board from the first SSI payment, which will be retroactive to the application date.

**F. SSI Offset for Recipients who Work:**

If an SSI recipient works, s/he may still be considered disabled if s/he needs assistance in working. The salary will offset the SSI. To calculate the amount that the salary will reduce the monthly SSI payment, one first subtracts $20 from the gross monthly salary and then $65. One

divides the remainder in half, and that quotient is the amount that the earned income will reduce the SSI. If one earns $1650/month, deducting $85 = $1565, and then dividing the remainder by half, one has $782.50 that will be deducted from $820. The adult's total income will be $37.50 from SSI plus $1650 in salary.

**SO IN OUR SCENARIO**:

1. SAUL could be considered disabled if it were shown that he is not substantially gainfully employed and can work only 20 hours/week due to his disabling condition.

2. DEBBIE's income and assets would no longer be deemed available to him.

3. He should be found to be residing in his own household for an SSI benefit of $820/month if DEBBIE charges him a flat fee for room and board.

4. SAUL's earned income of $800/month will offset his SSI. The first $20 and then $65 will be disregarded, bringing him to $715/month. Half of that amount, $357.50, is deducted from his $820, giving him monthly SSI of $462.50 in addition to his earnings of $800/month, for a total income of $1262.50, more than either the SSI or his earnings alone.

**G. Earned Income Disregard for Full Time Students**

A child with a disability under the age of 22 who is regularly attending school may exclude up to $1,780/month in earned income from computation for his/her SSI eligibility. The maximum earned income exclusion is $7,180/year. "Regularly attending school" means at least 8 hours/week at college or 12 hours/week for grades 7-12. If the school is a training course to prepare for employment, s/he must attend school for at least 12 hours/week, and 15 if shop practice is required. 20 C.F.R. 416,1861; SI 00501.020.

**H. Optional State Supplement Issue**

New York provides an Optional State Supplement of $87/month to the federal SSI benefit level of $733/month for those residing in their own households. The State is bound by the decision of the Social Security Administration as to whether or not one is residing in his own household. 18 N.Y.C.R.R. 398-4.3. Notwithstanding this regulation, in recent months New York State has reduced the Optional State Supplement to $23.00/month based on its own interpretation of the State Living Arrangement.

In several cases, the State characterized 18 year old adult children paying room and board to their parents as living with others and not as living alone, even though they complied with the Ruppert household living arrangement. The State reduced their Optional State Supplement to $23/month. Requests for reconsiderations were successful, and no hearings had to be held to correct the State Supplement and bring it to $87/month. **See Attachment 3 – Letter, Decision, Living Arrangement Form, 18 NYCRR 398-4.3, 18 NYCRR 398-4.5.**

**I. SSI POMS and First Party "Payback" Trusts**

Social Security POMS have addressed SSI issues with First Party SNTS. Their directives are as follow:

1. Payments made by a trustee to third parties or entities providing the beneficiary anything other than food and shelter for the beneficiary will NOT affect SSI.

2. Income from the Trust paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar. See SI 01120.203B(1)(c).

3. Use of the Trust to pay for food and shelter will result in in-kind income to the beneficiary, reducing the SSI payment by up to 1/3 of the federal benefit amount. An SNT Trustee MAY provide food and shelter for the beneficiary, but must decide whether the

consequent reduction in the SSI is beneficial to the beneficiary, in the trustee's discretion, depending upon the terms of the SNT.

4. Paying for restaurants is considered food rather than recreation by the Social Security Administration. POMS SI 01120.201I(1)(d). www.ssa.gov.

5**.** An SNT may be funded with accumulated SSI. A Representative Payee may transfer SSI benefits to an SNT or fund an existing SNT, GN 00602.075(A), so long as these are not retroactive SSI benefits for a child under 18, as these must be held in dedicated accounts. GN 00603.025(B).

6. When the Representative Payee is funding an SNT, the Representative Payee must determine that the trust is in the best interest of the beneficiary, and that it will be used exclusively for him/her and that s/he is the sole beneficiary during lifetime. GN 00602.075c(1).

7. Income irrevocably assigned to the trust from an annuity or support payments made when the beneficiary was less than 65 and which continue after the age of 65 remain protected by the trust. SI 01120.200G(1)(b).

**8**. Disbursements that are not cash and which do not result in in-kind support and maintenance are not income. Examples given by the POMS include payments to third parties for education, therapy, medical services not covered by Medicaid, recreation, entertainment and phone bills. Payments made to third parties for items such as household goods that are not considered a resource do not result in income for the beneficiary in the month that they are paid for. SI 01120.200E(1)(c). See also SI 01120.201I(c).

9. Additions to trust principal made directly to the trust are not income to the beneficiary if such payments have been irrevocably assigned to the SNT. SI 01120.200G(1)(b).

10 Income that, by its own provisions, may not be irrevocably assigned to the SNT include monthly payments from Social Security, public assistance (TANF or AFDC), Veterans benefits, federal employee retirement payments, and ERISA private pensions. SI 01120.200G(1)(c).

11. Payments for credit card bills are not income if the credit card was used to pay for items other than food or shelter or countable assets. SI 01120.201I(1)(d).

12. Credit card bills paid by the trust for restaurants will result in in-kind support and maintenance, subject to a 1/3 reduction. Id.

13. If the trust assets are used to pay for gift cards and gift certificates, this will be considered unearned income in the month of receipt, even if the gift certificate is to a store that does not sell food or shelter items if the individual could sell/exchange the card for cash. SI 01120.201I(1)(e).

14. Household goods, i.e., items of personal property found in or near the home used on a regular basis, are not countable resources. 20 C.F.R. § 416.1216(a)(1). These items include, but are not limited to furniture, appliances, electronic equipment such as personal computers and televisions, dishes, cooking equipment, etc. 20 C.F.R. § 416.1216(a)(2).

15. Personal effects include items of personal property ordinarily worn or carried by the SSI recipient. 20 C.F.R. 416.1216(b)(2).

16. Items acquired or held for their value, such as collectibles, gems and jewelry that is not worn or owned due to family significance are countable resources. Id.

17. Credit cards issued to the beneficiary enable the trust to be used for the benefit of the beneficiary without the trustee's going shopping with the beneficiary for all items.

**SO IN OUR SCENARIO:**

1. If SAM had inherited money from his father and had established an SNT through his mother, the trust would not affect his SSI if not used for food and shelter.

2. If this trust will pay for his rent in an apartment so that he can live on his own, for example, the use of the trust for his rent would reduce his SSI by up to 1/3 because it is providing in-kind support and maintenance.

3. If SAM uses a credit card to make his payments, he will be able to use his SSI for cash and have the trust pay his credit card bills without affecting his SSI so long as the trust does not pay for food and shelter.

**J. Noncitizens' Eligibility for SSI**

1. Individuals who were lawfully residing in the United States as of August 22, 1996 who are blind or disabled are eligible for SSI.

2, Noncitizens who were receiving SSI on August 22, 1996 and are lawfully residing in the United States are eligible for SSI.

3. Noncitizens lawfully admitted for permanent residence under INA and have 40 work credits in the United States and entered prior to August 22, 1996 are eligible for SSI.

4. If a noncitizen entered the United States after 8/22/1996, s/he will not be eligible for SSI for 5 years even if s/he has 40 work credits. See generally 20 CFR § 416.1166(a)(3); DI 23515.005; 42 USC 202; POMS SI 02610.025.

**K. Deeming: Spouse to Spouse**

Assets and income of a spouse not applying for SSI are deemed available to the SSI applicant/recipient spouse. Deeming is applied when the spouses live in the same household. The couple may have $3,000 in resources. The deeming is applied in much the same way as with parent to child deeming. To determine the amount that income will reduce an SSI benefit,

assume the spouse earns $3,000.00/month. Earned Income is employment wages, the net earnings from self–employment, certain royalties, honoraria, and sheltered workshop payments. The gross earned income of the non-applicant is reduced by $20 and then $65, with half of the remaining income used as a base number. ($3,000 - $85 = $2,915, divided by 2 = $1457.50. From that number $733, the federal benefit level for an adult, is subtracted ($1417.50 - $733 = $724.50. That is the amount that would be deducted from the spouse's SSI. The Federal income level for a household of 2 is $1,100/month, plus the OSS (Optional State Supplement). The spouse not applying for SSI will retain his earned income and the SSI applicant will receive $1,100 - $724.50 or $375.50, plus the OSS.

**L. Effect of Home Ownership on SSI Benefits**

**1. Home Owned by the SSI Recipient**

A home owned by an SSI recipient is an exempt asset. 42 U.S.C 1382b(a)(1), 20 § CFR 416.1210, 20 CFR § 416.1212. For SSI purposes, the value of the home is excluded as an asset. If the SSI recipient pays for the ongoing shelter costs from his/her SSI benefits, s/he is considered residing in his/her own household and will not have any reduction in SSI.

**2. Home Owned by an SNT**

A home owned by an SNT is not a countable resource for SSI or Medicaid purposes, even if the beneficiary does not reside in the home, as it is a trust asset. SI 01120.200F(1). If a third party, such as the SNT, pays for shelter costs of the beneficiary, that will result in in-kind support and maintenance that will reduce the monthly SSI benefit, up to 1/3 of the monthly SSI payment. Shelter costs include mortgage costs, including property insurance required by the mortgage holder, real property taxes, heating fuel, gas, electricity, water, sewer and garbage removal. SI 00835.465D(1). See 20 C.F.R. 416.1133(c).

If the trust owns the home but does not pay for housing costs, there is no reduction in SSI monthly benefits. SI 01120.200F(2). However, the purchase of the home by the trust will be considered in-kind support and maintenance (1/3 reduction of SSI) in the month of purchase. SI 01120.200F(3). The use of trust assets to purchase a home will not reduce Medicaid benefits in New York.

If the SNT purchases a home subject to a mortgage, and the monthly mortgage payments are made by the SNT, these monthly payments result in in-kind support and maintenance, providing Shelter expenses that reduce the SSI monthly benefit by 1/3 each month in which they are made. SI 01120.200F(3)(b). If the SNT pays for shelter or household operating expenses or household costs, this results in in-kind support and maintenance. SI 01120.200F(3)(c).

If the SNT pays for accommodations to the home to make it handicapped accessible or for renovations that increase the value of the home, this does not result in in-kind support and maintenance that results in a 1/3 reduction of the SSI monthly benefit. Id. Extra mortgage payments to reduce the principal owed and extra insurance coverage not required by the mortgagee are not household costs resulting in in-kind support and maintenance when paid by the SNT. SI 00835.465D(2),(3).

## III: SOCIAL SECURITY DISABILITY INSURANCE

### A. Overview

The Social Security Act provides for Disability Insurance Benefits, 42 U.S.C. 423, which is a benefit program for workers who become disabled and are unable to work. The program provides a monthly income during a period of disability, while the individual is unable to perform substantial gainful activity, 42 U.S.C. § 423(d), (e). Substantial gainful activity means

work that involves doing significant and productive physical or mental duties; and is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. In 2016, substantial gainful activity = $1,130/month.

The applicant must also have insured status to qualify for eligibility under the Disability Insurance Program. 42 U.S.C. § 423 (c); 20 C.F.R. § 404.101 et seq. The disabled wage-earner must have paid into the Social Security system through a deduction from earned income pursuant to FICA (Federal Insurance Contributions Act), 42 U.S.C. § 409, the federal income tax withholding paid to the Social Security system.

To be "currently insured," 42 U.S.C. § 423 (c)(1); 20 C.F.R. § 404.120, for a period of disability and Disability Insurance Benefits, one must have sufficient quarters of coverage ("Social Security Credits"). For each calendar year, an individual can earn a maximum of four (4) credits of employment and social security taxation. An individual gains one quarter for each $1,260.00 of Social Security taxed employment earnings. Hence, if the individual earns $5,040.00 in social security taxed employment earnings for a calendar year, with a minimum of $1,260 in each quarter, that individual has secured four (4) quarters of coverage or social security credits.

In general, the individual must have paid taxes into (FICA) for a period of twenty (20) quarters out of the prior forty (40) quarters, i.e., five (5) years out of the ten (10) years prior to the disability and the application for Social Security Disability Insurance Benefits. 42 U.S.C. § 423 (c)(1)(B)(i); 20 C.F.R. § 404.130. Those under the age of thirty-one (31) require fewer quarters of coverage, but never fewer than six (6) quarters for those under the age of twenty-four (24). 20 C.F.R. § 404.130 (c).

After a two year waiting period, a recipient of Social Security Disability benefits is eligible to receive Medicare, 20 C.F.R. § 406.12, even though that individual has not yet attained 65 years of age.

Unlike the SSI program, there is no asset or income eligibility threshold for SSDI.

**B. Coordination with SSI**

In some instances, individuals who qualify for Social Security Disability Insurance Benefits might also be eligible for Supplemental Security Income if the amount of their monthly Social Security Disability Insurance benefit is less than the monthly benefit of SSI. If, for example, the SSDI monthly payment based on the recipient's earnings record is $600/month, then the SSI program will pay $220/month in 2016 to supplement the SSDI to bring the total amount up to the maximum SSI benefit of $820/month. If, however, the SSDI will pay $1,000/month, the there is no SSI supplement. And, of course, to receive SSI, one must meet the asset ($2,000) and income tests of the SSI program.

**C. The Medical Criteria for Disability Pursuant to the Social Security Act**

The Social Security program of Disability Insurance Benefits provides monthly payments to a wage earner who is totally and permanently disabled. The Social Security Administration has issued a Listing of Impairments, 20 C.F.R. § 404, Subpart P, Appendix 1, Part A, and Medical Vocational Guidelines, 20 C.F.R. § 404, Subpart P, Appendix 2, which are guidelines used to establish if one is disabled. If an individual presents medical evidence that there is a medically diagnosed impairment with the symptoms, signs, and test results that meet those identified in the Listings, then a finding of a period of disability is indicated, 20 C.F.R. § 404, Subpart P, Appendix 1, Part A. If an individual does not meet the criteria of a "listed impairment", that individual can still be entitled to benefits if the severity of their medical

determinable impairment or combination of impairments rises to the level of a "listed impairment". 42 U.S.C. § 423(d), (e).

One must be totally and permanently disabled in order to receive Social Security benefits. 42 U.S.C. §§ 423 (d)(1)(A), 416 (i)(1). "Permanently disabled" refers to one who is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months. Id. One is totally disabled if his/her physical or mental impairment or impairments are of such severity that he/she is not only unable to do previous work but cannot, after considering the individual's age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 423 (d)(2)(A).

The Social Security Administration must also consider the combined effects of all of the individual's impairments without regard to whether or not any such impairment, if considered separately, would be of such severity as to rise to a level that would impair the individual's ability to perform substantial gainful activity. Substantial gainful activity means work that involves doing significant and productive physical or mental duties; and is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. See also 20 C.F.R. § 404.1571 et seq. The statute defines a physical or mental impairment as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques". 42 U.S.C. § 423(d)(3), 20 C.F.R. § 404.1508.

The courts have uniformly ruled that substantial gainful activity is work that is of a functional nature that the disabled individual can realistically perform in a competitive work environment. City of New York v. Heckler, 578 F. Supp. 1109 (D.C.N.Y., 1984), aff'd, 742 F.2d

729 (2d Cir., 1985), aff'd, 106 S. Ct. 2022, 476 U.S. 467, 90 L.Ed. 2d 462 (1987). The distinction between a competitive and a non-competitive work environment is generally seen with younger individuals who perform employment services in a sheltered environment. 20 C.F.R. § 404.1573(c). These workers might have been placed in employment situations through vocational rehabilitation and require the assistance of a job coach to assist them with day-to-day work activities. These individuals that require and receive oversight, supervision, job coaching and assistance in performing work activities would not be considered to be performing substantial gainful activity in a competitive work environment.

**D. The Application Process for Social Security Disability Insurance**

The Social Security Administration allows electronic application filings and form completions through their website, www.*ssa.gov*. The Social Security Administration provides a guide for use when one is preparing the data necessary for to file benefit applications and it is a downloadable packet from the Social Security website, www.*ssa.gov*.

The application requests information concerning the individual's personal data, including specific contact information, birth and citizenship information, family and dependent data, a summary of the physical and/or emotional impairments that prevent the individual from working, the date that the applicant last worked, the income earned by the applicant in the form of wages for the three years prior to the application, and a section for any additional remarks that the applicant wants to make or expand on a prior answer from the application.

As part of the application process, the applicant must complete a Disability Report–Adult (SSA-3368-BK) which details the applicant's medical history regarding the claimed current disabling impairment(s). One does not need to list medical history that is independent of

the current disabling impairment(s); however, a medical condition that is independent of the current disabling impairment(s), but which is a complicating factor in the applicant's treatment plan should be listed.

The application process also includes the work history of the applicant. The data is designed to provide a comprehensive work history so that the Social Security Administration can determine the vocational background of the applicant as a means to establish the individual's capacity to perform his/her past relevant work, and, if the individual cannot perform his/her past relevant work, whether the individual has the capacity to do other work. It is important to note that an individual does not have to be able to do work at the same earnings level, and in fact, a prior salary structure is not even considered by the Social Security Administration. S/he must simply be able to perform a job, any job, even if it is menial compared to the prior work that the individual was performing.

Once the practitioner is retained and representing the individual in the application process, a practitioner should secure his/her own Medical Authorizations so that the practitioner can receive a copy of any pertinent medical evidence from the applicant's treating sources directly, without having to wait for the Social Security Administration to make a copy available to the representative.

In addition, a treating source may be willing to prepare a narrative letter in support of the application for benefits, and a practitioner's Medical Authorization will enable the practitioner to request and secure a letter directly from the treating source. A narrative letter from a treating source is entitled to great weight if supported by objective medical findings.

### E. The Social Security Administration's Review of a Completed Application

After the application filing process is completed, the Social Security Administration will forward the medical information regarding the application to a state agency acting as a sub-contractor with the Social Security Administration for purposes of issuing medical determinations. If the application for Social Security Disability Insurance benefits is approved, then the file is sent to the Social Security Payment Center for the processing of benefits, the issuance of a Social Security Award notice and payment of benefits.

If the application for benefits is denied, the applicant may appeal the Notice of Disapproved Claim by filing a Request for a Hearing before an Administrative Law Judge within sixty (60) days of the denial Notice. See Form annexed.

**F. Social Security Administrative Hearing**

The Administrative Hearing is conducted by an Administrative Law Judge through the Office of Disability Adjudication and Review. 20 C.F.R. §§§ 404.914, 404.915 and 404.916.

All current Social Security files are electronic and therefore, access to a file to prepare for an Administrative Hearing is through the "Appointed Representative" website. ssa.gov/ar. Electronic Records Express provides access to appointed representatives to view a claimant's folder and this is critical in the preparation for an Administrative Hearing. In fact, the appointed representative has arguably an affirmative duty to access the claimant's electronic folder to make certain that all of the supporting evidence is in the claimant folder.

At the Administrative Hearing, the duty of the Administrative Law Judge is to act as an independent fact finder to elicit any and all information that he/she deems necessary to render a full and fair determination of the individual's application for benefits. The Administrative Law Judge must review all of the evidentiary documents in the administrative record, take sworn testimony from the applicant and other witnesses and listen to any legal

arguments raised by the practitioner on the Social Security Laws, Regulations and case-law on point.

The Administrative Law Judge may also elicit testimony from a Medical Expert and/or a Vocational Expert, acting as the Administrative Law Judge's own expert witnesses. These individuals are contracted providers for the Social Security Administration, and the Administrative Law Judge provides great weight to their testimony. The Administrative Law Judge is not bound by any of the prior determinations made by the Social Security Administration and will render and independent decision.

The Administrative Law Judge may either issue a favorable or unfavorable decision. The Second Circuit for the United States Court of Appeals has summarized the review procedure as follows:

> First, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the Commissioner next considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the Commissioner will consider him disabled without considering vocational factors such as age, education, and work experience; the Commissioner presumes that a claimant who is afflicted with a "listed" impairment is unable to perform substantial gainful activity. Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the Commissioner then determines whether there is other work which the claimant could perform. Bluvband v. Heckler, 730 F.2d 886, 891 (2d Cir. 1984).

If the decision is Favorable, then the file is sent to the Social Security Payment Center for the processing of benefits. If the decision is Unfavorable, an appeal may be filed with the Appeals Council of the Office of Disability Adjudication and Review. There is generally no appearance before the Appeals Council, and the review is handled by submission. However, oral

argument can be requested and a substantial showing must e made for the Appeals Council to grant a personal appearance be granted. Given the fact that oral argument before the Appeals Council is rarely held, establishing a strong case at the Administrative Hearing is critical to any chance of success in reversing the Administrative Law Judge before the Appeals Council.

The Appeals Council may decide favorably for the applicant and either reverse the Administrative Law Judge and award benefits, or remand the case back to the Office of Disability Adjudication and Review for a new Administrative Hearing. If the determination of the Appeals Council is Unfavorable, the individual may appeal an unfavorable decision to the United States District Court for the district where the applicant resides. The Commissioner of the Social Security Administration is represented by the United States Attorney's Office in the District where the lawsuit is filed. **See Attachment 4, Request for a Hearing by Administrative Law Judge.**

**G. Getting Paid**

An attorney may receive only 25% of a successful retroactive recovery from representation before the Social Security Administration. Only a contingency fee retainer agreement is permissible, and the fee must be approved by the Social Security Administration. **See Attachment 5, Appointment of Representative Form**.

**SO IN OUR CASE:**

**1**. Although SON SAM is working, he is not performing Substantial Gainful Activity so he could be considered disabled even though he is working.

2. If he is paying $1,260/month FICA tax he is earning credits.

3. After as few as 6 quarters he could qualify for some Social Security Disability on his own earnings.

4. He would then qualify for Medicare after 2 years.

5. Social Security counts as unearned income. It would offset his SSI amount, as also would his earned income. If he is earning $800/month, $357.50 ($800 LESS $85 LESS ½ OF THE REMAINDER) PLUS his Social Security benefit OF $120/month, for example, OR $477.50 is deducted from his SSI OF $820, leaving him an SSI benefit amount of $342.50. He would retain his earned income of $800/month PLUS his Social Security Disability payment of $120 PLUS SSI of $342.50 or a total of $1262.50.

**IV: DEPENDENTS OR SURVIVORS BENEFITS**

**A. Children under 18:** When a parent who has been a wage earner is retired (age 62 or older), deceased or disabled, minor children may receive survivors benefits on the earnings record of the parent. The amount of the benefit is based on the earnings of the parent. For the child to be eligible for these dependent's benefits, the child must be under the age of 18, or age 18 and a full-time student, or over age 18 until 19. 20 C.F.R. § 404.350.

If the parent is alive and receiving retirement or disability benefits, the benefit amount is 50% of the parent's benefit amount. 20 CFR § 404.353. If the parent is deceased, the benefit amount is 75% of the parent's benefit amount. 20 CFR § 404.353(a).

If there is more than one dependent, spouse and children, then the benefit is shared between them. 20 CFR § 404.304(d), 20 CFR § 404.335, 20 CFR § 404.353. The benefit continues up until the age of 18 for a child without a disability. There are no asset or income requirements for the child. 20 CFR § 404.350

The benefit amount to the family cannot exceed the Family Maximum benefit amount. 20 CFR § 404.403, 20 CFR § 404, 20 CFR 405, 20 CFR § 403, 20 CFR § 406.

B**. 19 Year Old Full Time Student:**

The dependent or survivor benefit continues while a full time student, provided that the dependent is in 12$^{th}$ grade or lower and not over 19 years of age. 20 § CFR 404.367, 20 CFR §

367(e). The benefit amount is based upon the parent's earnings. There are no asset or income requirements for the child. Id.

**C. Spouse under 62 Caring for Child Under 16 or Child with Disability**:

The spouse under the age of 62 of the retired or disabled or deceased wage earner who is caring for a child under 16 OR a child with a disability of any age will be able to receive Retirement or Disability benefits on the spouse's/parent's earnings, even though the caregiving spouse has not reached retirement age. 20 CFR § 404.348. The amount depends on what the person was or would have been receiving, the age of the survivors and the relationship to the deceased. The child with a disability must have become disabled prior to age 22. This is NOT a benefit for a widow. The children (a full-time student in elementary or secondary school) and the spouse will receive benefits subject to the FAMILY BENEFIT MAXIMUM of the deceased spouse/father's full retirement amount, based on the parent's earnings.

**SO IN OUR SCENARIO:**

1. DAUGHTER DEBBIE and SON SAUL will qualify for the survivors' benefits on deceased HUSBAND HARRY'S earnings. They will each receive their benefits, subject to the family maximum.

2. DEBBIE will receive her amount until SON SAUL turns 16.

3. SON SAUL will receive his benefit until while a full-time student if not disabled.

3. If SON SAUL should qualify as a child with a disability, and if DAUGHTER DEBBIE's own income from this Social Security and SON SAUL's own income from Social Security will be so low as to allow SON SAUL to receive SSI, he could also qualify for some SSI benefits.

4. If DEBBIE remarries, the stepparent's income and assets will be deemed available to the minor child for SSI.

5. If DEBBIE remarries, her age becomes a factor in the determination of her eligibility for benefits. She will not receive "parent's" benefits if she is remarried or otherwise eligible for widow's benefits.

**V. WIDOW/ WIDOWERS BENEFITS**

1. A widow who is at full retirement age and who has been married at least 9 months prior to the death of the spouse will receive 100% of the spouse's full retirement amount. 20 CFR § 404.335.

2. Benefits are payable if the widow is 60 years of age, or is 50 years and under 60 years of age, but disabled will receive benefits, reduced as with early retirement. 20 CFR § 335(c), 20 CFR § 338.

3. The widow of any age caring for the child under 16 OR child with a disability may receive benefits on the deceased spouse's account. 20 CFR § 404.340(e).

4. If the widow is unmarried. 20 CFR § 340(c).

**SO IN OUR SCENARIO:**

**1.** DAUGHTER DEBBIE, who is 45, will NOT receive Widows benefits at this time but will receive benefits as the caregiver of deceased HUSBAND HARRY's minor and/or disabled child, as "Mother's benefits".

2. If she is not disabled, she would be able to receive widows benefits at age 60, although that amount would be reduced in the same manner as one who takes retirement early.

**VI: CHILDHOOD DISABILITY BENEFITS (ADULT CHILD BENEFITS):**

When the child with a disability is over the age of 18 and his parent is retired, disabled or deceased, the adult child may be eligible to receive Social Security benefits based upon the parent's earnings. 42 U.S.C. 202(d).

**A. Requirements:**

1. The child must not be performing substantial gainful activity ($1,130/month earnings; $1,820/month for blind applicants);

b. must be unmarried at the time of the application;

c. must be disabled prior to age 22;

d. must be dependent upon the parent - this is presumed.

**B. Medicare Entitlement**

After 2 years, the adult child will receive Medicare benefits.

**C. Interrelation with SSI**

An adult child will receive the highest amount of either benefit, but the monthly benefits will not be added together to result in double monthly benefits. If the adult child's own SSI is $820/month, and the Childhood Disability benefit on the parent's earnings is $860/month, the client will LOSE SSI but receive the Social Security benefit. If the Social Security benefit is $500/month, then the SSI will be added to the Social Security benefit to result in $320/month of SSI and $500/month Social Security.

**ADVICE TO OUR CLIENTS:**

**1.** The letter that the Social Security Administration sends when the adult childhood benefit begins often frightens the parent. It says that their son or daughter has lost the SSI benefit and may also lose Medicaid. It does not mention that the adult child will still

be eligible for Medicaid or that a separate application must be placed for those whose Medicaid was provided automatically with the SSI. We must show that the adult child will soon qualify for 3 or even four entitlements.

**2.** Childhood benefits are not means tested. If the child receives Medicare and Adult Childhood benefits, then a lawsuit recovery or inheritance will not affect ongoing eligibility for these benefits. Only if the child needs Medicaid must planning such as a Special Needs Trust or gifting of assets be undertaken.

**3.** Although the disability must have occurred prior to the child's reaching 22, the entitlement begins only upon the parent's retirement, disability or death. Hence, many SSI recipients subsequently become eligible for this benefit and Medicare when the child is 30 - 40 years old or more.

4. There will be no Medicaid excess income if the sole reason that a former SSI recipient has lost SSI is due to the increased Adult Child benefit. However, to have no excess income, the adult child must have no more than $2000 in resources and not have made disqualifying transfers. See 95 ADM-11.

5. If the adult child wants to retain $14,850 and continue to receive Medicaid, then the excess income must be placed into an SNT.

**SO IN OUR SCENARIO:**

1. If SON SAM should be found disabled and eligible to receive SSI and/or Disabled Adult Child Benefits, then DEBBIE would qualify for the caretaking parent entitlement subject to the deceased husband's Family Maximum Benefit because she will be the caretaking parent of a child with a disability.

2. If SON SAM receives Adult Disabled Child benefits and SON SAUL receives Survivor benefits until 18, they will split the Family Maximum Benefit.

## VII. RETIREMENT BENEFITS & SPOUSAL BENEFITS: BRIEF OVERVIEW

### A. Full Retirement Age

A worker who retires at Full Retirement Age can do so without reduction of the benefits amount. 20 CFR §§ 312, 20 CFR § 409. However, if the worker delays retirement, there is a bonus of a percentage for each year that the worker delays retirement. The amount of the retirement benefit is based on the worker's salary history. 20 CFR §§ 310 – 313, 20 CFR § 404.204.

Full Retirement Age is based on the workers date of birth and is gradually increasing. 20 CFR §§ 310 – 313. Currently, the full retirement age is 66 for individuals born between the years 1943 – 1954, 66 1/2 for those born between 1955 and 1959, and age 67 for those born after 1960. Gradual increases to Full Retirement Age are expected. 20 CFR § 410.

At age 62, workers may retire and start collecting Social Security retirement benefits, but those individuals who apply for retirement benefits early will collect reduced benefits for the rest of their lives. Workers who retire at age 62 collect a percentage of the maximum benefit they would be eligible to receive at Full Retirement Age based on their earnings history. 20 C.F.R. §§ 404.231- 233, 20 CFR §§ 310 – 313. The amount of the reduction for taking early retirement slowly decreases as the retiree approaches Full Retirement Age. 20 C.F.R. § 404.233.

The retirement benefit of a worker who works past Full Retirement Age and does not begin collecting Social Security Retirement, is increased by an annual percentage as incentive for the delaying of retirement. The percentage of the increased amount is greater for each year that

retirement is delayed until age 70, when the worker must begin collecting the retirement benefit regardless of whether or not s/he retires. 20 C.F.R. 404.313.

**B. Spousal Benefits**

Spousal Benefits are available to the spouse of the retired worker if that spouse had been married to the worker for a period of at least one year. 20 C.F.R. 404.330(a). Benefits paid to a spouse will not reduce the benefits amount payable to the retired worker. 20 CFR 404.330

To receive spousal benefits, the spouse must be age 62 or older, or, if under the age of 62, be caring for a child who is either under age 16 or disabled. 20 C.F.R. 404.330(c). The monthly spousal benefit is equal to one-half the retried worker's benefit amount. 20 C.F.R. 404.333. In the event that the spouse is also eligible for a retirement benefit based on his or her own work history, the spouse will receive the higher benefit amount. 20 C.F.R. 404.330(d).

If the applicant is a former spouse of a recipient, he or she must have been married to the worker recipient of retirement benefits for at least 10 years and, and must not be remarried. 20 C.F.R. 404.331.

**C. Planning the Retirement**

Issues can surface where a worker and/or the spouse of the worker takes early retirement. Waiting for benefits until Full Retirement Age avoids any diminution of the benefit amount. However, sometimes circumstances such as health or financial need make early retirement advantageous. Many practitioners use programs that can calculate retirement benefits based on earnings of both spouses and projected life expectancy to best advise the client.

While a worker and/or spouse will be locked into a reduced retirement benefit for taking the benefit early, there is no bar against a spouse switching from his/own benefits record to that

of the spouse when he/she reaches Full Retirement Age. (Social Security Retirement Guide – Pamphlet – 2016). Maximizing the amount of the benefits is always the primary goal.

In some instances, a person may change their mind after he/she has filed for retirement benefits, be it early at age 62 or at some point prior to age 70. In such a scenario, the person may withdraw their application and consequently stop their benefits. However, in order to do so, s/he must make this change within twelve months after the person became entitled to the retirement benefits. Only one withdrawal is allowed during lifetime. (SSA.gov/ "Retirement Planner – If you Change Your Mind") (Bipartisan Budget Act of 2015)

If one withdraws the application, all of the benefits received by the individual and his/her family must be repaid to the Social Security Administration. All of the persons who received benefits must also consent in writing to the withdrawal, assuming that all are of age and capacity. In addition, if there were any monies paid from the gross retirement benefit for Medicare premiums, those need to be repaid as well. (SSA.gov/ "Retirement Planner – If you Change Your Mind")

Of course, a person may withdraw from Social Security Retirement benefits but still keep his/her Medicare at age 65. If the person keeps Medicare, the individual will be billed directly by CMS (Centers for Medicare and Medicaid Services) for the premiums. Id.

If the individual has attained Full Retirement Age but not yet age 70, and it is more than one year after receiving retirement benefits so withdrawal is not available, that individual can ask that the retirement benefits be suspended until age 70. **(**SSA.gov/ "Retirement Planner – Suspending Retirement Benefit Payments")

**D. Social Security Disability and Early Social Security Retirement**

If the worker planning retirement prior to Full Retirement Age due to health reasons happens to have impairments that would be deemed to meet the Social Security criteria for Disability Insurance Benefits, then it is prudent for the individual to apply for both Retirement and Disability. 20 CFR 404.310. The Retirement benefit will be processed much more quickly than the Disability benefit, and the individual can start to receive a monthly benefit immediately.

If a retired worker is found disabled by the Social Security Administration, s/he will receive the SSDI, which is the maximum benefit at Full Retirement Age. 20 CFR 404.310. After 2 years s/he will receive Medicare. If the individual is ultimately denied Social Security Disability benefits, s/he will still continue to receive the Social Security Retirement benefits applied for. However, the practitioner must consider whether to represent the client, as an attorney may be paid only 25% of a successful recovery.

**VIII. SO WHAT DO WE TELL GRANDMA, GRANDPA AND DEBBIE?**

**1.** Elder Law issues: If either or both grandsons were disabled, they could transfer assets to a trust for the sole benefit of the grandson to shelter assets for Medicaid eligibility.

2. Trust for DEBBIE? Not needed to shelter her own assets from being considered available to SON SAUL. Only needed if SON SAUL were going to qualify for SSI, which he probably won't because of the Social Security payments and pension that will be made to DEBBIE as the caretaker widow and the Social Security Survivor benefits paid to SON SAUL as the surviving son until 18 or 19.

3. DEBBIE's assets do not affect SON SAM's eligibility for benefits: either Childhood Benefits as an adult child with a disability, or SSI.

4. SON SAM may qualify for Adult Disabled Child benefits even if he is working because he is not engaged in Substantial Gainful Activity.

5. SON SAM might qualify for his own SSDI if he pays enough into FICA, although he would lose Disabled Adult Child Benefits.

6. SON SAM will lose Disabled Adult Child benefits if he ever marries, unless he marries someone with a disability.

7. DEBBIE'S benefits as a caretaking parent (Mother's benefits) may continue if she is under 62 and not remarried and the children are under 18 and/or disabled.

8. DEBBIE will be able to receive widow's benefits after age 60 if she does not remarry before age 60.

9. DEBBIE's receipt of Mother benefits may be affected if she works outside the home. If she earns more than $1,310/month, her benefit will be reduced by $1 for every $2.00 earned.

10. If GRANDPA continues to work and does not take his own Social Security until age 70, GRANDMA can take her spousal retirement prior to age 66 ON GRANDPA'S EARNINGS. However, her benefit will be reduced if she is under Full Retirement Age.

11. If GRANDPA takes Social Security at age 66, GRANDMA can take her spousal benefit on his full earnings, but her benefit amount will still be reduced because she hasn't reached full retirement age.

12. If GRANDPA takes his Social Security now at age 66 so that GRANDMA can receive Social Security on his earnings, he can withdraw his application and cease receipt of benefits within 1 year, but he must pay back the government for his benefits received, as well as all others who received benefits on GRANDPA'S earnings record.

## CONCLUSION

The Social Security Act provides a safety net for retirees, widows, surviving children and those with disabilities. Knowing the entitlements for which our clients may be eligible assists in providing them with planning options to maximize their benefits and preserve assets.

# Attachment 1

## – excerpt from SSA POMS SI 01150.110 stating that a transfer by a non-SSI recipient parent is not counted against a child's SSI

# SI 01150.110 Period of Ineligibility for Transfers on or After 12/14/99

### 2. Length of Period of Ineligibility

A period of ineligibility can be from 1 month up to a maximum of 36 months depending on the amount of the uncompensated value. A period of ineligibility cannot exceed 36 months regardless of the uncompensated value of the transfer. Months in the period of ineligibility can coincide with months of ineligibility for other reasons. See SI 01150.111 for instructions for computing the number of months in the period of ineligibility.

**Example**: Mr. Franklin has been receiving SSI for several years. While conducting a redetermination in 8/00, the CR finds that Mr. Franklin transferred a resource for less than fair market value on 12/20/99 and is subject to a 6-month period of ineligibility that begins as of 1/00. The CR also finds that Mr. Franklin was ineligible due to excess income in 3/00 and 4/00. Mr. Franklin's period of ineligibility runs from 1/00-6/00. The ineligibility in 3/00 and 4/00 due to excess income does not affect the length of the period of ineligibility due to the resource transfer.

### E. Policy—types of transfers affected

This provision applies to transfers made:

- by an individual;
- by the individual's eligible or ineligible spouse (SI 00501.150);
- by persons who are co-owners of the resource being transferred;
- on behalf of the individual by a person acting for and legally authorized to execute a contract (e.g., a legal representative, a legal guardian, a parent for a minor child, etc.);

by an individual transferring assets which he constructively received (e.g., he/she refused an inheritance).

by an individual transferring assets in the month of receipt (e.g. the transfer of income that would have been considered a resource in the following month, if retained).

This provision does not apply to transfers made by a deemor unless the deemor is a co-owner of the resource or is the ineligible spouse. For example, the provision does not apply to a resource transfer made by a parent who is a deemor (unless the eligible child and parent are co-owners of the resource).

# Attachment 2 –
# Acquiescence Ruling
# Ruppert v. Bowen

## Acquiescence Rulings

**AR 90-2(2)**

**EFFECTIVE/PUBLICATION DATE: 07/16/90**

## AR 90-2(2): *Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989) -- Evaluation of a Rental Subsidy as In-Kind Income for Supplemental Security Income (SSI) Benefit Calculation Purposes -- Title XVI of the Social Security Act

## ISSUE:

Whether the Secretary may charge an SSI applicant or recipient who receives a rental subsidy with in-kind income in all cases or whether the Secretary must first determine that the applicant or recipient received an "actual economic benefit" from the rental subsidy.

## STATUTE/REGULATION/RULING CITATION:

Sections 1611 and 1612(a)(2) of the Social Security Act (42 U.S.C. Sections 1382 and 1382a); 20 C.F.R. Sections 416.1130, 416.1140, and 416.1141.

## CIRCUIT:

Second (Connecticut, New York, Vermont)

*Ruppert v. Bowen*, 871 F.2d 1172 (2d Cir. 1989)

## APPLICABILITY OF RULING:

This Ruling applies to determinations or decisions at all administrative levels (i.e., initial, reconsideration, administrative law judge hearing and Appeals Council).

# DESCRIPTION OF CASE:

Multiple SSI recipients filed a joint action challenging the methods used by the Social Security Administration (SSA) to calculate their benefits. Thus ruling related to the claims of Rose and Edward Faicco, Cheryl Karnett, and Alan Green, who alleged that the Secretary's treatment of the difference between the current market rental value of their housing and the rent actually paid for the housing as in-kind income was erroneous.

The facts for the pertinent claims are as follows:

*FAICCOS*

Rose and Edward Faicco were both over age sixty-five. They rented a house from their daughter. Although the monthly expenses for the house were $951, the Faiccos paid rent of $350 per month, which was reduced to $250 per month when their daughter's variable rate mortgage decreased.

An administrative law judge (ALJ) found that each of the Faiccos was overpaid $262.20 between November 1982 and March 1983. The ALJ found that they had been overpaid either because they had received subsidized rent or, because they did not pay their *pro rata* share of household expenses and therefore lived in their daughter's household. The ALJ also found that they were not without fault in causing the overpayment and that the overpayment could not be waived. This became the final decision of the Secretary and suit was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

*KARNETT*

Cheryl Karnett, who is mentally retarded and autistic, lived with her parents. Her mother executed a rental agreement as both Cheryl's agent and her landlord. The rental agreement called for Ms. Karnett to pay her mother rent of $169 per month and food payments of $120 per month.

An ALJ found that Mr. Karnett had unearned income of $36 per month, $11 per month because her room's market value was $180 and $25 per month because of occasional meals provided by her parents. The ALJ's decision became the final decision of the Secretary. A civil action was filed in the United States District Court for the Eastern District of New York. The court affirmed the Secretary's decision. This decision was appealed to the United States Court of Appeals for the Second Circuit.

*GREEN*

Alan Green lived with his parents. Mr. Green and his mother had a written agreement, under which he was to pay her $100 per month in rent and $125 per month for food. There was evidence that his mother stated to SSA that she would have charged a stranger $135 for lodging. An ALJ determined that Mr. Green had received in-kind income of $35 per month, the difference between the current market rental value and the rent he agreed to pay. This became the final decision of the Secretary and a civil action was filed. The United States District Court for the Eastern District of New York affirmed the Secretary's decision. The decision was appealed to the United States Court of Appeals for the Second Circuit.

# HOLDING:

The United States Court of Appeals for the Second Circuit held that, although the statute and regulations concerning in- kind income and rental subsidies are facially valid, if the proportion of income that an SSI recipient expends on housing is "so great that it flies in the face of reality" to conclude that unearned income in the form of subsidized housing is actually available to the recipient, the unearned income should be disregarded.

The court remanded the subject cases to the district court for a determination of whether any SSI recipients had received an "actual economic benefit" from their rental subsidies. However, the court did not state how "actual economic benefit" is to be established.

## STATEMENT AS TO HOW *RUPPERT* DIFFERS FROM SOCIAL SECURITY POLICY:

Under 20 C.F.R. Section 416.1130(b), SSI applicants and recipients are found not to be receiving in-kind support and maintenance in the form of subsidized rent, if they are paying the amount charged under a business arrangement. A business arrangement exists when the amount of monthly rent required to be paid equals the current market rental value. In situations where the landlord/tenant relationship is other than a parent/child relationship, we presume that the amount of monthly rent required to be paid equals the current market rental value.

When there is a parent/child relationship between landlord and tenant, SSA determines whether a rental subsidy exists. Generally, SSA views any difference between the current market rental value and the actual amount of rent paid as being in-kind income, up to the presumed maximum value established under 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). SSA generally considers this difference to be an "actual economic benefit" to the applicant or recipient.

The Second Circuit's decision in *Ruppert* found that the difference between the current market rental value and the actual rent paid does not always constitute an "actual economic benefit" to the SSI applicant or recipient. The Court directed that a determination be made as to whether an applicant or recipient received an "actual economic benefit" from a rental subsidy, before charging the applicant or recipient with in-kind support and maintenance.

## EXPLANATION OF HOW SSA WILL APPLY THE DECISION WITHIN THE CIRCUIT:

This Ruling applies only in cases in which the applicant or recipient resides in Connecticut, New York, or Vermont at the time of the determination or decision at any administrative level, i.e., initial, reconsideration, administrative law judge hearing, or Appeals Council.

In cases where SSA determines that an applicant or recipient has received a rental subsidy, SSA will determine whether the applicant or recipient received an "actual economic benefit" from the rental subsidy. If SSA determines that the applicant or recipient received an "actual economic benefit," he or she will be imputed to have received in-kind support and maintenance. If SSA determines that the applicant or recipient did not receive an "actual economic benefit", the rental subsidy will be disregarded for purposes of determining eligibility for and the amount of Supplemental Security Income benefits.

Although the court required there to be a determination of "actual economic benefit" in rental subsidy cases, it did not specify the test to be used in making that determination. SSA has decided that it will

determine that an applicant or recipient did not receive an "actual economic benefit" from a rental subsidy when the monthly amount of rent required to be paid equals or exceeds the presumed maximum value described in 20 C.F.R. Section 416.1140(a)(1) (one-third of the Federal benefit rate plus the $20 general income exclusion). If the required amount of rent is less than the presumed maximum value, we will impute as in-kind support and maintenance the difference between the required amount of rent and either the presumed maximum value or the current market rental value, whichever is less.

# Attachment 3 –

# Letter, Decision, Living Arrangement Form, 18 NYCRR 398-4.3, 18 NYCRR 398-4.5

**KASSOFF, ROBERT & LERNER, LLP**
*ATTORNEYS AT LAW*
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(516) 766-7700
Fax (516) 766-0738

July 18, 2016

NYS OTDA
Office of Administrative Hearings
NYS OTDA
PO BOX 1930
Albany, NY 12201
**VIA FAX ONLY 518 473 6735**

**RE:** [redacted]
**SSI CLAIM #** [redacted]
**PERSON ID NUMBER** [redacted]
**REQUEST FOR FAIR HEARING:**
**CHALLENGE TO HOUSEHOLD LIVING ARRANGEMENT**

Dear Sir/ Madam:

Please be advised that this office represents [redacted], who has been approved for SSI as a person residing in his own household, Category A. from March, 2016 ongoing. See SSI acceptance attached.

As per the Notice from NYS OTDA of the State Supplement Program dated June 27, 2016, NYS has not applied the correct living arrangement to [redacted] Pursuant to 18 NYCRR 398-4.3, "[t]he office is bound by the decision and action taken by SSA on the SSI eligibility determination." SSA has categorized him as living in his own household. He does not live in the household of another.

[redacted] pays a flat fee to his landlord for room and board. See Acquiescence Ruling 90-2 applied to this case and all cases in the Second Circuit, in which the adult child living with the parent is considered to be living in a commercial establishment. See 18 NYCRR 398-4.5(1). Enclosed please find the Living Arrangement Form and a Request for Fair Hearing.

Please schedule a Fair Hearing. [redacted] challenges the determination that he resides in the household of another. Please provide the full amount of the State Supplement to [redacted] of $87/month.

Sincerely,

Joan Robert

JLR:jlr



(1)

NYS OTDA
STATE SUPPLEMENT PROGRAM
PO BOX 1740
ALBANY, NEW YORK 12201

| CORRESPONDENCE NO: 2051211 | DATE: 06/23/2016 |
|---|---|
| CATEGORY: SSI/SSP | PERSON ID NUMBER: |

0000299 P-0001 T-0002 00000299 2 MB .419

[redacted]

This is to inform you that you are eligible for benefits under the New York State Supplement Program (SSP) beginning in February 2016. SSP provides a monthly benefit to aged, blind or disabled persons with income and resources below established State limits.

Eligibility for SSP benefits is based on your current State Living Arrangement (SLA), information provided to New York State and information which you provided to the Social Security Administration (SSA) when applying for federal Supplemental Security Income (SSI) benefits.

You are eligible for $23.00. We have calculated your SSP monthly benefit amount based on the following information available to us:

Your State Living Arrangement (SLA) is: (Living with others in the community as an individual)

| | |
|---|---|
| Monthly Income Counted by SSA: | $0.00 |
| SSI Federal Benefit Rate Exclusion: | - $733.00 |
| SSP Countable Monthly Income: | $0.00 |
| Your SLA Maximum Benefit Amount: | $23.00 |
| Total SSP Countable Monthly Income: | - $0.00 |
| Total Monthly SSP Benefit Amount: | $23.00 |

County of Residence: Suffolk

Please see the enclosed SSP Living Arrangement Form for a description of your current New York State living arrangement category as well as other living arrangement categories.

0000299

LDSS-5030 (Rev. 2/15)

NYS OTDA State Supplement Program

# Living Arrangement Form

Name [redacted] PID _____

Residence Address [redacted] (Street or PO Box) (City) (State) (Zip Code)

Mailing Address if different than residence address _____ (Street or PO Box) (City) (State) (Zip Code)

**Please tell us the date that your current living arrangement began: (Month/Year)_____**

**Using the definitions below, please check the box that best reflects your current living arrangement.**

☒ **Living Alone** – You fit in this category if you meet one of the following conditions:

- You live physically alone or with a spouse receiving SSI;
- You live only with a foster child or foster children;
- You live only with a homemaker authorized by the Social Services district office or an aide paid for under the Medical Assistance (Medicaid) program;
- You live with others but pay a "flat fee for room and board" or receive a "flat fee for room and board fee" from all others in the residence;
- You live with others but take the majority of your meals during the month outside of your residence;
- You live with others but you separately prepare, or have someone separately prepare, the majority of your meals during the month;
- You have no permanent living arrangement and do not have a spouse or child with you for whom you are responsible.

☐ **Living with Others** – You fit in this category if you meet one of the following conditions:

- You live with your spouse who does not receive SSI;
- You live with others and you prepare food in common with at least one other person you live with;
- You live in a religious community;
- You are less than 18 years of age in any living arrangement other than Congregate Care Level 1 or 2;
- You have no permanent living arrangement and are with an ineligible spouse or child for whom you are responsible.

☐ **Congregate Care – If you currently reside in Congregate Care (Level 1, 2, or 3) OR in a Medical Care Facility throughout the month, please have someone from the facility submit the Congregate Care Change Form (LDSS-5023) to the SSP Bureau. All SSP forms are available at www.otda.ny.gov/programs/ssp. Please call us toll free at 1-855-488-0541 if there are any questions.**

**I/We understand that anyone who knowingly lies or misrepresents the truth is committing a crime and can be punished under Federal law, State law, or both. Everything on this statement is the truth as best I/We know.**

| Applicant/Recipient/Representative Signature | Date | Spouse Signature |
|---|---|---|
| [redacted] | 7/15/16 | X |

The completed form must be returned to **NYS OTDA State Supplement Program, PO Box 1740, Albany NY 12201**, or through e-mail at otda.sm.ssp@otda.ny.gov, or by fax to: 518-486-3459.

0000299

WestlawNext **New York Codes, Rules and Regulations**

18 CRR-NY 398-4.3
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES
SUBCHAPTER B. PUBLIC ASSISTANCE
ARTICLE 5. MISCELLANEOUS
PART 398. SUPPLEMENTAL SECURITY INCOME (SSI) ADDITIONAL STATE PAYMENTS
SUBPART 398-4. STATE SUPPLEMENT PROGRAM (SSP)

18 CRR-NY 398-4.3
18 CRR-NY 398-4.3

## 398-4.3 Eligibility determinations for SSP benefits.

The office shall determine each individual's and couple's initial and ongoing eligibility for SSP benefits on the basis of the data supplied by the Federal SSA through the State Data Exchange (SDX), information provided by the applicant or recipient pursuant to Subpart 398-5 of this Title, and other information available to the office. The office is bound by the decision and action taken by SSA on the SSI eligibility determination.

18 CRR-NY 398-4.3
Current through June 15, 2016

**END OF DOCUMENT**

18 CRR-NY 398-4.5
NY-CRR

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK
TITLE 18. DEPARTMENT OF SOCIAL SERVICES
CHAPTER II. REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES
SUBCHAPTER B. PUBLIC ASSISTANCE
ARTICLE 5. MISCELLANEOUS
PART 398. SUPPLEMENTAL SECURITY INCOME (SSI) ADDITIONAL STATE PAYMENTS
SUBPART 398-4. STATE SUPPLEMENT PROGRAM (SSP)

18 CRR-NY 398-4.5
18 CRR-NY 398-4.5

# 398-4.5 New York State living arrangements.

The five categories of State living arrangements are:

**(a) Living alone.**

*Living alone* means living in a private household composed of one eligible individual or one eligible couple.

(1) An individual or couple is considered to be living alone, if the individual or couple:

see

(i) rents a room in an apartment or a private home, but pays a flat fee and takes the majority of their meals during the month outside the dwelling unit or prepares the majority of their meals during the month separately;

(ii) pays a fixed, pre-established flat fee for both room and board in a commercial establishment which meets no other SSP living arrangement criteria (*e.g.*, not licensed as a congregate care facility and not a public emergency shelter);

(iii) lives with others, but takes the majority of their meals during the month outside the dwelling;

(iv) lives with others, but separately prepares, or has someone separately prepare, the majority of his or her meals during the month;

(v) receives a fixed, pre-established flat fee for room and board from all others in the dwelling;

(vi) lives with only a foster child;

(vii) lives with only a homemaker authorized by a social services district (SSD);

(viii) lives with only a family care resident placed by: the New York State Office of Mental Health (OMH), the New York State Office for Persons with Developmental Disabilities (OPWDD), or an SSD;

(ix) lives with only an aide paid for under the Medical Assistance program; or

(x) has no permanent living arrangement (*e.g.*, a transient person or homeless person) and is not living with an ineligible spouse or a child for whom they have primary responsibility.

(2) An individual or couple is not considered to be living alone if:

(i) the individual lives with an ineligible spouse;

(ii) the individual or couple lives with a child for whom they have primary responsibility (unless the child is a foster child);

(iii) the individual is a child; or

(iv) the individual or couple resides in a dwelling with others and prepares food in common with at least one other person in the dwelling.

**(b) Living with others.**

*Living with others* means living in a private household composed of an eligible individual or couple and at least one other person. It includes a person who:

# Attachment 4

# Request for Hearing by Administrative Law Judge

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

Form Approved
OMB No. 0960-0269

# REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE

*(Take or mail the **completed original** to your local Social Security office, the Veterans Affairs Regional Office in Manila or any U.S. Foreign Service post and keep a copy for your records)*

See Privacy Act Notice

| 1. Claimant Name | 2. Claimant SSN | 3. Claim Number, if different |
|---|---|---|
| | | |

4. I REQUEST A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE. I disagree with the determination because:

An Administrative Law Judge of the Social Security Administration's Office of Disability Adjudication and Review or the Department of Health and Human Services will be appointed to conduct the hearing or other proceedings in your case. You will receive notice of the time and place of a hearing at least 20 days before the date set for a hearing.

5. I have additional evidence to submit. ☐ Yes ☐ No

Name and source of additional evidence, if not included.

Submit your evidence to the hearing office within 10 days. Your servicing Social Security office will provide the hearing office's address. Attach an additional sheet if you need more space.

6. Do not complete if the appeal is a Medicare issue. Otherwise, check one of the blocks

☐ I wish to appear at a hearing.

☐ I do not wish to appear at a hearing and I request that a decision be made based on the evidence in my case. (Complete Waiver Form HA-4608)

**Representation:** You have a right to be represented at the hearing. If you are not represented, your Social Security office will give you a list of legal referral and service organizations. If you are represented, complete and submit form SSA-1696 (Appointment of Representative) unless you are appealing a Medicare issue.

| 7. CLAIMANT SIGNATURE (OPTIONAL) | DATE | 8. NAME OF REPRESENTATIVE (if any) | DATE |
|---|---|---|---|
| | | | |

| RESIDENCE ADDRESS | | | ADDRESS | | |
|---|---|---|---|---|---|
| CITY | STATE | ZIP CODE | CITY | STATE | ZIP CODE |
| | | | | | |
| TELEPHONE NUMBER | FAX NUMBER | | TELEPHONE NUMBER | FAX NUMBER | |
| | | | | | |

**TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION- ACKNOWLEDGMENT OF REQUEST FOR HEARING**

9. Request received on _____ (Date) by: _____ (Print Name) _____ (Title)

_____ (Address) _____ (Servicing FO Code) _____ (PC Code)

10. Was the request for hearing received within 65 days of the reconsidered determination? ☐ Yes ☐ No

If no, attach claimant's explanation for delay and supporting documents if any.

11. If claimant is not represented, was a list of legal referral service organizations provided? ☐ Yes ☐ No

12. Interpreter needed ☐ Yes ☐ No

Language (including sign language):

13. Check one: ☐ Initial Entitlement Case
☐ Disability Cessation Case or ☐ Other Postentitlement Case

14. HO COPY SENT TO: _____ HO on _____
☐ Claims Folder (CF) Attached: ☐ Title (T) II; ☐ T XVI;
☐ T VIII; ☐ T XVIII; ☐ T II CF held in FO ☐ Electronic Folder
☐ CF requested ☐ T II; ☐ T XVI; ☐ T VIII; ☐ T XVIII
(Copy of email or phone report attached)

16. CF COPY SENT TO: _____ HO on _____
☐ CF Attached: ☐ Title (T) II; ☐ T XVI; ☐ T XVIII
☐ Other Attached: _____

15. Check all claim types that apply:

| | |
|---|---|
| ☐ Retirement and Survivors Insurance Only | (RSI) |
| ☐ Title II Disability - Worker or child only | (DIWC) |
| ☐ Title II Disability - Widow(er) only | (DIWW) |
| ☐ Title XVI (SSI) Aged only | (SSIA) |
| ☐ Title XVI Blind only | (SSIB) |
| ☐ Title XVI Disability only | (SSID) |
| ☐ Title XVI/Title II Concurrent Aged Claim | (SSAC) |
| ☐ Title XVI/Title II Concurrent Blind | (SSBC) |
| ☐ Title XVI/Title II Concurrent Disability | (SSDC) |
| ☐ Title XVIII Hospital/Supplementary Insurance | (HI/SMI) |
| ☐ Title VIII Only Special Veterans Benefits | (SVB) |
| ☐ Title VIII/Title XVI | (SVB/SSI) |
| ☐ Other - Specify: | |



Form **HA-501-U5** (01-2015) ef (01-2015)
Use 08-2012 Edition Until Stock is Exhausted

**TAKE OR SEND ORIGINAL TO SSA AND RETAIN A COPY FOR YOUR RECORDS**

# Attachment 5

# Claimant's Appointment of Representative Form

Social Security Administration
**Please read the instructions before completing this form.**

Form Approved
OMB No. 0960-0527

| Name (Claimant) (Print or Type) | Social Security Number |
|---|---|
| Wage Earner (If Different) | Social Security Number |

## Part I CLAIMANT'S APPOINTMENT OF REPRESENTATIVE

I appoint this individual, _____
(Name and Address)

to act as my representative in connection with my claim(s) or asserted right(s) under:

☐ Title II (RSDI) ☐ Title XVI (SSI) ☐ Title XVIII (Medicare) ☐ Title VIII (SVB)

This individual may, entirely in my place, make any request or give any notice; give or draw out evidence or information; get information; and receive any notice in connection with my pending claim(s) or asserted right(s).

☐ I authorize the Social Security Administration to release information about my pending claim(s) or asserted right(s) to designated associates who perform administrative duties (e.g. clerks), partners, and/or parties under contractual arrangements (e.g. copying services) for or with my representative.

☐ I appoint, or I now have, more than one representative. My principal representative is:

_____
(Name of Principal Representative)

| Signature (Claimant) | Address | |
|---|---|---|
| Telephone Number (with Area Code) | Fax Number (with Area Code) | Date |

## Part II REPRESENTATIVE'S ACCEPTANCE OF APPOINTMENT

I, _____, hereby accept the above appointment. I certify that I have not been suspended or prohibited from practice before the Social Security Administration; that I am not disqualified from representing the claimant as a current or former officer or employee of the United States; and that I will not charge or collect any fee for the representation, even if a third party will pay the fee, unless it has been approved in accordance with the laws and rules referred to on the reverse side of the representative's copy of this form. If I decide not to charge or collect a fee for the representation, I will notify the Social Security Administration. (Completion of Part III satisfies this requirement.)

Check one: ☐ I am an attorney. ☐ I am a non-attorney eligible for direct payment under SSA law.
☐ I am a non-attorney not eligible for direct payment.

I am now or have previously been disbarred or suspended from a court or bar to which I was previously admitted to practice as an attorney. ☐ YES ☐ NO

I am now or have previously been disqualified from participating in or appearing before a Federal program or agency. ☐ YES ☐ NO

**I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.**

| Signature (Representative) | Address | |
|---|---|---|
| Telephone Number (with Area Code) | Fax Number (with Area Code) | Date |

## Part III FEE ARRANGEMENT

*(Select an option, sign and date this section.)*

☐ **I am charging a fee and requesting direct payment** of the fee from withheld past-due benefits. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **I am charging a fee but waiving direct payment** of the fee from withheld past-due benefits --I do not qualify for or do not request direct payment. *(SSA must authorize the fee unless a regulatory exception applies.)*

☐ **I am waiving fees and expenses from the claimant and any auxiliary beneficiaries** --By checking this block I certify that my fee will be paid by a third-party entity or government agency, and that the claimant and any auxiliary beneficiaries are free of all liability, directly or indirectly, in whole or in part, to pay any fee or expenses to me or anyone as a result of their claim(s) or asserted right(s). *(SSA does not need to authorize the fee if a third-party entity or a government agency will pay from its funds the fee and any expenses for this appointment. Do not check this block if a third-party individual will pay the fee.)*

☐ **I am waiving fees from any source** --I am waiving my right to charge and collect any fee, under sections 206 and 1631 (d)(2) of the Social Security Act. I release my client and any auxiliary beneficiaries from any obligations, contractual or otherwise, which may be owed to me for services provided in connection with their claim(s) or asserted right(s).

| Signature (Representative) | Date |
|---|---|

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

Form Approved
OMB No. 0960-0269

# REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE

*(Take or mail the **completed original** to your local Social Security office, the Veterans Affairs Regional Office in Manila or any U.S. Foreign Service post and keep a copy for your records)*

See Privacy Act Notice

| 1. Claimant Name | 2. Claimant SSN | 3. Claim Number, if different |
|---|---|---|
| | | |

4. I REQUEST A HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE. I disagree with the determination because:

An Administrative Law Judge of the Social Security Administration's Office of Disability Adjudication and Review or the Department of Health and Human Services will be appointed to conduct the hearing or other proceedings in your case. You will receive notice of the time and place of a hearing at least 20 days before the date set for a hearing.

5. I have additional evidence to submit. ☐ Yes ☐ No

Name and source of additional evidence, if not included.

Submit your evidence to the hearing office within 10 days. Your servicing Social Security office will provide the hearing office's address. Attach an additional sheet if you need more space.

6. Do not complete if the appeal is a Medicare issue. Otherwise, check one of the blocks

☐ I wish to appear at a hearing.

☐ I do not wish to appear at a hearing and I request that a decision be made based on the evidence in my case. (Complete Waiver Form HA-4608)

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| 7. CLAIMANT SIGNATURE (OPTIONAL) | DATE | 8. NAME OF REPRESENTATIVE (if any) | DATE |
|---|---|---|---|
| | | | |

| RESIDENCE ADDRESS | | | ADDRESS | | |
|---|---|---|---|---|---|
| CITY | STATE | ZIP CODE | CITY | STATE | ZIP CODE |
| | | | | | |
| TELEPHONE NUMBER | FAX NUMBER | | TELEPHONE NUMBER | FAX NUMBER | |
| | | | | | |

**TO BE COMPLETED BY SOCIAL SECURITY ADMINISTRATION- ACKNOWLEDGMENT OF REQUEST FOR HEARING**

9. Request received on _____ (Date) by: _____ (Print Name) _____ (Title)

_____ (Address) _____ (Servicing FO Code) _____ (PC Code)

10. Was the request for hearing received within 65 days of the reconsidered determination? ☐ Yes ☐ No

If no, attach claimant's explanation for delay and supporting documents if any.

11. If claimant is not represented, was a list of legal referral service organizations provided? ☐ Yes ☐ No

12. Interpreter needed ☐ Yes ☐ No

Language (including sign language):

13. Check one: ☐ Initial Entitlement Case
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☐ CF requested ☐ T II; ☐ T XVI; ☐ T VIII; ☐ T XVIII
(Copy of email or phone report attached)

16. CF COPY SENT TO: _____ HO on _____
☐ CF Attached: ☐ Title (T) II; ☐ T XVI; ☐ T XVIII
☐ Other Attached: _____

15. Check all claim types that apply:

| | |
|---|---|
| ☐ Retirement and Survivors Insurance Only | (RSI) |
| ☐ Title II Disability - Worker or child only | (DIWC) |
| ☐ Title II Disability - Widow(er) only | (DIWW) |
| ☐ Title XVI (SSI) Aged only | (SSIA) |
| ☐ Title XVI Blind only | (SSIB) |
| ☐ Title XVI Disability only | (SSID) |
| ☐ Title XVI/Title II Concurrent Aged Claim | (SSAC) |
| ☐ Title XVI/Title II Concurrent Blind | (SSBC) |
| ☐ Title XVI/Title II Concurrent Disability | (SSDC) |
| ☐ Title XVIII Hospital/Supplementary Insurance | (HI/SMI) |
| ☐ Title VIII Only Special Veterans Benefits | (SVB) |
| ☐ Title VIII/Title XVI | (SVB/SSI) |
| ☐ Other - Specify: | |



Form **HA-501-U5** (01-2015) ef (01-2015)
Use 08-2012 Edition Until Stock is Exhausted

**TAKE OR SEND ORIGINAL TO SSA AND RETAIN A COPY FOR YOUR RECORDS**

# MEDICAID PLANNING UPDATE

by

**JULIEANN CALARESO, ESQ.**

Burke & Casserly, P.C.

Albany

# *Medicaid Planning Update*

By JulieAnn Calareso, Esq.
Burke & Casserly, P.C.
www.burkecasserly.com
NYSBA Intermediate Elder Law CLE, presented in cooperation with the
Elder Law and Special Needs Section of the Association

**Recap on Basic 2016 Figures**

A single individual may retain $14,850 in countable assets whether he or she is applying for community based Medicaid or chronic care Medicaid. A married couple seeking Medicaid coverage for one spouse may retain no more than $74,820-$119,220 of assets, which is the Community Spouse Resource Allowance that the Community Spouse of a chronic care Medicaid applicant is permitted to retain.[1]

Income remains $50 for the applicant, whether single or married. The Community Spouse may retain $2,980.50 of income, and a portion of all income over that amount. Typically, the contribution requested is 25% of all excess income.

Example

Facts. Husband's income = $4,750 total net, after permissible deductions for Medicare premiums and secondary health insurance premiums. Wife's income = $2,000 total, after permissible deduction for Medicare premium.

Scenario #1: Husband needs care. Post eligibility income budgeting looks like this:

| | |
|---|---|
| $2,980.50 | Permissible income level for spouse (wife) |
| -2,000.00 | Wife's income |
| $980.50 | Shortfall wife is due |

| | |
|---|---|
| $4,750.00 | Husband's total income |
| -980.50 | Contribution from husband's income to wife |
| -50.00 | Income husband may keep |
| $3,719.50 | Husband's contribution toward care |

Total family contribution = $3,719.50

[1] See GIS 15 MA/21.

Scenario #2: Wife needs care. Post eligibility income budgeting looks like this:

| | |
|---|---|
| $4,750.00 | Husband's total income |
| -2,980.50 | Income husband may keep |
| $1,769.50 | Husband's excess income |
| X 25% | |
| $442.38 | Husband's requested income contribution each month |
| | |
| $2,000.00 | Wife's income |
| -$50.00 | Permissible income wife may keep |
| $1,950.00 | Wife's income contribution each month |

Total family contribution to care: $442.38 + $1,950 = $2,392.38.

**Coordination of Community Medicaid Strategies with Future Chronic Care Needs**

Perhaps the biggest planning tool that is available when care at home is needed is the ability to take advantage of the fact that eligibility for community based Medicaid coverage does not include a look back period.[2] The fact that the local County Department of Social Services (or the Human Resources Administration, or HRA, for the five boroughs of New York City) will not review 60 months of financial records to attempt to determine whether transfers for less than fair market value were made enables a person to transfer sizeable amounts of assets and apply for MLTC and other community based Medicaid as of the first day of the month following the month of these transfers.

Caution must be exercised, however, because while this transfer will not impact eligibility for MLTC and community based Medicaid benefits, the transfer will significantly impact eligibility for chronic care Medicaid should it be needed in the 60 months immediately following the transfer. Therefore, some additional planning – other than outright gifting – should be considered so as to minimize the ramifications if chronic care Medicaid is needed within five years.

[2] The imposition of a penalty period for community based Medicaid is a federal option codified at 42 U.S.C. 1396p(c)(1)(C)(ii). New York has not adopted this option, despite having suggested that it might for a while.

**Spending Down Before Planning**

The family should explore the spending of excess assets on necessary items. Many times, families have held off on investing in the new furnace or making other home repairs; many times, they are driving old cars; many times, they have "always wanted something" or know of a home modification that would make like easier, but have been too hesitant to spend the money. Encourage the family to invest in those purchases.

Prepaying funeral arrangements is also permitted. There are several ways to go about doing this. The first is to work with a local funeral home and acquire a preneed funeral account. New York State permits a funeral director to hold an Irrevocable Burial Agreement on behalf of a Medicaid applicant/recipient.[3] There are no limits to the amount that can go into the trust, but attempting to estimate the realistic and reasonable cost of the funeral is wise, as the family does not recapture any unused portion of a prepaid funeral arrangement.

If a prepaid funeral account is not acquired, the Medicaid applicant/recipient may still prearrange funeral and burial costs by acquiring and arranging for a grave, headstone, engraving, casket, grave opening and perpetual care. These expenditures are permissible, exempt assets of the applicant.[4] In addition, a Medicaid applicant/recipient may retain a life insurance policy with a face value of no more than $1,500 or may retain a dedicated burial fund account with no more than $1,500. Either of these, or a combination of both, provided it does not exceed $1,500, are permissible in addition to the burial space items listed above.[5] It is not permissible to attempt to have the burial allowance and the preneed funeral arrangements, but in circumstances where your client has not engaged in any planning, exploring these different options is a viable way to spend excess resources and plan for eligibility for Medicaid. In addition, acquiring burial accounts for the family members is also a way to spend down.[6]

Other property that is exempt from the determination of eligibility includes the personal property of the applicant, and the homestead. The homestead is the primary residence of the

[3] See Social Services Law Section 209(6)(b) and General Business Law Section (451(1)(b); see also Medicaid Reference Guide, page 365.
[4] See Medicaid Reference Guide Page 316.
[5] See 18 NYCRR § 360-4.6(b)(1).
[6] See Medicaid Reference Guide Page 365; see also 11ADM-04.

Medicaid applicant or the applicant's spouse, or the applicant's minor, disabled or blind child.[7] If an applicant has excess resources and a homestead encumbered by debt (mortgage or home equity line of credit), satisfaction of some or all of that debt is a permissible way to spend down excess resources. Because the homestead is exempt in determining home and community based Medicaid eligibility (provided the equity does not exceed $828,000[8]) this is a desirable strategy for planning for home care.

If the decision of the family is that the parent will be moving into the home of the caregiver, some consideration must be given to having the Medicaid applicant purchase a life estate in the home. However, after September 2011, this planning tool is not as attractive as it once was.

Historically, a life estate owned by a Medicaid applicant was valued at $0 when a Medicaid eligibility determination was made. This was true for each life estate the applicant owned, no matter how many life estates he/she owned. While this rule remains in effect and the ownership of a life estate (or multiple life estates) will not impact eligibility for Medicaid benefits, the purchase of that life estate or the disposing of the remainder interest in of the property while retaining a life estate may impact eligibility.

The DRA resulted in the rule that any purchase of a life estate by a Medicaid applicant will be considered a transfer for less than full value (a gift) unless the applicant purchased the life estate and resided in the home for at least a year after the purchase.[9] The purchase could not be of an interest in a property that the Medicaid applicant had prior to the purchase of the life estate. This rule cut off the possibility of selling the house to the kids at a reduced cost, then buying back an interest in the property.

While a life estate is disregarded for a Medicaid eligibility determination, the life estate still does have a value. The value must be fixed if an applicant is acquiring a life estate, and the value must be fixed if the applicant is transferring away ownership of the remainder of the property reserving for himself/herself a life estate.

Until September 26, 2011, the value of the life estate was arrived at by multiplying the value of the home in which the life estate was being purchased by the life estate table established

[7] See 18 NYCRR § 360-1.4(f) and §360-4.7(a)(1).
[8] See GIS 15 MA/21.
[9] See GIS 06 MA/016.

by the Health Care Financing Administration (HCFA). This HCFA table, known as Transmittal 64, or interchangeably known as the CMS table after HCFA became the Centers for Medicare and Medicaid Services (CMS), was appended as Attachment V of 96 AMD-08. This life estate valuation chart attributed significant value to life estates. For example, an 80 year old person's life estate was valued at 0.43659 of the value of the property.[10]

However, on September 26, 2011, the method for calculating the value of a life estate changed dramatically.[11] The change came about as part of the now-abandoned expanded estate recovery provisions that were promulgated in New York. 11 OHIP/ADM-8 provided that life estates were to be valued by using the Internal Revenue Code's Table S, taking into account the applicable federal midterm rate for the month of the transfer (referred to as the 7520 rate, based upon the provision of the Internal Revenue Code fixing that rate).

Therefore, that same 80 year old person's life estate will be of significantly less value under this new calculation. In 2013, the valuation tables were again updated.[12]

Assume the transfer (whether the acquisition of the life estate or the transfer away of the remainder interest in the property) occurred in September 2015. The 7520 rate has been announced to be 2.2%. Going to the retained life estate table of the IRS (Table S), we find that the life estate is valued at 0.16157. This is a dramatic difference from when the HCFA/CMS tables had to be used!

Because of this new method of calculation, the acquisition of a life estate in another's home is a much less attractive planning tool. That same 80 year old person would only have to pay $80,785 for a life estate in a $500,000 home under the new method; under the old method, he could have paid $218,295.

As you can see, the new method for determining the value of life estates significantly curtails the attractiveness of acquiring a life estate in another's home as a planning tool. There may, however, be times when such a transfer is desirable, and no planning option should be ignored when a crisis strikes.

As you work with your clients, you will review their current circumstances, and may find it advantageous to advise the simple spend down of assets. Some clients feel a moral obligation

[10] See 96 ADM-8.
[11] See 11 OHIP/ADM-8; see also GIS 12 MA/001.
[12] See GIS 13/MA 06.

to spend down; some married clients are pleased to learn that improvements to their home, an upgrade on a vehicle, or the prepayment of funeral expenses are available to them without penalty. Depending upon the Medicaid applicant's needs, acquiring a computer, or a television, or custom chair or other durable equipment may be of benefit. Some clients appreciate being able to hire professionals, such as geriatric care managers and/or elder law attorneys, to handle "the paperwork" without it negatively impacting eligibility. Therefore, before any planning is done, strategically analyze whether your client would benefit from spending down on necessary items.

There has always been a perception that having and spending some more "for a period of time" would enable a family to secure a more desirable nursing home placement. While this may be true, what each nursing home requires or desires is very specific to each facility. Therefore, practitioners benefit from learning local customs and practices. Some facilities indicate that if the financial means is not there to privately pay for five years, they want Medicaid in place before acceptance; some facilities are comforted by knowing an experienced and reputable elder law attorney is on the case – ensuring that there will be no Medicaid issues, or, if there are, that a plan is in place to address them.

At the conclusion of these strategic planning steps, a Medicaid application can be submitted for community based coverage. Yet, if the situation progresses after a while, nursing home admission may be the harsh reality for this family. Planning for eligibility for chronic care Medicaid now typically requires 60 months of planning. Mid-length strategies are limited, but include life estate acquisition as discussed above, and the use of a Personal Care Contract to allow a family member to be compensated for the care provided. But, the true crisis planning is the implementation of the Promissory Note/Gift plan, discussed below.

**Crisis Planning for Chronic Care (Nursing Home) Medicaid**

When a family approaches and asks for guidance on setting aside some of the family's wealth to pass along to heirs while nursing home admission is imminent, the plan is, most often, the Promissory Note/Gift plan. However, it is not the only option. Before launching into the Note/Gift concept, consider alternatives, and explain them fully to the client.

**Evaluate Assets for a Five Year Plan**

As you gather information from the client, you may soon realize that there is sufficient means to start a five year plan, even for a person who is imminently entering a skilled nursing facility. This sometimes occurs when income is extremely high, when the cost of care is unusually low, when assets are sizeable, or when more than one of these factors is at play in any given situation. Considering the cost of care at the facility of choice, whether the applicant is single or married, the types of assets available and involved, and whether there are suitable and trustworthy persons to engage in high-level planning (such as the Gift/Note plan) is critical to determining whether the implementation of a five year plan is suitable.

A significant advantage to the five year plan for married couples of significant financial means is that planning is then underway for both spouses. At other times, with significant wealth, the Note/Gift plan would run for almost five years in order to achieve the same objective, and the few months of savings is outweighed by the highly technical obligations of maintaining the Gift/Note plan for such a significant duration.

Another issue to consider is whether a client who has significant means to engage in lengthy Gift/Note planning should be morally obligated to pay for care for a period of time. While Medicaid planning is legal and available to all persons, there are people in the community who feel that millionaires should not be entitled to Medicaid without first having contributed significantly to the cost of care.

Finally, a consideration must be had to whether five years of records can be obtained, and what might be contained within them. For people who have unknown financial pasts (such as when an adult child steps in to take over a parent's finances and knows nothing about the way the parent had been managing finances), it may simply be easier to "start fresh" – make significant transfers on a particular date, and count five years out for eligibility. In this way statements are being gathered prospectively, and whatever the parent may have done in the past is irrelevant.

**Consider Exempt Transfers**

There exist significant opportunities for "exempt" transfers.[13] Transfers between spouses do not cause eligibility issues; transfers to a disabled child; transfers to a trust established for the sole benefit of a disabled person under age 65; a sibling with an equity interest in the home who meets certain criteria; and to a caretaker child are all possible considerations that must be evaluated before engaging in additional planning. Each potential exempt transfer has its benefits and detriments. For example, while the transfer of assets to a disabled child may not impact the parent's Medicaid benefits, the receipt of such assets may impact the disabled child's benefits, depending upon the circumstances and the benefits the disabled child is receiving. Another example that warrants careful consideration is the misalignment that a transfer to a disabled child may have on the overall estate plan of the parent - giving an asset to a disabled child is a 'quick fix' but might deny the non-disabled children from sharing in the parent's assets. The elder law practitioner would benefit from a careful review of the potentially available exempt transfers in each situation, and advise the client and family accordingly.

**Consider Spousal Refusal**

Spousal refusal is another viable strategy that warrants consideration in some circumstances. This federal right permits an otherwise responsible spouse from refusing to contribute assets or income to the support of the ill spouse.[14] In New York, a "refusing" spouse may retain assets and income beyond the allowable amounts if a letter signed by the refusing community spouse is submitted with the Medicaid application and if the Medicaid applicant spouse assigns to the local district the right to pursue from the refusing spouse the statutory legal obligation of support.[15]

It is my practice to tell refusing spouses that Spousal Refusal is not a responsibility avoidance tool, but rather a cost savings mechanism. There are many issues that must be considered when advising on the possible use of spousal refusal. First, there is the very real

[13] See 18 NYCRR 360-4.4(c)(2).
[14] See 42 U.S.C. 1396K(a)(1)(A).
[15] See Social Services Law § 366(3)(a).

threat of a law suit against the refusing spouse. The potential estate recovery against the refusing spouse is another consideration. The intricacies of spousal refusal should be carefully investigated by the elder law practitioner discussing this with the client, and the client should be fully aware of the risks and benefits associated with this strategy. It is appropriate in some cases, but not in all cases.

**Consider the Promissory Note/Gift Plan**

Finally, as you explore all other options, the implementation of a Promissory Note/Gift Plan can be considered. You will recall that the Deficit Reduction Act (DRA)[16] changed the timing at which a penalty period for gifts begins to run. Prior to the DRA, the penalty period for any transfers began to run on the first day of the month following the month of transfer. In this way, a transfer could be made, the penalty period calculated, and then the family could "wait out" the running of the penalty period. At the end of the penalty period, the transfer was no longer a consideration in Medicaid eligibility.

The DRA changed that. The penalty period begins to run on the LATER of:

(1) the date when

(a) the Medicaid applicant:

(i) is resource eligible;

(ii) is income eligible;

(iii) requires nursing home level care; and

(iv) has filed a Medicaid application; **and**

(b) no other ineligibility period is outstanding; **or**

(2) the first day of the month after which assets have been transferred.[17]

Therefore, the applicant must be in a nursing home, have no more than $14,850 in his/her name, and have a Medicaid application submitted in order for the penalty period to begin running. It is the careful coordination of these factors that the experienced elder law attorney must undertake in order to have a successful Promissory Note/Gift Plan.

[16] See 06 ADM-05.
[17] See GIS 06 MA/016.

The premise of the Promissory Note/Gift Plan is the depletion of the applicant's assets in a simultaneous gift and loan transaction. A portion of the applicant's assets are gifted away, and, at the same time, the remainder of the applicant's excess resources is loaned away in a DRA compliant Promissory Note.[18] In one fell swoop, the applicant is now below the $14,850 resource level. The penalty period for the transfer can begin, provided the applicant is receiving nursing home care and a Medicaid application is submitted. During the running of the penalty period, the loaned funds are returned to the applicant on a monthly basis, thereby providing the applicant with additional funds with which to privately pay the nursing home until such time as the penalty period expires.

The Promissory Note/Gift Plan was the logical planning tool that remained after the implementation of the DRA. As this type of planning began to develop in 2006, its implementation was, of course, met with resistance from the Local Department of Social Services (LCDSS). Some fair hearing decisions set the tone, allowing properly implemented Promissory Note/Gift plan to proceeds.[19] With solid legal footing underneath, practitioners must now begin the tedious but valuable journey into Promissory Note/Gift planning.

**Beginning the Promissory Note/Gift Plan**

The gathering of information is critical. Rough numbers can be used to illustrate to the client the broad strokes of how the plan will work, but precise figures are needed before a plan can be finalized. How your practice decides to gather the information is a personal decision. Some firms do not start calculations until all documents are in; some firms ask for current statements of holdings and then rough out numbers. Other firms, like me, have different team members working on different portions of the plan throughout the month.

1. Determine the Medicare Cut Off Date. The Promissory Note/Gift Plan will only work when the applicant financially qualifies for Medicaid health benefits. This means the applicant must be receiving nursing home care, is "income eligible" and has assets below the permissible threshold. Because New York is an income spend-

[18] See GIS 06 MA/016.
[19] See Matter of Geraldine A., Fair Hearing #4733466Z, Albany County, decided August 29, 2007.; Matter of Anna M., Fair Hearing # 4733471N, Albany County, decided August 29, 2007; Matter of Mary K, Fair Hearing #4733465H, Albany County, decided August 29, 2007.

down state, Medicaid will only provide coverage when the applicant's medical needs exceed his or her ability to pay. Therefore, in order to be "income qualified" for Medicaid benefits, the applicant must have medical bills that exceed his or her income. If Medicare is paying for the applicant's rehabilitative care in the nursing home, chances are that the applicant will have supplemental insurance to cover the co-pay, or will have enough income to pay the co-pay for the care. As a result, he or she will not have medical expenses that exceed income, so, the applicant will not be income eligible. Therefore, determining the precise day on which Medicare will no longer be paying for the care in the nursing home is critical to the timing of the Promissory Note. Unfortunately, this may be mid-month or, even worse, with only a day or two left in the month. Timing is everything!

2. Assess the Assets. It is critical to know what the applicant has. Remember what assets must be counted…***everything that is not exempt***! Ask about life insurance cash values; ask about nursing home deposits; ask about those pesky stock shares that were issued when life insurance companies went public years ago; ask about those 529 plans that the applicant set up for her grandkids; ask about the joint bank account the applicant holds with her sister…all of these things will either need to be factored into the Promissory Note/Gift Plan, or fully explained and documented to LCDSS if they are not to be considered assets of the applicant.
3. Assess the Prior Transactions. Put on your LCDSS Caseworker hat. You must review every financial record that you will be submitting to LCDSS.[20] If there is a transaction the applicant can't explain, it will be considered a gift. You must know what things are going to be considered prior transfers/old gifts in order to arrive at an accurate Promissory Note/Gift Plan.
4. Assess the Income. You must examine the income of the applicant in minute detail. You need to know the gross income from all sources – Social Security or Railroad Retirement Benefits; pensions; required minimum distributions from IRAs; rental income from a life estate or any other property; VA benefits; long term care insurance

[20] While the Medicaid application itself suggests that LCDSS review all transactions of $2,000 or more, that figure is merely *suggestive*; individual LCDSS are permitted to review transactions of whatever amount they wish, and your author has experienced upstate counties reviewing transactions (deposits and withdrawals) of $500.

benefits; disability insurance benefits; income from trusts of which the applicant is a beneficiary; and dividend and income from investments. Do not be caught unprepared! Compare 1099s and award letter from Social Security and pension administrators. Do not trust bank statement or the fact that you see the same deposit every month going into an account. Some pensions pay a 13th check at some point during the year. Look, look, and look again! You must then know the exact value of the only the permissible offset– health insurance expenses. In addition, review pension statements carefully to see if the pension administrator reimburses the applicant for Medicare premiums. If so, this must be taken into account. Determine if Medicare premiums are withheld from income. Determine if health insurance premiums are withheld from pensions. Determine if the applicant pays a monthly or quarterly premium for health insurance. Determine if the applicant has been having income taxes withheld from income. All of these factors must be addressed in order to arrive at an accurate Promissory Note/Gift Plan.

5. Assess the TRUE cost of care. You must know, precisely, the exact cost of daily care, plus the then-prevailing NYS nursing home assessment (currently 6.8% through March 2016).[21] It will also benefit you to know what portion of the nursing home assessment is refundable to your client as well.
6. Assess the Outstanding Liabilities. You must determine if the applicant has debts that must be paid before you calculate your Promissory Note/Gift Plan. Debts can include paying your fee and prepaying for funeral costs. Remember, we are trying to arrive at excess resources, so the total of all gross resources, minus expenses that will be paid in the immediate future, result in the excess resource figure from which we will begin our plan. Outstanding medical expenses can be used to offset excess assets if needed.
7. Gauge Your Client's Need for Retained Assets. There can be great flexibility in the Promissory Note/Gift Plan if the client is not wed to the concept of having $14,850 in his/her name on the first day of the month in which the plan begins. Because there will inevitably be a surprise – interest that posts; a forgotten check that didn't clear in

[21] See Public Health Law § 2807-d(2)(b); Tax Law, Article 22, Section 606(hh) permits the refund of a portion of this assessment; see also NYS Dept. of Taxation Form IT-258, Claim for Nursing Home Assessment. See also https://www.health.ny.gov/facilities/cash_assessment/

time; a long lost life insurance policy – it is my practice to prepare the applicant and the family for the fact that my plan will not permit him/her to retain the full $14,850. I do, however, carefully demonstrate to the applicant and the family that the retained funds will be sufficient and that costs will be covered from a variety of other avenues.

8. Assess the Liquidity of Assets. Some of your decisions may be made for you if it turns out that the applicant has significant illiquid assets that cannot easily be converted to cash. Depending on the timing of the plan, and depending upon the income tax and capital gains basis of various assets, you may be forced to permit your applicant to retain life insurance policies with cash values as his/her retained funds. (After eligibility, liquidation can occur.) Another example might be the gifting of a remainder interest in a home with a retained life estate, so as to preserve step up in basis benefits upon death of the applicant, using liquid resources for the loan. There is a horrible feeling when you arrive at a plan based on the presumption that the assets are all easily transferrable, only to find out that you're over-resourced and can't do anything about it!
9. Remember Your Penalty Period Divisor. The penalty period will be calculated based upon the regional rate of nursing home care as prescribed by New York State for the region in which the facility is located. So, it is possible to have a Nassau County resident applying for Medicaid to pay for coverage of her stay in an Albany County nursing home. The regional rate when calculating the penalty period will be $9,414 based upon the northeastern regional rate and not $12,390 based upon the Long Island regional rate.[22]
10. Put Your Numbers to Work. A good first step is to determine what it is that your Promissory Note must generate for your applicant to permit him/her to meet the cost of care. Be aware that there is a requirement that the applicant's monthly income cannot exceed the cost of care in order for that applicant to be considered eligible for Medicaid benefits. Therefore, if your applicant's regular net income and Promissory Note payment total an amount that exceeds the monthly cost of care your plan will not work.

[22] See GIS 15 MA/001; see also 96 ADM-8, page 15.

**How to Do the Math**

There are software programs that exist that can generate a Promissory Note calculation for you. Other people do the math with a pencil and paper. Still others have developed an Excel spreadsheet or other database-like program to determine how a promissory note might work. In reality, you need to have a good amortization calculator at your disposal because you must determine an actuarially sound promissory note (discussed below).

**The Parties at the Promissory Note/Gift Party**

Obviously, the well-versed elder law practitioner is the most important part of the Promissory Note/Gift Plan. However, a dependable, reliable paralegal is critical as well, as you will be reviewing voluminous documents – and perhaps in a very short period of time. In addition, you must have all the documents you need, and so the active participation of the applicant (or, most likely, the family) is also critical. Even if your letter of engagement and fee structure put the responsibility for securing all documentation on you and your firm, you will still need the applicant and family's input and guidance in explaining prior transfers and transaction that need additional documentation.

The discussion must then be had with the applicant as to who can be a suitable recipient of the gifted funds and who is a trustworthy borrower for the Promissory Note. Ideally, the Borrower will be someone with whom you, as the attorney, have a good working relationship.

**Drafting the DRA Compliant Promissory Note**

The actual Promissory Note document (which is a legal document to be prepared by qualified counsel only) must meet certain specifications in order to be acceptable to the local County Department of Social Services.[23] A Promissory Note meets the requirements of the federal DRA statue if it is (1) actuarially sound, as discussed below, (2) the monthly payment amounts are equal during the term of the note with no provisions for deferral or balloon

[23]See 42 U.S.C.A. 1396p(c)(1)(I); see also 06 ADM-05.

payments at the end of the note, and (3) the promissory note is not cancelled (forgiven) upon your death. Failure to comply with these provisions is fatal to your plan.

A promissory note will be deemed actuarially sound if the payout period (the number of months the payments will be made under the note) is proportionately related to no more than a person's life expectancy. 06 AMD-05 provides that a Promissory Note is actuarially sound if it is calculated "in accordance with the actuarial publications of the office of the Chief Actuary of the Social Security Administration."[24] Using this life expectancy chart, our hypothetical 80 year old would have had a 7.31 year life expectancy if a male and a 8.95 year life expectancy if female. However, GIS 14 MA/028 was issued on December 4, 2014, providing an updated Life Expectancy Table.[25] Using the new life expectancy chart, that same 80 year old male has a life expectancy of 8.1 and a female has 9.61. This slight difference is most likely irrelevant when discussing a Promissory Note plan because most Promissory Notes are in place for much less than 5 years. If an applicant had the funds to engage in a loan that would span more than 60 months, he/she wouldn't be doing a Promissory Note/Gift Plan and would instead simply transfer assets and wait until the expiration of the look back period.

While the DRA does not include this provision, it is advisable that the Promissory Note be non-negotiable. In other words, make the Promissory Note unable to be resold. A traditional Promissory Note can be sold between parties – much like your home's mortgage may have been sold to another bank. This negotiability gives the Promissory Note value and might result in other provisions of the Medicaid eligibility rules pulling the negotiable promissory note into the "available resource" category. Therefore, making your Promissory Note non-negotiable will be an added layer of protection.

The proper drafting the Promissory Note is critical, as an improperly drafted note can be deadly to the plan.[26] Geriatric care managers, Medicaid Advisors, and other non-attorney persons who attempt to undertake Promissory Note planning may very well wind up costing the applicant the precise assets he/she was attempting to preserve.

[24] See 06 ADM-05, attachment VIII.
[25] See 14 MA/028.
[26] See Matter of Rose Pape, Fair Hearing #4732056R, February 15, 2007.

**Doing the Math**

With a well drafted Promissory Note document in hand, the question still remains…how much is the Gift, how much is the Note, and how will all of this work??

Different practitioners approach the plan differently. Some fix the amount of assets the applicant retains, and allow the Gift/Note numbers to be adjusted. Others prefer a gift number that doesn't include a partial month penalty period, allowing the loan and retained assets figures to be adjusted. Others prefer to ensure the monthly loan repayment figure is as close to the actual cost of care (when added to other income) as possible.

Other factors to think about include building in a "cushion" in the applicant's retained funds and in the gifted monies in case the LCDSS caseworker identifies any transfers that you might have missed. You may also wish to consider whether the applicant will apply for and receive the refund on the nursing home assessment and/or an income tax refund. Both of these sums will assist in making the applicant and family more comfortable with the figures you present.

Finally, it is time to just put pen to paper and begin playing with the figures. A good starting rule of thumb is to try half the value of the excess resources. Plug that value in and calculate the penalty period, and then plug that number into the Promissory Note and see where the numbers come out. Remember to reserve some funds for the applicant! The manipulation of the figures can be a time consuming endeavor, even for those people using document drafting software or other calculators. However, the end results for the client can be tremendous, so take your time and good luck.

## Return of Gifts (The "Weiss" Issue):

*thanks to Matthew J. Nolfo, Esq. and David H. Weiss, Esq., who prepared the substance of these materials for the Elder Law and Special Needs 2016 Summer Meeting in Philadelphia*

When a Medicaid application is submitted and the sixty (60) month review of financial records is done, occasionally transfers are discovered. As we know, transfers trigger a penalty period. It is often advantageous to consider a return of gift. If an irrevocable trust has been used,

a partial or complete revocation under EPLT §7-1.9 is considered. If outright gifts are made, a return of the asset or a cash equivalent is often needed. However, families often indicate "Oh, but I used that money for [my parent]" and the practitioner is then left to discern whether the use of the gifted funds count as a return of gift under the Medicaid rules.

> *"For purposes of these [Medicaid] rules, transferred assets shall be considered to be returned if the person to whom they were transferred: uses them to pay for nursing facility services for the MA applicant/recipient; or provides the MA applicant/recipient with an equivalent amount of cash or other liquid assets."* 96 ADM-8

A recent case brought to the forefront the rule that has been in New York Medicaid for a while – a gift is only considered to be returned if the actual monetary value of the gift is returned, in whole or in part, to the donor/Medicaid recipient, or of the gifted funds have been used on the donor/Medicaid recipient's nursing home care. Use of funds on things such as assisted living care, home care, or other expenses are not considered a return of gift. The case is Matter of Weiss v. Suffolk Cty Dep't of Soc. Svcs., *et al*. 121 A.D.3d 703, App. Div. 2d Dep't, Oct. 1, 2014.

## Recent Cases/Fair Hearings

*FH #7107567M, Oneida County, June 3, 2016*

Facts: A/R spent $40,400 on roof repairs for a house owned by her son. "Land Use" agreement (informal document) states A/R was entitled to life use with A/R to pay all mortgage payments, insurances and taxes. A/R and son switched houses for about a year. A/R and son never lived together.

Issue: Was penalty period assigned to transfer of assets for less than fair market value when she expended funds for roof repairs correct?

Decision: The Medicaid applicant spent funds on a house in which she had no legal interest. Agency determination that roof repair expense was uncompensated transfer sustained.

*FH #7065632J, Albany County, June 3, 2016*

Facts: 67 year old Medicaid applicant resides in a nursing home and filed for Medicaid in mid-2015. Medicaid viewed a deed, executed by Applicant on April 4, 2006 by which the Applicant transferred ownership of her house to herself and her three siblings. The conveyance reserved the Applicant's life estate interest in the premises, with the condition that the interest would fail if the possessory interest should cease for more than 90 days, or that the Applicant had the right to extinguish the life interest at any time. Applicant moved into assisted living in 2013. Applicant also executed a deed dated May 15, 2014 and recorded June 5, 2014 which convey and cancel the Applicant's life estate interest to her three siblings in the house which she owned jointly with them.

Issue: Was Agency determination of a transfer of assets for less than fair market value correct?

Decision: Agency's imposition of penalty period was correct. Based upon the facts, there was no evidence that the possessory interest was surrendered when she moved into the assisted living facility; further, the 2014 deed did demonstrate the surrender of the life estate. The 2014 deed extinguished the life estate, resulting in uncompensated transfer subject to penalty.

*FH #7225195R Oneida County, June 3, 2016*

Facts: Community spouse (CS) put IRAs in pay-out but did not maximize. Irregular withdrawals made.

Issue: Excess resource calculation including non-periodic payments from IRA.

Decision: CS made non-periodic withdrawals from IRA, considered a conversion of a resource and not countable income. Lump sum withdrawal does not satisfy requirement for exemption. A/R must maximize benefits as a condition of eligibility. An IRA is a countable resource if CS is NOT receiving periodic payments. See Social Services Law Section 360-4.10.

*FH #7300106H Suffolk County, June 7, 2016*

Facts: CS's total available income = $2,960.50. A/R's total available income = $2,580.79. CS struggles to make ends meet. CS submitted normal monthly bills (no unforeseen or exceptional expenditures).

> The argument proffered by the Appellant's spouse was basically that her daily living expenditures and the fact of the Appellant's institutionalization created unexpected and/or exceptional financial strain which made it difficult or impossible for the Appellant's spouse to currently meet her day to day financial obligations. She contended that she was experiencing difficulty meeting her living expenses, including the maintenance of her residence and she had been forced to dip into her savings which will soon run out. She stated it would then become impossible to actually meet her monthly obligations.

Issue: Award increasing CS's monthly income allowance to relieve significant financial distress.

Decision: Significant financial distress means exceptional expenses which CS cannot be expected to meet from MMNA or from amounts held in resources- recurring or extraordinary non-covered medical expenses, amounts to preserve, maintain or make major repairs to homestead, amounts necessary to preserve income-producing asset. Sympathetic but unfortunate- no expenses rose to the criteria of exceptional and unforeseen.

*FH #: 6994577Y Suffolk County, August 28,2015*

Facts: Medicaid applicant asked for otherwise eligible date of July 2014. The applicant was the co-owner of real property as a joint tenant with another person. On August 18, 2014, the applicant signed an agreement to sell the real property which he owned as a joint tenant. The agreement was not signed by the other joint owner. C losing of title to the real property occurred on September 29, 2014 at which time the applicant and the joint tenant agreed to the sale. Both parties received a share of the proceeds of the sale.

Issue: When does legal impediment end on jointly owned real property between the Medicaid applicant and another?

Decision: Administrative Directive 03 OMM/ADM-01 provides that all nonexempt resources are considered available and applied against the appropriate resource standard, unless there is a legal impediment that precludes the liquidation of the resource. A legal impediment exists when a Medicaid applicant is legally prohibited from, or lacks the authority to, liquidate the asset. For example, a legal impediment exists when a Medicaid applicant needs the consent of a co-owner of a jointly owned asset in order to sell the asset, and the co-owner refuses to give consent. If such consent is given, the asset is considered an available resource beginning with the month following the month of consent. In this case, the Agency's determination that the asset was available as of the date the a Medicaid applicant signed the consent to sell cannot be sustained, as the first available time at which the joint owner consented was September.

*Dwyer v Valachovic*, 3rd Dept. 03/03/2016; 137 AD3d 1369, 2016 NY Slip Op 01542
Facts: SCPA 2103 discovery proceeding with petitioner alleging that Decedent owned or held an interest in bank deposits of $90,000. Only asset Decedent held was a $9,000 account.
Decision: Burden of proof on party alleging undue influence. Burden shifts when confidential relationship established. Mere existence of a Power of Attorney neither establishes nor shifts the burden of proof to respondent. 3 year limitations period applicable to conversion claim.

*Matter of Flannery v Zucker*, 4th Dept. 02/11/2016; 136 AD3d 1385, 2016 Slip Op 01075

*** see the fair hearing below – sounds like this Fair Hearing (#6739462L) preceded this Article 78

Facts: Medicaid applicant was beneficiary of a trust. Trust was not funded until Grantor's death. Agency had determined that entire trust was available resource because the Trustees had discretion to distribute principal for HEMS, even if they never exercised such authority.
Decision: When reviewing fair hearing determination, court must determine whether the agency's decision is supported by substantial evidence and is not affected by an error of law, bearing in mind petitioner has the burden of demonstrating eligibility. Court held trust was not a

testamentary trust even though it was funded at death because it was not created by Will. [NOTE: this leads us to understand that the Trust was created by the Applicant's spouse, because a testamentary trust is the only type of trust that is acceptable for a spouse to leave to benefit a surviving spouse.] Further, the court held that applicant failed to establish that it was a third party trust because the applicant failed to prove no assets of his/hers went into the Trust. Therefore, the Agency's determination that trust was available resource was correct.

*Fair Hearing #6739462, Ontario County, May 30, 2014*

Facts: Husband set up revocable trust in 1983 with trusts established for wife after his death (Trusts A and B). Only Trust A was funded after husband's death. Trust A provides for discretionary distributions of principal and income to wife for health, maintenance and welfare. Children were co-trustees. Trust had $1M+/- when wife applied for Medicaid.
Decision: SCPA § 103(48) defines testamentary trust as "a trust created by Will." Appellant provided no case law, statute or regulation that a testamentary trust could be created by a revocable trust. Trustees have authority to invade trust corpus to provide for Medicaid applicant, therefore entire corpus is available resource in determining her Medicaid eligibility.

*Fair Hearing#7319847Y*, Erie County, June 9, 2016
Facts: Single applicant for chronic care benefits, Attempt to get more than $50 per month of income. His phone charges were $40 per month and therefore the personal needs allowance was not sufficient.
Decision: Medicaid regulations do not allow any amount greater than $50.00 for a single person with no exception for hardship or for modification.

# Recent ADMs/GIS/INF

*16 OHIP / ADM 02*
Subject: Immediate Need for Personal Care Services and Consumer Directed Personal Assistance Services

Date: July 1, 2016

The purpose of this Office of Health Insurance Programs Administrative Directive (OHIP ADM) is to advise local departments of social services (LDSS) of the requirements to provide expedited Medicaid eligibility determinations for Medicaid applicants who have an immediate need for Personal Care Services (PCS) or Consumer Directed Personal Assistance Services (CDPAS). The directive also advises local districts of expedited procedures for determining PCS or CDPAS eligibility for Medicaid applicants and recipients with an immediate need for either service. The directive defines an applicant/recipient (A/R) with an immediate need for PCS or CDPAS, outlines the requirements that need to be met in order for local districts to perform an expedited eligibility determination and details the time frame for the assessment for PCS or CDPAS.

*GIS 16 MA/06*

Subject: Changes to the Statute for the Consumer Directed Personal Assistance Program (CDPAP)

Effective April 1, 2016

The purpose of this General Information System (GIS) message is to inform local departments of social services (LDSS), eligibility and managed care staff of revisions to the Consumer Directed Personal Assistance Program (CDPAP). Effective April 1, 2016, and in accordance with Chapter 511 of the laws of 2015, changes will go into effect that modify who can work as a CDPAP personal assistant for an eligible participant. The purpose of these changes is to permit parents of adult children to be hired and work as CDPAP personal assistants.

*GIS 16 MA/010*

Subject: 2015 Update to the Actuarial Life Expectancy Table

Effective Date: Immediately

As advised in Administrative Directive 06 OMM/ADM-5, "Deficit Reduction Act of 2005 – Long-Term Care Medicaid Eligibility," the life expectancy table issued by SSA is required to be used in evaluating whether an annuity purchased by or on behalf of an applicant/recipient on or after February 8, 2006 is actuarially sound. The table is also used in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound.

*GIS 16 MA/11*

Subject: Closing the Long Term Home Health Care Program (LTHHCP)

Effective Date: May 27, 2016

The purpose of this General Information System (GIS) message is to inform local departments of social services (LDSS) that the Long Term Home Health Care Program (LTHHCP) will formally close on May 27, 2016.

*GIS 16 MA/09*

Subject: Revised DOH-4220: Access NY Health Care Application

Effective Date: Immediately

The Access NY Health Care application has been updated. Individuals applying for nursing home coverage should apply using the Access NY Health Care application.

**** Note: There are two different Supplement A forms available that must be used. See https://www.health.ny.gov/health_care/medicaid/#apply**

## Application

DOH-4220

- English, Spanish, Chinese, Haitian Creole, Italian, Korean, Russian

DOH-5130 - Alternative Format Supplement - Options to receive information if you are blind or visually impaired.

## Supplement A

There are two Supplements: DOH-4495A and DOH-5178A. Please read the instructions below to see which Supplement you should use.

If you reside in one of the counties listed below, use Supplement DOH-5178A.

- 

| | |
|---|---|
| o Albany County | o Schoharie County |
| o Montgomery County | o Suffolk County |
| o Saratoga County | o Warren County |
| o Schenectady County | o Washington County |

- **DOH-5178A**:If you DO NOT reside in one of the counties listed above, use Supplement DOH-4495A.
- **DOH-4495A**:

Note: A new system called the Asset Verification System has started in the counties listed above. The Asset Verification System will verify certain resources through computer matches. Because the initial pilot stage of the Asset Verification System is limited to the counties listed above, only residents of those counties should use Supplement DOH-5178A.

# Spousal Budgeting Issues (eligibility as single person, post-eligibility budgeting)

See materials prepared by Valerie Bogart, included

*New York Elder Law* by David Goldfarb & Joseph Rosenberg (Lexis/Matthew Bender, 2016)

Chapter 8
§8.02[2][c]

RETURN OF GIFT

No penalty period will be imposed on transferred assets that have been returned (but a penalty period will be imposed based on the value of the transferred assets that have not been returned).[59] In *Matter of Peterson v Daines*,[60] the court concluded that uncompensated transfers were not cured by the subsequent return of a different interest (joint tenancy) in a different property.

**Caution:**

If funds from a trust are distributed to a beneficiary under a trust provision, and subsequently returned to the grantor, some local agencies do not consider this a return of transferred assets since the return is not from the person or entity who received the gift.

**Caution:**

The Appellate Division, Second Department has upheld a narrow view of the language regarding the return of a gift allowing only direct return of funds or payments for medical expenses, such as nursing home bills.61 However, funds used by a fiduciary, such as an agent under a power of attorney, may be used to show that the transfer was not uncompensated.[62]

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[59] SSL § 366(5)(d)(3)(iii); 18 NYCRR § 360-4.4(c)(2)(iii)(d). 96 ADM-8 (3/29/1996) at 23–24.
[60] Matter of Peterson v Daines, 77 A.D.3d 1391, 909 N.Y.S.2d 611 (4th Dep't 2010).
[61] Matter of Weiss v. Suffolk County Dept. of Social Servs., 121 A.D.3d 703, 993 N.Y.S.2d 368 (2d Dep't 2014). 96 ADM-8 (3/29/1996) at 23–24 states: "For purposes of these rules, transferred assets shall be considered to be returned if the person to whom they were transferred: uses them to pay for nursing facility services for the MA applicant/recipient; or provides the MA applicant/recipient with an equivalent amount of cash or other liquid assets."
[62] Matter of J.P., FH # 6042610J (Nassau County 05/23/2012).

MLTC & SPOUSAL BUDGETING

New York's laws on spousal impoverishment budgeting[24.1] were amended in 2013 to include, for the purposes of budgeting, under the definition of an "institutionalized spouse" a person who is receiving care, services, and supplies under the Managed Long Term Care (MLTC) Program to the extent that federal financial participation is available therefore.[24.2] The law was previously amended to apply to other Home and Community Based Service (HCBS) waiver programs.[24.3]

Couples, where one person is receiving Medicaid home care through the MLTC program, will now be able to use the "spousal impoverishment" budgeting rules. On September 24, 2013, the New York State Department of Health announced that "spousal impoverishment protections" are available to married participants in all MLTC plans, including PACE and Medicaid Advantage Plus plans.[24.4]

These rules were previously expanded to the Traumatic Brain Injury (TBI) and Nursing Home Transition and Diversion (NHTD) waiver programs and had previously been applied to the "Lombardi Program" (Long Term Home Health Care Program).[24.5]

Under the "spousal impoverishment protections" income can be shifted from the spouse receiving Medicaid to the non-Medicaid "well" spouse to bring his or her income up to a Minimum Monthly Maintenance Allowance (MMMNA) ($2,980.50 in 2016). However, spousal impoverishment protection is considered "post-eligibility budgeting," and the Medicaid spouse's excess income cannot be transferred to a pooled trust.

In waivered community-based programs the Medicaid spouse can keep a calculated personal needs allowance (PNA) (in 2016, $384). The PNA for a community-based or waiver recipient is the difference between the two-person and one-person income levels (in 2016, $1,209 - $825 = $384).[24.6]

It is necessary to determine how much income, in addition to the Medicaid recipient's PNA, can be shifted to the non-Medicaid Community Spouse. First, calculate the Community Spouse Monthly Income Allowance (CSMIA), which is the difference between MMMNA and the Community Spouse's net income.

[24.1] SSL § 366-c(2)(a).
[24.2] 2013 N.Y. Laws Ch. 56, Part A, § 68. For a description of MLTC, *see* § 6.04[7], above, the New York Department of Health website, *available at* https://www.health.ny.gov/health_care/managed_care/mltc/aboutmltc.htm, and the NY Health access website, *available at* http://www.wnylc.com/health/entry/160/.
[24.3] 2009 N.Y. Laws Ch. 58, Part D, § 42.
[24.4] GIS 13 MA/018. Note: GIS 14 MA/15 (effective August 15, 2014) had rescinded GIS 13 MA/018 and stated that spousal impoverishment rules must be used. However GIS 14 MA/025 (effective November 3, 2014), reverses the recession and reinstates GIS 12 MA/13 and GIS 13 MA/18 (and rescinds GIS 14 MA/15). *See* https://www.health.ny.gov/health_care/medicaid/publications/gis/14ma025.htm.
[24.5] See GIS 12 MA/013, *available at* https://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma013.pdf, explains the methodology for calculating spousal impoverishment budgeting in Home and Community-Based Waiver Programs.
[24.6] GIS 12 MA/013 explains the methodology for calculating the personal needs allowance.

For example, under spousal impoverishment protections budgeting, if the Community Spouse's gross income from pension, Social Security and Minimum Required Distribution from an IRA is $2,000 per month and he or she has a $240 deduction for Medicare Supplemental Insurance, the Community Spouse's net income is $1,760 ($2,000 minus $240) and the CSMIA payable from the Medicaid spouse is $1,220.50 (MMMNA $2,980.50 – net income $1,760). Therefore, in addition to the Community Spouse's net income of $1,760, the couple gets to keep $1,604.50 (Medicaid spouse PNA $384 + CSMIA $1,220.50). Note that the amount available to satisfy the CSMIA depends on the Medicaid spouse's income.

Assume again under a "post-eligibility" spousal impoverishment budget, that the Medicaid spouse who is the Applicant/Recipient has income (after deduction for Medicare Supplemental Insurance) of $2,000, then the Applicant/Recipient keeps a PNA of $384, and shifts $1,220.50 to the Community Spouse and the remaining Medicaid monthly spenddown is $395.50 ($2,000 income - $384 PNA = $1,616 - $1,220.50 CSMIA = $395.50 Medicaid monthly spenddown). According to the Department of Health interpretation of these rules, a pooled trust cannot be used to eliminate the spenddown with spousal impoverishment budgeting.[24.7]

Alternatively, under individual single person budgeting that permits use of a pooled trust for excess income, the Medicaid spouse who is the Applicant/Recipient could keep only the single person income level of $825 plus a $20 disregard and the spenddown would be $1,155 ($2,000 - $845), which could be transferred into a pooled trust. The Community Spouse could exercise the right of spousal refusal and keep his or her entire income of $2,000. This option would enable the couple to keep all of their income and would be considered more advantageous than having a spenddown $395.50, although a substantial portion of the Medicaid spouse's income, $1,155, would be managed and distributed by the pooled trust.

According to the Department of Health, the Medicaid spouse who is the Applicant/Recipient can decide which budgeting methodology is more favorable: the "post-eligibility" spousal impoverishment budget that transfers excess income to the community spouse (up to the MMMNA limit), but does not permit the use of a pooled trust for excess income or individual single person budgeting that uses a pooled trust for excess income.[24.8]

Spousal impoverishment rules still apply to the couple's resources, whichever methodology is used for income. In 2016, the Applicant/Recipient may keep $14,850 in his own name. As for the Community Spouse, the minimum resource allowance is $74,820.[24.9]

**Caution:**

The rules are complex and there are advantages and disadvantages to each methodology for calculating income. Generally, according to the GIS, if under spousal impoverishment budgeting, the sum of the recipient's Personal Needs Allowance ($384 in 2016), Community Spouse Monthly Income Allowance (Difference between MMMNA and the Community Spouse's net income, payable from the

[24.7] GIS 14 MA/15 (effective August 15, 2014) (applies budgeting with "post-eligibility rules," which precludes the use of a pooled trust for income).

[24.8] In most cases it will be more advantageous to use the pooled trust. There will be a few cases where after income is shifted to the Community Spouse there is no excess income and no need for a pooled trust, which makes spousal impoverishment budgeting more advantageous. These issues may be moot if the N.Y.S. Department of Health accepts the NYSBA Elder Law Section's interpretation of federal policy that under the MLTC Waiver, you can use spousal budgeting and the pooled trust.

[24.9] It is not clear how the maximum would be calculated since it is one-half of the combined resources "as of the first day of institutionalization" up to a maximum (for 2016) of $119,220. Of course, in community-based care there is no first day of institutionalization. Other resource exemptions apply.

income of the Medicaid spouse) and a Family Member Allowance, if applicable, is less than or equal to the sum of the Medicaid income level for a household of one ($825 in 2016 plus the $20 unearned income disregard, for a total of $845), spousal impoverishment budgeting with post-eligibility rules is not more advantageous. In cases where the spousal impoverishment budgeting will eliminate a spenddown and eliminate the need to use a pooled trust, it may be more advantageous.

The Department. of Health have has put these rules in effect pending the issuance of further guidance from the Centers for Medicare and Medicaid Services regarding Section 2404 of the Affordable Care Act and the application of spousal impoverishment with post-eligibility rules for married individuals receiving long term care services under a Section 1915(c) waiver or under an 1115 waiver.[24.10] On May 7, 2015, CMS issued State Medicaid Director Letter 15-001 providing guidance to states on implementation of Section 2404 of the Affordable Care Act.[24.11] It would appear from the CMS Guidance that at least for couples in the MLTC program, the more restrictive post-eligibility budgeting rules (including precluding use of the pooled trust) would not apply.[24.12] However, at the time of this writing the State Department of Health has not clarified its policy.

If the spouse, who is a Medicaid recipient, receives community based medical assistance, the standard Medicaid levels of income and assets apply. See Chapter 6, *above*. For community based care, see specifically the discussion of "deeming" and "spousal refusals" at § 6.05[2], *above*, and § 7.03[2], *below*. If at some point the community spouse also has to receive nursing facility services or the equivalent under MLTC or HCBS, each spouse is considered a separate household, each is entitled to the standard resource allowance, there is no deeming of resources between them, and spousal protections do not apply.[24.13]

[24.10] GIS 14 MA/025.

[24.11] *See* CMS State Medicaid Director Letter 15-001, *available at* http://www.medicaid.gov/federal-policy-guidance/downloads/SMD050715.pdf.

[24.12] CMS State Medicaid Director Letter 15-001 at p. 5.

[24.13] New York's definition of an "institutionalized spouse" under SSL § 366-c(2)(a) is inconsistent with the definition under Section 2404 of the Affordable Care Act, specifically 42 U.S.C. § 1396r-5(h). The federal definition of an institutionalized person provides, in part, that the institutionalized spouse is married to a spouse who is not in a medical institution or nursing home, whereas the N.Y. definition includes the additional provision that the institutionalized spouse is married to a person who is "not receiving waiver services…" SSL § 366-c(2)(a). This means that if one spouse is residing in an institution, and the other spouse is residing at home receiving MLTC services, the MLTC spouse is not considered a "community spouse" entitled to spousal impoverishment protections.

# Strategies for Dealing with a Spend Down in MLTC – Married Applicants

1 Spousal Refusal & Spousal Impoverishment

Starting July 2016, can now request Spousal Impoverishment budgeting upon applying for Medicaid if using Immediate Need procedures.

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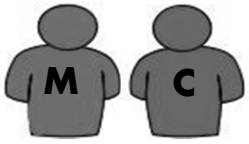
## Case Scenario: Morgan & Chris




- Morgan and Chris are married
- Morgan receives Social Security Disability (SSD) & Chris gets SS Retirement. Both receive Medicare.
- Morgan needs community-based long term care
- Morgan's Medicaid budget – Since he receives SSD and Medicare and has no children, "**Disabled, Aged, Blind" (DAB or "SSI-related**") budgeting is used at application

| | **Morgan – Needs MLTC** | **Chris – Spouse** |
|---|---|---|
| Income – Social Security | $2,000 | $1,500 |
| Medicare Part B premium | $121 | $121 |

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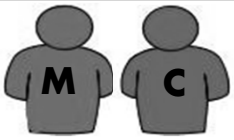
## Morgan's Regular Non-MAGI "DAB" Medicaid Budget




- Morgan's "SSI-related" community Medicaid budget **includes** Chris' income as spouse because both are either disabled or age 65+
- Morgan's spend down is **$2,029**/month if he **does not use spousal refusal**

| | Morgan MLTC | Chris |
|---|---|---|
| Income | $2,000 | $1,500 |
| Chris' income | $1,500 | |
| Medicare Part B premium | - $242 | $121 |
| Income disregard | - $ 20 | |
| ***Net Countable Income*** | ***$3,238*** | |
| Medicaid standard (couple) | - $1,209 | |
| ***Excess Income/Spenddown*** | ***$2,029*** | |

## Strategy 1: Spousal Refusal

- Medicaid eligibility must be determined just based on the applying spouse's income and resources if the non-applying spouse refuses to make his/her own resources and income available or does not live with the applicant. Soc. Serv. L. § 366.3(a)
- 2016-17 NYS Budget survived the 27th attempt to repeal that statute. Would have required deeming of spouse's income and resources if spouse lives with applicant.
- Must weigh risk of lawsuit for support by local DSS.
- Consider options - may not need spousal refusal if Spousal Impoverishment methodology helps. See next slides.

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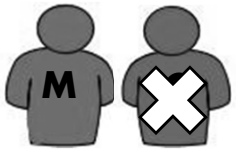
## Morgan's Medicaid Budget with Spousal Refusal




- Morgan's "SSI-related" Medicaid budget does not **include** Chris' income
- Morgan's spend down with spousal refusal is **$1,034**/month - better than $**2,029.**

| | Morgan MLTC | Chris |
|---|---|---|
| Income | $2,000 | ~~$1,500~~ |
| Medicare Part B premium | - $121 | ~~$121~~ |
| Income disregard | - $ 20 | |
| ***Net Countable Income*** | ***$1,859*** | |
| Medicaid standard (single) | - $825 | |
| ***Excess Income/ Spenddown*** | ***$1,034*** | |

**Deposit in Pooled Trust**

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## Strategy 2 - Spousal Impoverishment

- Option where **one spouse** is in MLTC or nursing home, or seeking Immediate Need Medicaid, and other spouse is "Community Spouse" NOT on or seeking Medicaid.
  - **Federal requirement for MLTC since 2014 (ACA)(but only until 2019).** Before, was only in Nursing home and certain waivers.
- NYS procedures are in **NYS DOH GIS 14 MA/015**, NYS DOH GIS 13 MA/018 and GIS 12 MA/13. All on https://www.health.ny.gov/health_care/medicaid/publications/
- Summary on http://www.wnylc.com/health/entry/165/
- Can now request this with Immediate Need Medicaid application.

**ASSETS** – Instead of usual $21,750 allowed for a couple --

- Spouse may keep greater of **$74,820** of assets or half of assets up to $119,820
- MLTC recipient may have **$14,850** assets – has 30 days after application approved to rearrange assets per these limits.

## Spousal Impoverishment Income Budgeting – Basic Rules

- Normally couple can keep **only $1229/month** COMBINED income The rest is the spend-down.
- With Spousal impoverishment budgeting, couple can keep up to:

  $2,980.50/mo. **Minimum Monthly Maintenance Needs Allowance** (**MMMNA)** for "Community Spouse."

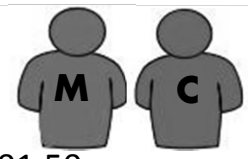
  + $ 384.00/mo. **Personal Needs Allowance** for MLTC Spouse

  = **$3,364.50/mo. Total combined income PLUS**

  + $ 668.00/mo. **Family Member Allowance-** for each financially dependent child (including adult child), parent, or sibling of either spouse living with them (maximum 3 people)*

*18 NYCRR §360-4.9 - 4.10, DOH MEDICAID REFERENCE GUIDE: INCOME at 278-282, GLOSSARY (June 2010). DOH GIS 16 MA/007 - 2016 Federal Poverty Levels

## Morgan can supplement Chris' income with CSMIA – Community Spouse Monthly Income Allowance – up to $2,980.50




- Chris gets less than the max CSMIA ($1601.50 – enough to bring his income to $2,980.50), because Morgan's income is not high enough after his PNA.
- Morgan will have no spenddown, but could if their income were higher. Couple can keep all income.

| | Morgan MLTC | Chris |
|---|---|---|
| Net Income | $1,879 | $1,379 |
| PNA (amount Morgan keeps) | -$384 | |
| CSMIA ("transferred" to Chris) | -$1,495 | $1,495 |
| Excess Income/Spenddown | $0 | < $2,980 MMMNA |

## NEW: Spousal Impoverishment available on application for IMMEDIATE NEED Medicaid

- Before DOH issued 16 ADM-02, a married person applying for Medicaid in order to enroll in MLTC had to initially apply using regular Medicaid rules – combining both spouse's income using couple level of $1209/mo. or using Spousal Refusal. Soc. Serv. L. § 366.3(a).
- This is because NYS sees Spousal Impoverishment as a "post-eligibility" budgeting methodology. GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act.
- **Under 16 ADM-02, married person may request Spousal Impoverishment budgeting with Medicaid application based on IMMEDIATE NEED for personal care or CDPAP**.

## Initial Budget where *NOT* seeking Immediate Need Medicaid – Spousal Impoverishment Not allowed.

- The applicant may have a high spend-down using regular community Medicaid rules. Even if the "community spouse" Chris did a spousal refusal, so Chris' $1,500/ month income isn't counted, Morgan's (Applicant's) income of $2,000 would create a high spenddown. (Earlier slide)
- But this is just for one month, because right **after she enrolls in an MLTC plan, she can request Spousal Impoverishment budgeting and will have NO spenddown.**
- A pooled trust wouldn't be worth the trouble just for a month.
- If seeks IMMEDIATE NEED Medicaid, can request Spousal Impoverishment upon APPLICATION.

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## Converting to Spousal Impoverishment Budgeting – if didn't use "Immediate Need"

- Enrolling in MLTC doesn't automatically change the budgeting to spousal impoverishment!
- As soon as applicant is enrolled in an MLTC → submit DOH *Request for Spousal Impoverishment Assessment Form* to LDSS / HRA
  - HRA and some other counties prefer MLTC Plan, not Member, submit this request
- Form available at page 9 of NYS Medicaid Update, March 2014 –- see next slide.
- Warning –local DSS and plans still unfamiliar!

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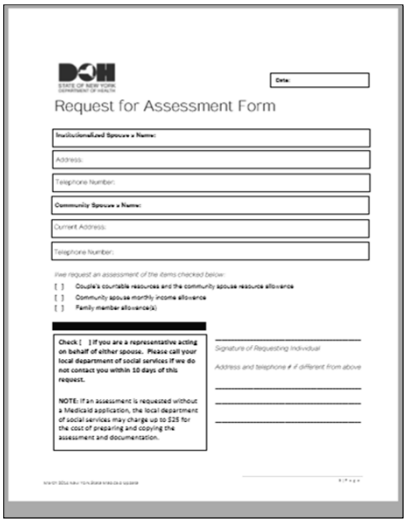
NYS DOH Medicaid Update March 2014 p. 9



DOH STATE OF NEW YORK DEPARTMENT OF HEALTH

Request for Assessment Form

Date:

Institutionalized Spouse's Name:

Address:

Telephone Number:

Community Spouse's Name:

Current Address:

Telephone Number:

I/we request an assessment of the items checked below:

[ ] Couple's countable resources and the community spouse resource allowance

[ ] Community spouse monthly income allowance

[ ] Family member allowance(s)

Check [ ] if you are a representative acting on behalf of either spouse. Please call your local department of social services if we do not contact you within 10 days of this request.

NOTE: If an assessment is requested without a Medicaid application, the local department of social services may charge up to $25 for the cost of preparing and copying the assessment and documentation.

Signature of Requesting Individual

Address and telephone # if different from above

www.health.ny.gov/health_care/medicaid/program/update/2014/mar14_mu.pdf

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## What if Spousal Impoverishment Doesn't Help? Applicant applies as SINGLE person.

- What if the Community Spouse (Chris) has income higher than $3,000/month (instead of $1,500).
- Chris wouldn't be entitled to a CSMIA (impoverishment allowance) because his income is already at the allowance - $2,980. So spousal impoverishment budgeting isn't helpful.
- **ANSWER**: Morgan will have a high spend-down and may instead use a pooled trust. **GIS 14 MA/025** gives you a choice of using spousal impoverishment or, if not favorable, to be **budgeted as a single person** without spouse's income being counted.
  - He is budgeted as single. GIS 12 MA/013. "SSI-related" community budgeting is used. Net income over $825/mo. = Spend-down = Trust deposit. See next slide No spousal refusal needed.
  - May Request on Immediate Need application.

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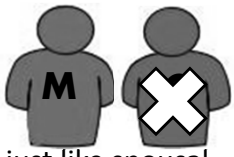
## Morgan's Medicaid Budget if Opts Not to Use Spousal Impoverishment.




- Morgan is **budgeted as a single** person.
- Morgan's spend down based on being single – just like spousal refusal - **$1,034**/month.

| | Morgan | Chris |
|---|---|---|
| Income | $2,000 | ~~$3,000~~ |
| Medicare Part B premium | - $121 | ~~$121~~ |
| Income disregard | - $ 20 | |
| ***Net Countable Income*** | ***$1,859*** | |
| Medicaid standard (single) | - $825 | |
| ***Excess Income/ Spenddown*** | ***$1,034*** | |

**Deposit in Pooled Trust**

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