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## Harmful Medicaid Provisions in Governor Paterson's Proposed 2009-2010 Executive Budget Successfully Blocked by NYSBA Elder Law Section

Governor Paterson included several provisions in the 2009-2010 Executive Budget submitted to the legislature relating to Health and Medicaid. Three of these proposals pertained to:

- Amendments regarding the regulation of pooled trusts;
- Amendments to the rules relating to Medicaid recovery from personal injury lawsuits; and
- Amendments pertaining to Long Term Care Assessment Centers.

The pooled trust amendment would have capped the amount that a pooled trust could retain in the trust after a beneficiary of the trust died. Under current law, the charity operating the trust is permitted to retain the balance remaining in the pooled trust account at the beneficiary's death, but "to the extent that amounts remaining in the individual's account are not retained by the trust..., the state will receive all such remaining amounts up to the total value of all medical assistance paid on behalf of such individual." Soc. Serv. Law Section 366(2)(b)(2)(iii). Under the Governor's proposal, the non-profit organization would be permitted to retain a maximum of 10 percent of the assets remaining in the pooled trust account, with Medicaid receiving the other 90 percent (limited only by the amount of medical expenses paid on behalf of the individual).

Arguing that this proposal violates the 1999 Supreme Court decision in *Olmstead*, as well as federal law (42 USC Section 1396p(d)(4)(C)(iv)), the Elder Law Section, with the assistance of Association lobbyist Harold Iselin of Greenberg Traurig and Ronald Kennedy, Director, NYSBA Department of Government Relations, submitted written testimony on February 2, 2009 in opposition to the adoption of this proposal. Following enactment of the budget, the Section was advised that the foregoing proposal was not included in the 2009-2010 budget adopted by the legislature.

The Governor also proposed empowering the state to place liens on settlement proceeds and/or awards, equal to one-third of the gross settlement proceeds/award, regardless of the amount of the award allocated to past medical expenses. Here again, the Elder Law Section's opposition (as contained in the written testimony) to this proposed provision resulted in the lien provision not being adopted as part of the final budget bill passed by the legislature. The Elder Law Section argued that the lien provision violates the U.S. Supreme Court holding in *Arkansas Dept. of Health and Human Services v. Ahlborn*, 547 US 268 (2006), where the court held that Federal Medicaid law does not authorize a Medicaid agency to assert a lien on a Medicaid beneficiary's settlement in an amount exceeding past medical expenses.

Finally, the Governor proposed to establish regional Long Term Care Assessment Centers that would replace local social service districts for authorizing Medicaid personal care services, the Consumer Directed Personal Assistance Program, assisted living, the proposed Cash and Counseling Demonstration, managed long term care programs, and the Long Term Home Health Care (Lombardi

and AIDS) programs. The centers would determine if the individual is eligible for certified home health agency (CHHA) services beyond 60 days. These Long Term Care Assessment Centers will be private entities; the state would be contracting out the home care assessment function. Under the prevailing case law the home care authorization, termination or reduction done by these Centers would no longer constitute "state action" and there could be no appeal or fair hearing rights for the consumer. The Elder Law Section opposed the implementation of the Centers on the basis of due process safeguards that would be lost to applicants for such services.

The Elder Law Section was successful in having language added to the budget bill (see Paragraph 6 of Section 29, Part D (p.130) of the Article VII bill), as follows:

6. When a long-term care assessment center is authorized to assess long-term care needs or authorize services pursuant to this section, an applicant or recipient may challenge any action taken or failure to act in connection therewith as if such assessment or authorization were made by a government entity, and shall be entitled to the same medical assistance benefits and standards and to the same notice and procedural due process rights, including a right to a fair hearing and aid continuing pursuant to section twenty-two of this chapter, as if the assessment or authorization were made by a government entity.

In addition, rather than implementing the program statewide, the Long-Term Care Assessment Centers will be introduced as a pilot project in one upstate county or region and one New York City county.

## Save the Date

July 23-26, 2009, Elder Law Summer Meeting, Ritz Carlton Hotel, Washington, D.C.

October 28-31, 2009, Elder Law Fall Meeting, The Sagamore Hotel, Bolton Landing, N.Y.

January 26, 2010, Elder Law Annual Meeting, The New York Hilton Hotel, New York City

**Please mark your calendars, and join us for informative, enjoyable events in fun locations.**

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to either Howard S. Krooks, [hkrooks@elderlawassociates.com](mailto:hkrooks@elderlawassociates.com), Antonia J. Martinez, [elderlawtimes@yahoo.com](mailto:elderlawtimes@yahoo.com) or Rose Mary K. Bailly, [rbail@albanylaw.edu](mailto:rbail@albanylaw.edu)