NYSBA Sections
Elder Law

Elder Law eNews

A Production of the Elder Law Section Communications Committee

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August/September 2009

New York State Welcomes New Power of Attorney Provisions and Forms!

Effective September 1, 2009, Chapter 644 of the laws of 2008 amends the provisions of the General Obligations Law relating to the use of powers of attorney in New York and creates a new statutory short form incorporating the following changes:

- To be valid, a Power of Attorney (POA) must contain the acknowledged signatures of both Principal and Agent.
- An Agent's authority to make gifts must be granted through a separate statutory Major Gifts Rider and executed in the same manner as a Will (*i.e.*, 2 witnesses required).
- The statutory gifting provision amount stated in the Major Gifts Rider is increased to that of the annual exclusion amount under the Internal Revenue Code.
- Unless otherwise specified, execution of the POA revokes all prior POA forms.
- Unless otherwise specified, where more than one Agent is designated, they must act together.
- Principal can appoint someone to monitor the Agent's actions. Such designated "Monitor" will have the authority to request records reflecting transactions entered into on behalf of the Principal.
- Principal's rights are stated on page one in simplified language.
- Agent's role, fiduciary obligations, and legal limitations are explained. Agent's signature at end of document constitutes an acknowledgement of his or her fiduciary responsibility.
- 12 point font is required by the statute.
- No deviation from the statutory short form is permitted.

Powers of Attorney created prior to the effective date of September 1, 2009 will continue to be valid provided they were valid under the laws in effect at the time of their creation. POA forms executed on or after September 1, 2009 must follow the specific language of the statutory forms.

NYSBA President Michael Getnick recently sent an e-mail to the membership with a link to the POA forms in compliance with the new statute. **Click here** to view this e-mail.

IMPORTANT NOTE: A bill has been introduced that would amend the new POA statute. The bill, on legislative agenda after September 1st, proposes that execution of a POA form will not automatically revoke previously executed POA forms. Stay tuned for updates!

Second Circuit Affirms District Court's Decision in *Wong v. Daines*

On June 22, 2009, the Second Circuit Court of Appeals upheld the lower court's ruling in *Wong v. Daines*, 582 F.Supp. 2d 475 (2008), holding that the income of an institutionalized individual placed into a special needs trust is countable for post-eligibility budgeting, based upon a rule in the HHS State Medicaid Manual and corresponding state regulations. The rule allows, in a Medicaid nursing home context, for Medicaid to count for post-eligiblity purposes (i.e., chronic care budgeting) income that passes through an individuals hands and is thereafter placed into a supplemental needs trust.

The Plaintiff in this case was a disabled Medicaid recipient under the age of 65 who brought an action on behalf of himself and a class of similarly situated individuals challenging the above-referenced HHS rule. The United States District Court for the Southern District of New York entered summary judgment in favor of the defendants, New York City HRA, New York State Department of Health, and HHS. The Medicaid recipient appealed.

The U.S. Court of Appeals, Second Circuit, held that the rule, State Medicaid Manual Section 3259.7, did not conflict with the federal statute authorizing the creation of special needs trusts (42 U.S.C.A. § 1396p(d)). The Second Circuit gave a great deal of deference to Section 3259.7 because Congress did not address the issue in creating the federal statute.

One interpretation of this case, however, may be of benefit to Medicaid applicants in a community setting because State Medicaid Manual Section 3259.7 makes it clear that, in such cases, income that passes through an individual's hands and is placed in a supplemental needs trust in the month that the individual receives the income may not be counted for Medicaid eligibility determinations. In other words, the use of self-settled SNTs and pooled trusts by persons who are on community Medicaid is valid. Therefore, Medicaid applicants and recipients for community Medicaid purposes should be able to continue to use SNTs and pooled trusts as vehicles to protect their income.

The other positive outcome of this case is that the Second Circuit indicated that to the extent an individual's income is assignable, then, even in a Medicaid nursing home context, such income can be assigned to an SNT or a pooled trust and may not be counted for chronic care budgeting purposes. For disabled persons under age 65 that should be no problem because transferring the income stream to an SNT or pooled trust will not cause any transfer penalties.

A more detailed discussion of this case will be included in the upcoming Fall issue of the **Elder Law Attorney**.

The Plaintiff in this case was represented by Elder Law Section members Aytan Bellin and Rene Reixach.

Wong v. Daines, 571 F.3d 247 (2nd Cir. Ct. of Appeals, 2009).

Guardian denied *Nunc Pro Tunc* Relief for Authority to Engage in Medicaid Planning

In an Article 81 proceeding, Petitioners, as co-Conservators of the property of a Conservatee, were seeking to modify their powers to include Medicaid planning and gifting. They were appointed in 1992 (prior to the effective date of Article 81 of the Mental Hygiene Law), and requested to have the order for Medicaid planning approved by the Court, *nunc pro tunc*, as of August 25, 2008. The Conservatee was admitted to a nursing home on December 27, 2008, under an agreement to pay a private rate "unless and until Medicaid coverage is obtained." Since the Conservatee's estate had approximately $92,000 in assets and $21,000 in unpaid nursing home bills when the Petition was filed, the Petitioners were proposing to make gifts of approximately $43,000 and to execute a DRA-compliant Promissory Note for $36,000 with payments covering an estimated 5 month penalty period. In support of the application, a fair hearing decision was cited (Matter of Anna M. (FH# M346001)) approving the use of promissory notes in Medicaid planning. The Petition was opposed by the Wayne County Department of Social Services on the grounds that*, inter alia*, the plan would violate the DRA, §81.21 of the Mental Hygiene Law, and the Debtor/Creditor Law.

The Court considered *In re Shah*, 95 NY2d 148 (2000), holding that Medicaid planning is within the scope of an Article 81 guardianship; however, it found that, in this case, to allow the *nunc pro tunc* order would violate the intent of the Medicaid program by allowing the Conservatee to render himself "needy" to avail himself of

benefits. In addition, such an order would unilaterally modify and therefore interfere with the nursing home agreement, the Court said, and the gifts appeared to not be in accord with §81.21 of the Mental Hygiene Law. However, the Court stated that Medicaid planning could be carried out by the Conservators on a prospective basis, including the utilization of a promissory note, as long as the gifts were proper under §81.21 of Mental Hygiene Law.

In the Matter of Robert Peter Ostrander and Doris C. Ostrander for the Modification of Conservator Powers for Robert Stephan Reeves, Respondent. NY Supreme Court (Wayne County) Index No. 34649/2008, April 8, 2009.

Medicaid "Payback" Provisions Apply over the Lifetime of the Beneficiary, Not from Time SNT is Established

In a recent ruling, *In re Abraham XX*, the Court of Appeals ruled that Medicaid can recover all benefits paid out over the lifetime of the beneficiary of a supplemental needs trust (SNT). The issue in this case was whether the State could recover the costs of Medicaid provided to the beneficiary of an SNT for the period between the date of the settlement of a medical malpractice action and the date on which the settlement funds were paid into the SNT after his death.

The beneficiary of the SNT, Abraham XX, suffered from quadriplegic cerebral palsy as a result of his premature birth, and received custodial care paid for by Medicaid until his death at age 11. During Abraham's life, his mother litigated a medical malpractice action on his behalf which was settled for $5 million. The State filed a lien for approximately $1.7 million in Medicaid costs for care provided through the date of the settlement. The lien was paid in full, but the parties disputed the allocation of the remaining settlement proceeds, including the amount to be allocated to the SNT. During the litigation over the settlement, Abraham continued to receive Medicaid reimbursed care until the issue was resolved and a lump sum payment of $2.17 million was placed into the SNT.

Upon Abraham's death, the State asserted a claim of approximately $1.5 million against the SNT for the cost of all Medicaid services provided to Abraham going forward from the settlement of the medical malpractice action, including the period of time while the litigation was pending. The trial court held that the estate was entitled to a partial refund because the doctrine of *res judicata* precluded the State from receiving more than its lien. The Appellate Division reversed saying that, by virtue of the terms of the SNT, the State was entitled to reimbursement for all unrecovered Medicaid expenses. On appeal to the Court of Appeals, the estate argued that reimbursement was barred by federal and state anti-recovery Medicaid provisions which prohibit the State from obtaining recovery of Medicaid correctly paid.

The Court of Appeals, with one dissent, held that the State could recover benefits paid during the so-called "gap period" from the SNT because the applicable federal and state statutes provide that a state can recover from remaining SNT assets "an amount equal to the total medical assistance paid on behalf of an individual under a State Plan," and the SNT in question required the trustee to pay the State "to the extent required by law." The court found that both the express language of the applicable statutes and the language of the SNT supported the underlying public policy which allowed SNT beneficiaries to remain Medicaid eligible during their lifetime while allowing the state to recover costs it incurred from all assets remaining in a SNT at a beneficiary's death. Acknowledging that while Medicaid anti-recovery provisions are of general applicability to Medicaid recipients, the court found them inapplicable to cases involving SNTs because of the unique nature of SNTs. Thus, the Court concluded that the only limitation on the amount the State could recover was to the extent of assets remaining in the SNT. The majority concluded that the interpretation most congruous with the legislative intent was that an individual wishing to receive the benefits of an SNT (i.e., exemption of the assets for Medicaid eligibility purposes), must give the State an interest in the assets remaining in the SNT in

strict accordance with the statutory provisions. The dissent reasoned that the Court's conclusion will discourage families from creating SNTs because the Trustees would be required to reimburse the State for the Medicaid costs incurred prior to the creation of an SNT, whereas a Medicaid recipient without an SNT who subsequently receives an inheritance or personal injury settlement would not face that requirement.

In re Abraham XX, 2008 Slip. Op. 09005, 2008 WL 4934432 (N.Y. 2008).

Surrogate's Court Reforms Will to Allow Disabled Beneficiary to Obtain Benefits of a Supplemental Needs Trust

The decedent died on August 31, 2006 and was survived by four adult children, one of whom was disabled. A guardian ad litem was appointed for the child with a disability. Under Article Four of decedent's Will, a trust was created providing for income to be paid to the disabled child, with trustee discretion to pay principal to her for health, support and maintenance. The Will failed to nominate trustees of the Article Four trust, so the three remaining children petitioned the court to become appointed as trustees and to convert the Article Four trust into a supplemental needs trust. Although no Medicaid benefits were being provided, the New York State Department of Health opposed the conversion of the Article Four trust into a supplemental needs trust, arguing that the Will postdates the enactment of EPTL Section 7-1.12, the statute that authorizes the establishment of supplemental needs trusts for individuals with severe and chronic or persistent disabilities. DOH also argued that the decedent directed the trustees to provide for the disabled child with a "lifestyle that would provide for her standard of living which she had enjoyed during [the decedent's] lifetime." DOH cited *Matter of Rubin*, 4 Misc.3d 634, 781 N.Y.S.2d 421 [Sur. Ct., New York County 2004], which involved two legal proceedings wherein the court determined that reformation is available to correct mistakes, but "not… to change the terms of a trust to effectuate what the settler would have done had the settler foreseen a change of circumstances that has occurred."

The court concluded that reformation of the trust in this case is warranted inasmuch as it meets the criteria first enunciated in *Matter of Escher*, 94 Misc.2d 952, 407 N.Y.S.2d 106 [Sur. Ct. Bronx County 1978], *affd. sub. nom*. And later in EPTL Section 7-1.12. In reaching this conclusion, the court relied on Article Eight in the Will, which directed that the trust "shall not in any way jeopardize any monies that she is now receiving from any government agency or that she will be entitled to receive after my death." The court in this case declined to follow the restrictive analysis set forth in the *Rubin* case cited above.

Matter of Rappaport, 866 N.Y.S.2d 483 (Sur. Ct. Nassau County, September 29, 2008).

Section Fall Meeting Set for October 29-31 in Lake George

The Fall Meeting, to be held October 29 – 31st at the Sagamore Resort in Lake George, NY, will be an exciting event, bringing some new features to our traditional fall program. We are pleased to have the Senior Lawyers Section join us for this program. Thursday will begin with our executive committee meeting, and the program itself will begin in the early afternoon with the Practical Skills Classrooms. Attendees will have the chance to participate in four (4) small classroom lectures on some of the basics of Elder Law. Whether it's Transitioning Into an Elder Law Practice, learning the basics on Medicare and Medicaid, or brushing up on the new Power of Attorney, this classroom format will benefit both old and new practitioners. Friday morning we will hold our Elder Law Update, plus a panel discussion on Long Term Care Insurance and how it plays a role in an elder law practice. We are excited to offer our Law Practice Management session on Planning for An Emergency in Your Practice, hosted by Anthony Palermo. Friday afternoon brings us to roundtable discussions on some of the more advanced issues in Elder Law, including SNTs, Planning for the Multistate

Client, an Open Forum on Drafting, among others. The Senior Lawyers Section will be bringing in a nationally renowned Life Coach, Rosemary Byrne, to talk with us on the transition out of practice into retirement. Saturday morning concludes with an ethics presentation, a session on Veteran's Benefits, and a presentation on the results of a survey conducted by Matt Nolfo regarding the use of Medicaid planning within the guardianship context. We have a fun, Halloween-inspired dinner planned for Friday, and hope to have good weather to enjoy the Adirondack fall foliage. We hope you can join us!

Save the Date

Please note the following upcoming Section meetings:
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, Antonia J. Martinez, elderlawtimes@yahoo.com or Deepankar Mukerji, dmukerji@kblaw.com