Elder Law **eNews**

A Production of the Elder Law Section Communications Committee

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New Form M11q (Medical Request for Home Care) Went into Effect in New York City on April 1, 2010

Thanks to Self-Help attorney and Elder Law Section member Valerie Bogart for contributing the information provided below regarding the new M-11q Form to be used for home attendant applications in New York City.

This is the first major change to the M-11q form in over 20 years. Following are links to download the new form, and links to Self-Help's article on Applying for Personal Care Services in NYC. In this article, you can download:

> A fillable copy of the new form (HRA's official copy is posted at http://nyc.gov/html/hra/downloads/pdf/M11q.pdf along with other information about home care Q-Tips, Selfhelp's guide to the M-11q which has been revised to include tips for completing the new form,
> A suggested template for physicians to supplement the new form with comments, and
> An updated CASA contact list (with new address and contacts for CASA 8 in Brooklyn)

For more background on Medicaid personal care services, see this article on Medicaid Personal Care or Home Attendant Services.

If you assist people needing Medicaid home care outside of NYC, you may still find Q-Tips helpful for completing the physician's order form used in your county.The Medical Request Forms for Nassau and Suffolk is posted here. Self-Help will post forms from other counties if you e-mail them to legal@selfhelp.net

For more information, please read Self-Help's article on NY Health Access regarding Medicaid personal care services in New York State in general.

Family Health Care Decisions Act is Signed Into Law

On March 16, 2010, Governor David Paterson signed the Family Health Care Decisions Act, Chapter 8 of the Laws of 2010, culminating a protracted legal process and years of advocacy by the Elder Law Section seeking passage of the legislation. The Family Health Care Decisions Act allows for family members and others who are close to the patient to act as surrogates and make decisions regarding medical treatment for a loved one in certain limited situations where no health care proxy or other advance directives have been executed and there is no "clear and convincing" evidence of the patient's wishes.

Further information on the Family Health Care Decisions Act will be forthcoming from the Health Care

Issues Committee of the Elder Law Section.

Click here for the complete text of the bill.

Personal Interview Requirement for Medicaid and Family Health Plus Applications is Eliminated

Effective April 1, 2010, the New York State Department of Health, pursuant to Chapter 58 of the Laws of 2009, has eliminated the requirement for a "face-to-face" interview for new Medicaid and Family Health Plus applications. Applicants may now mail in or drop off applications; however, individuals still have the option of requesting an interview if they so desire. A revised Access NY Form is attached to the ADM.

The new application requirements are detailed in 10 OHIP/ADM-4, available at the New York State Department of Health Library of Official Medicaid Documents website at http://www.health.state.ny.us/health_care/medicaid/publications/.

Choice of Drafting Language in Personal Services Contract Results in Uncompensated Transfer of Assets.

In an Article 78 proceeding involving a personal services agreement with a lump sum transfer, the Court concluded that the agreement created an ineligibility period for the Medicaid applicant. Relying heavily upon *Matter of Carmella Barbato v. New York State Dept. of Health* (65 AD3d 821)(August 21, 2009)(4th Dept), the Court found the Personal Services Agreement did not meet the guidelines established in GIS 07 MA/019 because: 1) the contract failed to provide for a return of prepaid funds in the event the caretaker is unable to fulfill her duties; and 2) the contract stated that the services would be provided on an "as needed" basis. This latter provision precludes a determination that fair market value is received and allows for a windfall to the caregiver, according to the GIS, and therefore results in a transfer penalty on an otherwise eligible individual. The Court noted that the transfer penalty could be reduced upon an evaluation of services actually received by Medicaid applicant after the contract was executed and funded. The case was remanded for re-evaluation of services actually received after the execution of the contract based upon credible documentation or service logs provided by the caregiver.

Also at issue in this case was the Power of Attorney, which did not specifically authorize the agent to enter into a Personal Services Agreement with herself. The Court ultimately found that because the POA gave the attorney-in-fact the ability to act on the principal's behalf regarding Medicare and Medicaid benefits, and to make decisions regarding his domicile and residence, this omission could not be disregarded.

Finally, the Court rejected an argument that GIS 07 MA/019 is not valid because it constituted a rule or regulation imposed without publication and a comment period before being enacted. The Court stated that the GIS was "guidance for the interpretation of an existing statutory requirement,..., and as such, not a rule."

Matter of Application of Stern v. Dairies, 3928/09 (11-23-2009), 2009 NY Slip Op 32836 (U), Supreme Court, Queens County.

Court Voids Reverse Mortgage Due to Apparent Incapacity of Mortgagor

In a case of first impression, the Supreme Court, Queens County voided the Reverse Mortgage Agreement previously entered due to Mortgagor's incapacity, holding that where a mentally ill person enters into a Reverse Mortgage Agreement, the burden of knowledge of incapacity is shifted to the financial institution seeking to enforce the terms of the mortgage.

Ms. B. purchased her home in 1974. In October 2001, Ms. B made a transfer of her home to herself and her brother with rights of survivorship, and subsequently entered into two Reverse Mortgage Agreements: December 2001 for $300,000; and June 2003 for $375,000. Ms. B. was hospitalized in December 2000 and treated for paranoid chronic schizophrenia. In 2001, she suffered from cognitive impairment encompassing loss of memory and inability to function.

The Court found that Ms. B's mental illness rendered her incapable of understanding the nature of the reverse mortgage contracts she signed. Furthermore, the lending institution should have known about Ms. B's mental illness given the statutory requirements and safeguards imposed by the National Housing Act of 1996 (NHA). While providing the elderly with access to their home equity, its purpose is also to ensure the rights of elderly mortgagors are protected and create safeguards to protect homeowners who enter into Reverse Mortgage Agreements. The NHA requires 1) counseling of prospective mortgagors by a counselor or attorney required to discuss and advise mortgagor of rights and responsibilities resulting from a reverse mortgage transaction; and 2) a certification attesting to the fulfillment of this requirement has taken place or been waived. This procedure allows a reviewing court to ensure the statutory safeguards of NHA have been complied with.

Here, there was no evidence that the safeguards imposed by the NHA were carried out. The lending institution was not able to substantiate the details of what Ms. B was told nor could it produce the person who filled out the Certificate of Counseling. No information was provided about her qualifications or the substance of the counseling. It was also unclear whether Ms. B had any questions or even if the counseling took place with Ms. B at all or if it was with Ms. B's brother, who stood to benefit from the transaction and had allegedly intimidated Ms. B. In fulfillment of the statutory obligations imposed by NHA, the Court held that the lending institution should have known of mortgagor's incapacity and voided the contract.

Matter of Doar, NYLJ, January 7, 2010 (Supreme Court, Queens County)(Index No. 31393/07)(Decided: December 18, 2009).

DSS Estate Claim is Payable in Full from Refusing Spouse's Estate

The Appellate Division, Second Department, recently ruled that a claim by Medicaid on a decedent's estate--where the decedent was a community spouse and had sufficient resources to pay for the medical care of the institutionalized spouse--is payable in full even when there is a disabled child.

The decedent and his spouse had two children, one of whom was disabled. In 1995, the decedent made a declaration of spousal refusal and thereafter, his spouse received Medicaid coverage for nursing home care. He died testate in 2002, leaving a will which provided that his residuary estate was to be paid to a supplemental needs trust for his wife's care. Upon her death, the trust remainder was to be paid out in specific bequests to contingent legatees, including the disabled child. A guardian ad litem was appointed to exercise the right of election for his spouse, but she died before the election could be made. DSS interposed an estate claim, which was rejected by the executor. The Surrogate found the claim valid but limited it to the extent it impinged on the specific

bequest to the disabled child.

On appeal, the Second Department found that, since the decedent was a legally responsible relative under Social Services Law, and had sufficient means to pay for the institutionalized spouse's care (generally, in excess of the CSRA), the claim was payable under an implied contract theory; moreover, there was no prohibition on recovering on the disabled child's share, because the ban in §369 of Social Services Law applies to Medicaid recipients only, not responsible relatives. However, instead of allowing the entire claim of $386,382.77, the Court said that only the decedent's "available resources", i.e., the $268, 048, in excess of the CSRA at the time of the Medicaid application, plus the income in excess of the MMMNA of $157.80 per month for the 75 months that Medicaid was provided, was payable, reducing the DSS claim to $279,883.

The appellants in this case were represented by Elder Law Section members Aytan Bellin and Peter Strauss.

In the Matter of Leon Schneider, deceased, 2010 NY Slip Op. 971; 2010 N.Y. App. Div. LEXIS 1015 (February 9, 2010).

Fair Hearing Decisions Needed!

If you've won a Fair Hearing that might be helpful to others, or lost a decision that will be instructive, you can contribute the decision to the Fair Hearings Database maintained by the Empire Justice Center. Submissions can be mailed to Empire Justice Center, 119 Washington Avenue, Albany, NY 12210, Attn: Susan Antos, or submitted online to www.wnylc.net (registration required).

Program and Events Update

Save the Date for these upcoming Section Meetings:

August 5-8, 2010, Elder Law Summer Meeting, Ritz Carlton Hotel, Philadelphia
October 28-30, 2010 Elder Law Fall Meeting, Renaissance Westchester Hotel, White Plains
January 25, 2011, Elder Law Section Annual Meeting, NY Hilton Hotel, NYC

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