

Elder Law eNews

A Production of the Elder Law Section Communications Committee

Ami S. Longstreet, Section Chair
Howard S. Krooks, Committee Co-Chair
Michael J. Amoruso, Co-Chair
Rose Mary K. Bailly, Vice-Chair

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Thanks to Dean Bress for Contributions to e-News and Welcome to Michael J. Amoruso and Rose Mary Bailly

I wish to let everyone know that Dean Bress, who has tirelessly worked on the e-News for several years, has stepped down as a contributor. Dean has been a consistent participant in New York State Bar Association committees and a featured speaker at many educational programs. The e-news will miss Dean's insight and guidance in the production of the e-News. I also wish to thank Michael J. Amoruso and Rose Mary Bailly, who have agreed to join the e-News team. As you can see from this edition, a great deal of time and effort has been put into making this a great first issue. I look forward to working Michael and Rose Mary on future editions of the e-News.

Howard S. Krooks, Chair, Communications Committee

RECENT COURT DECISIONS

COURT CONDEMNS BANK'S DISREGARD OF GUARDIAN'S DECISION TO CLOSE ACCOUNT AND TERMINATE CREDIT CARD OF INCAPACITATED PERSON

Lucia Garcia was appointed guardian for Thomas Garcia. Pursuant to her commission, Lucia Garcia closed the account the IP had at Fleet Bank, and notified Fleet in person and by mail. Fleet reopened the account and a debt was incurred. Fleet assigned the debt to a collection agency who assigned it to a debt collector. At each turn, Lucia Garcia tried to resolve the matter. The debt collector initiated proceedings. In spite of the correspondence from Lucia Garcia, the debt collector served Mr. Garcia with papers and a default judgment was entered against Mr. Garcia in Civil Court.

Supreme Court, Queens County held that a lawsuit cannot be commenced against an incapacitated person without first obtaining leave of Court, and that a default judgment cannot be entered against an incapacitated person, unless his representative appeared in the action. In addition, the law firm that commenced the proceedings against Mr Garcia and the debt collection agencies must answer to the court for their conduct and explain why they should not be held in contempt. Lastly, Ms. Garcia is authorized to retain counsel to vacate the Civil Court judgment, and all legal fees are to be paid for by the law firm who initiated the debt collection action.

CPLR section 309 (b) states that when initiating an action against an incompetent, personal service must be made on the committee as well as the incompetent. In addition, leave of the Court must be obtained. The premise is founded in case law based on the theory that the committee appointed to take charge of the incompetent's property is an officer of the court. *Smith v. Keteltas*, 27 A.D. 279, 50 N.Y.S. 471 (1st Dep't 1898).

In Garcia, the Court ordered the plaintiff's to appear and to explain why they should not be help in

contempt. The Court relies on *Copeland v. Salomon*, 56 NY2d 222, 451 NY2d 682 (1982), citing *Chautauque County Bank v. Riley*, 19 N.Y. 369 (1859), stating that because the committee is an officer of the court, "bringing an action without leave may constitute contempt."

Matter of Garcia, 16 Misc.3d 1123, 2007 Slip Op 51554(U) (N.Y. Sup. Ct. Queens County August 14, 2007)

This summary contributed to the e-News by the Guardianship Committee Chaired by Anthony Enea.

TRANSFER OF GUARDIANSHIP ACCOUNT FUNDS TO NYSARC TRUST PERMITTED AS PART OF SETTLEMENT OF OMRDD CLAIM FOR NON-MEDICAID COVERED SERVICES

The Guardian of Anna P. petitioned the court to withdraw the balance of settlement proceeds in a guardianship account and transfer them to a NYSARC Trust in order to settle and pay a claim **for non-Medicaid covered services** by the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD). OMRDD stated that if guardian/petitioner paid the amount owed in the claim, OMRDD would defer 90% of the payment if it were placed in a NYSARC Trust. **The guardian ad litem argued, and the court agreed, that this arrangement would be in Anna P's best interest because there would be no funds in the guardianship account to jeopardize her Medicaid eligibility, the funds in the trust could be used to pay non-Medicaid covered expenses, and the payment of OMRDD's claim could be deferred until Anna P's death.** The court granted the petition.

Matter of Anna P, 16 Misc.3d 988, 2007 NY Slip Op 27328; 2007 N.Y. Misc. LEXIS 5681 (N.Y. Surr. Ct. Bx. Co. August 10, 2007)

This summary contributed to the e-News by the Guardianship Committee Chaired by Anthony Enea.

DELAWARE FEDERAL DISTRICT COURT EASES INTERSTATE MOVES BY MEDICAID RECIPIENTS

In a September 11, 2007 decision, Judge Gregory Sleet of the United District Court of the District of Delaware found that the constitutional protection of the right to travel was impinged by Delaware's policy of not permitting a person to file a Medicaid application unless s/he was a resident of that state.

The plaintiff was a 33 year old woman residing in a North Carolina intermediate care facility for mental retardation. Her parents had moved to Delaware and wished her to enter a similar program near them. Delaware's policy required the plaintiff, who could not afford private care, to first physically move to Delaware at her own expense before Delaware would determine her Medicaid eligibility.

The court found that the timing of the approval process effectively prevented the plaintiff from moving to Delaware. The court held that forcing the plaintiff to live without necessary care and services, or forcing her to pay out of pocket for a private placement, places an impediment to the exercise of her fundamental right to travel that is not warranted or justified by any interest articulated by the state.

Duffy v. Meconi, --- F.Supp.2d ----, 2007 WL 2687591 (D.Del. September 11, 2007) (C.A. No. 05-127)

This summary was contributed to the e-News by the Medicaid Committee Co-Chaired by Valerie Bogart and Ira Salzman.

RECENT STATUTORY CHANGES

FAMILY MEMBERS CAN MAKE END-OF-LIFE DECISIONS FOR PERSONS WITH MENTAL RETARDATION OR A DEVELOPMENTAL DISABILITY WITHOUT OBTAINING A GUARDIANSHIP APPOINTMENT

C. 105 of the 2007 Laws of New York amends Section 1750-b of the surrogate's court procedure act to authorize end-of-life decision making by family members for a person who has been diagnosed as having mental retardation or a developmental disability without the need for the appointment of an article 17A guardian.

The statute, as amended, authorizes the family member to make end-of-life decisions in the best interests of the person and " when reasonably known or ascertainable with reasonable diligence, based on the [person's] wishes, including moral and religious beliefs." N.Y. Surr. Ct. Proc. Act §1750-b(1)(a), as amended. The decision of a family member pursuant to section 1750-b is subject to the procedures and safeguards in the statute for making end-of-life decisions and judicial review is available for decisions to which there have been objections.

The statute further provides that persons who may exercise the authority to make end-of-life decisions "a significant and ongoing involvement in a person's life"; however, the development of a list of qualified family members and the order of priority of such family is left to the discretion of the Office of Mental Retardation and Developmental Disability. N.Y. Surr. Ct. Proc. Act §1750-b(1)(a), as amended. This solution contrasts with other surrogate decision making statutes in New York which expressly list the qualified decisionmakers and the other of their priority. See N.Y. Pub. Health L. §2965(surrogates for authorizing a do-not resuscitate); N.Y. Pub. Health L. §4201 (surrogates authorizing the disposition of remains); N.Y. Pub. Health L. §4301(surrogates for authorizing an organ donation).

The statutory amendment takes effect December 30, 2007. This amendment creates an even greater contrast with end-of-life decisionmaking under article 81 of the mental hygiene law which is guided by common law principles as reflected in *Matter of O'Connor*, 72 N.Y.2d 517 (1988). Under *Matter of O'Connor*, a decision to withhold or withdraw life sustaining treatment from a person no longer able to express his or her wishes must be supported by clear and convincing evidence of that person's prior competent wishes rather than what is in the person's best interest.

This summary contributed to the e-News by the Guardianship Committee Chaired by Anthony Enea.

RECENT FAIR HEARING DECISIONS **NYSDOH APPROVES DRA-COMPLIANT PROMISSORY NOTES**

Three August 29, 2007 Albany County fair hearing decisions (numbered 4733471N, 4733466Z and 4733465H) addressed a number of the open issues regarding promissory notes under the Deficit Reduction Act of 2005 ("DRA"). Timothy Casserly of the Albany law firm of Burke & Casserly, PC represented the appellants in each matter.

In each case, the Albany County Department of Social Services ("DSS") had denied an application for Medicaid because the applicant had transferred a sum of money to a family member in exchange for a non-negotiable promissory note payable to the applicant. The amounts of the notes ranged from \$40,000 to \$49,000. Two of the notes had a six-month term; the other a five-month term. Each note had an interest rate of 5%.

The decisions reversed the DSS' denials of Medicaid and held:

The payment of funds by the applicant in return for the promissory note was not an uncompensated transfer of assets which would engender a penalty period; and

The promissory note was not an available resource in the hands of the applicant.

Issues related to whether there was an uncompensated transfer.

Section 6016(c) of the DRA states that funds used to purchase a promissory note shall be an “asset” for the purposes of the transfer of assets rules unless the note:

- (i) has a repayment term that is actuarially sound;
- (ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- (iii) prohibits the cancellation of the balance upon the death of the lender.

The decisions held:

The actuarial soundness requirement was satisfied even though the term of the loans were well under the life expectancy of the applicant.

The 5% interest rate to be paid under the notes was found to be a market rate. The decisions noted that the DRA did not address the issues of an applicable interest rate. The decisions noted that bank CDs paid a similar rate of interest or less.

The notes satisfied the DRA requirements that payments were in equal amounts, with no deferrals or balloon payments, and they prohibited the cancellation of the balance upon the death of the lender.

Issues related to whether the promissory notes were available resources

As noted above, the DRA specifically permits transfers in exchange for promissory notes which satisfy specified criteria. However, that law is silent on the related issue of whether the promissory note is an available resource in the hands of the applicant. If the note were a resource, the applicant would not be eligible for Medicaid because of excess resources. As a result, s/he would not be eligible for benefits and any applicable penalty period would not begin to run because the applicant would not be “otherwise eligible” for Medicaid.

The decisions held that the notes in these matters were not available resources in the hands of the applicant. Although the decisions took note of the fact that the notes were not negotiable, the decision appeared to turn on the economic argument that a note executed between family members had no value in the market place and hence had no value. This argument was supported by the testimony of an individual described as an actuary and economist.

This summary was contributed to the e-News by the Medicaid Committee Co-Chaired by Valerie Bogart and Ira Salzman.

ASSETS TRANSFERRED TO MEDICAID GRAT DEEMED AVAILABLE RESOURCE WHERE GRANDDAUGHTER SERVED AS TRUSTEE OF GRAT AND CREATED TRUST AGREEMENT VIA POWER OF ATTORNEY FOR APPELLANT

In a Fair Hearing decision issued on October 31, 2007 (Matter of Lillian R., FH #4823013P), the assets of a Grantor Retained Annuity Trust [GRAT] were determined to be “an ‘easily liquidated resource in the control of someone acting on behalf of the Appellant [pursuant to 18 NYCRR 360-4.4]’, thus making it an available resource” and that “The Agency’s determination to deny the Appellant’s application for Medical

Assistance due to excess resources was correct.”

In this case, representatives of Lillian R. submitted a Medicaid application to the Albany County Department of Social Service [DSS] in which there was shown to be a gift of \$34,000 to the applicant's granddaughter and a nearly simultaneous transfer of \$27,500 to a GRAT of which the granddaughter was the Trustee. The terms of the GRAT provided that the trust would pay the money back to Lillian R. in five monthly installments of \$5,619.97 (which included principal and interest). The apparent purpose of the GRAT was to convert a penalty period of 9 months for an uncompensated transfer of \$61,750.00 to a reduced penalty period of 5 months for the \$34,000 gift to her granddaughter, while using the remaining \$27,750.00 paid to the GRAT and repayable to Lillian R. as a means of paying a nursing home during the reduced penalty period. DSS denied the Medicaid application on the grounds that the \$27,500 in the GRAT was a resource which made the applicant ineligible for Medicaid at that time. Thus, in order for the applicant to qualify for Medicaid and have her penalty period begin, she would have to spend down the \$27,750.00 excess resources over a period of 4 months, which would delay the commencement of the penalty (for the \$34,000.00 transfer to her granddaughter) for 4 months. This would mean that the spend down period of 4 months plus the subsequent penalty period of 5 months would result in a waiting period of 9 months; this is the same amount of time that would have to have run if there had been a gift and penalty period associated with a \$61,750 transfer. Since the Fair Hearing decision upheld the determination of DSS, this resulted in the Medicaid program having a reduced expenditure of \$27,750.00, which otherwise would have been the amount saved and transferred without penalty by the applicant.

There is some rather significant language in the decision which would indicate that GRATs per se are not prohibited devices in elder law planning post-DRA: "In this case, the Trustee of the GRAT, Ms. Dorinda S, who is in control of the GRAT and had the ability to alter the GRAT at any time to the benefit of the Appellant, is also Appellant's POA who entered into the GRAT on behalf of the Appellant in the first place. This would make the GRAT an "easily liquidated resource in the control of someone acting on behalf of the Appellant", thus making it an available resource. If this GRAT had a different trustee who was in no way related to the situation, like a recognized lender or other independent investor, the AR's arguments that this qualified as an Annuity and was not a resource would have been strongly considered, but that is not the case. The trustee in this case is the Appellant's grandddaughter and is the Appellant's POA who created this "Annuity" and entered into it on behalf of the Appellant as her representative. Further, the provisions in the trust allow for the Trustee not to follow the guidelines of the trust with regards to distributions establishing that the Trustee has the ability to access the funds and distribute them in any manner that the trustee deems necessary...Accordingly, the Agency's determination that the GRAT was a resource was correct and their determination to deny the Appellant's Medical Assistance for excess resources is hereby affirmed."

The summary of this fair hearing decision was contributed to the e-News by Section members Steven Rahmas and Frances Pantaleo.

ACCUMULATED HOLOCAUST REPARATION PAYMENTS NOT COUNTABLE ASSETS

On September 19, 2007, the New York State Medicaid program issued a corrected fair hearing decision, reversing its own adverse ruling and vindicating the rights of survivors of the Holocaust. FH No. 4433606Z (Rockland County). The decision involves the exclusion enacted by Congress in 1994, prohibiting reparations paid to victims of Nazi Persecution from being counted in the assessment of financial need for Medicaid and other federally funded benefits.

This decision arises out of an elderly Holocaust survivor's application for Medicaid to pay for his nursing home care. He had received an average of \$6000 each year since 1952 in German reparations, and managed to save about two-thirds of those funds. Over these fifty-five years, he had deposited these funds in many different accounts, sometimes mixing them with his earnings or other sources. Finally, when he was about to apply for Medicaid, he gathered the funds in a single dedicated Reparations

Account. The local Medicaid program in Rockland County, New York refused to exclude the funds in this account, arguing that since the funds had been commingled over the years with other funds, he could not prove that the funds in the account were the very reparations received from Germany. After a fair hearing, the State Medicaid program agreed with the County and refused to grant Medicaid until he spent all the funds in the Reparations Account on his nursing home care. Littman Krooks LLP represented the appellant at the original hearing.

Selfhelp Community Services, Inc., through its Evelyn Frank Legal Resources Program, then took the case on, filing a request to reopen this decision. Selfhelp took a special interest in this case, having been founded in 1936 to help the waves of émigrés from Nazi Germany find employment, housing, and a meaningful new life. During the following years, we provided the first generation of Nazi victims with housing assistance, help with employment, and home care. As the survivor population aged, new generations came to us for help, and today we care for a greater number of Holocaust survivors than any other organization in North America. As this frail population continues to age into their 70's, 80's and beyond, their needs are more pressing than ever. Selfhelp's continuing commitment is to be the "last remaining relative" to any survivor of Nazi persecution who asks for our assistance.

The amended decision, dated September 19, 2007, holds that the funds in the Reparations Account were excluded. As a result, the funds do not have to be spent before Medicaid would pay for this man's nursing home care. The State's decision agrees with Selfhelp that it was sufficient that this man could document each and every monthly payment he had received from Germany over 55 years – he did not also have to prove which account he deposited these payments in over all of these years. The decision cites the Social Security Procedure and Operations Manual Service (POMS) rules about excluded funds, which state that excluded funds do not necessarily have to remain physically apart from other funds to be considered "identifiable." POMS SI 01130.700. (Decision pp. 12-13).

By this decision, the State has relieved aging Holocaust survivors of a burden of proof that would be impossible to meet, ensuring them access to vital Medicaid services.

This summary was contributed to the e-News by the Medicaid Committee Co-Chaired by Valerie Bogart and Ira Salzman.

[NYSDOH Issues 3 GIS and 1 INF Memoranda on September 24, 2007](#)

GIS 07 MA/018 – Transfer of Assets Rules Do Not Apply to Waivered Services!

Under GIS 07MA/018, the transfer of asset provisions no longer apply to waived services. For purposes of this GIS, waived services include services and supplies provided through the Long Term Home Health Care Program, Traumatic Brain Injury Program, Care at Home Program and the Office of Mental Retardation & Developmental Disabilities Home & Community Based Program. Accordingly, an individual applying for waived services need only provide documentation of current resources (as opposed to 36 or 60 months) similar to an applicant for community Medicaid. In addition, despite the change in transfer of asset treatment, spousal impoverishment budgeting will still apply for these waived services.

GIS 07 MA/019 – NYSDOH Provides Guidance on Caregiver Agreements

In this GIS, the NYSDOH recognized an increase in utilization of Personal Service Contracts ("PSK") since the implementation of the DRA. The GIS identifies a PSK that provides for a lump sum transfer in exchange for services to be provided over lifetime as the most common contract encountered. When reviewing a PSK, the GIS instructs local districts to make a threshold determination of whether the A/R will receive fair market value ("FMV") for the resources transferred. If the A/R receives FMV, then no transfer penalty will be assessed; however, if FMV is not received, then the district must consider the PSK

as a transfer of an asset and impose a penalty period.

In order to be considered a PSK for FMV, the contract must have a legally enforceable provision for the return of prepaid money if (1) the caregiver is unable to perform duties under the PSK, and (2) the A/R dies prior to life expectancy. Also, the GIS provides that if the PSK stipulates services will be rendered on an “as needed basis”, then the FMV determination cannot be made and the PSK will be deemed a transfer of assets.

When calculating the transfer penalty, the GIS directs that local districts must give credit by reducing the transfer amount by the value of services actually provided from the time the PSK is signed and funded through the date of application. The GIS forbids any credit for services provided in a nursing home. In order to substantiate the PSK value, the A/R must provide credible documentation (i.e., daily log w/dates & hours of service provided). Local districts are encouraged to compare the job descriptions and hourly rates in the PSK with the U.S. Dep’t. of Labor’s Occupational Outlook Handbook located at www.bls.gov/oco.

GIS 07 MA/020 – DRA Annuity Treatment for Partnership Policyholders Explained

This GIS explains that for A/R’s with a full asset protection NYS Partnership Policy, any annuity is exempt from the DRA annuity rules since Medicaid eligibility is determined without regard to resources.

In contrast, under a NYS Partnership Dollar Policy an individual is entitled to a resource disregard equal to the value of LTC benefits paid by insurance company; thus, the GIS provides the following guidance regarding the treatment of a post-DRA annuity:

If the annuity is a countable asset:

- may use Dollar asset protection to offset the annuity value
- any value not offset is a countable asset
- NYS is not required to be the remainder beneficiary

If the annuity is a countable asset:

- Must name NYS as remainder beneficiary, however, if not then may use Dollar asset protection to offset Transfer Penalty

07 HIP/INF-3 – DOH will Advocate for Single Premium Immediate Annuity in Fair Hearings Seeking an Enhanced CSRA

This Informational Letter was released to prepare districts for Fair Hearings where an Appellant seeks an enhanced community spouse resource allowance (“CSRA”) by providing calculation guidelines to determine the amount of excess resources that need to be retained to eliminate any minimum monthly maintenance needs allowance (“MMMNA”) shortfall. The two methods of calculation set forth in the INF include the (1) Savings Account Method, and (2) Single Premium Immediate Annuity (“SPIA”) Method. Under the Savings Account Method, the resource amount needed to generate income to eliminate monthly MMMNA shortfall is calculated with the average interest rate of a savings account. Typically, if interest rates are low there is a need for more resources to satisfy the MMMNA. In contrast, under the SPIA Method, the resource amount is merely the amount needed to purchase a SPIA that would generate the income shortfall.

To demonstrate the different calculation methods, the INF poses an example that assumes a 75-year old female with a \$325 MMMNA shortfall and \$134,000 excess resources. In this example, the CSRA would need to be increased by \$130,000 (assuming a 3% interest rate) to meet the MMMNA shortfall under the

Savings Account Method. On the other hand, under the SPIA method, the CSRA would merely be increased by \$39,538 to satisfy the MMMNA since that is the amount of the premium required to purchase the SPIA. The INF instructs local districts to advocate for the most cost effective method to fulfill the MMMNA shortfall in a fair hearing. Under this INF, the most cost effective method for the district is the SPIA Method.

Save the Date

January 29, 2008, Annual Meeting, Marriott Marquis, NYC

April 3-4, 2008, UnProgram, Syracuse

August 13-16, 2008 Elder Law Summer Meeting, Renaissance Harbor Place, Baltimore, MD

October 23-26, 2008 Elder Law Fall Meeting & Advanced Institute, Otesaga Resort, Cooperstown, NY

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, Michael J. Amoruso, Michael@amorusolaw.com or Rose Mary K. Bailly, rbail@albanylaw.edu