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[Update on Technical Amendments to New York's Power of Attorney Statute](#)

Michael Amoruso, as Chair of the Elder Law Section ("ELS"), created the ELS POA Task Force in August 2009 to analyze and address anticipated issues with the new Power of Attorney statute, educate our Section members regarding the new statute, gather questions and experiences from Section members regarding the implementation of the new Power of Attorney form in their practices, and to suggest alternative legislative wording to NYSBA to resolve those issues of concern to our members and the clients we represent. The members of the ELS POA Task Force include Timothy Casserly, Michael Amoruso, David Goldfarb, Amy O'Connor, Richard Weinblatt and Lee Hoffman. The ELS POA Task Force meets on a weekly basis and demonstrates our Section's commitment to assisting NYSBA on the legislative front to make necessary amendments to the Power of Attorney statute.

ELS POA Task Force members have undertaken the vast effort to assemble discussion points and compile and vet questions from various listservs and Section members. The ELS POA Task Force members prepared the materials and presented a webcast with updates from the NYSBA Center four weeks after the implementation of the statute which attracted over 250 attendees. The ELS POA Task Force has drafted and redrafted suggested language for the statute to accomplish the proposed solutions and address issues and concerns of our members. Since October, they have been working closely with NYSBA POA Working Group on weekly rewrites as part of the NYSBA's larger efforts to bring necessary amendments to the Power of Attorney statute. In the hope that this process of seeking changes and amendments to the Statute continues with the Senate and the Assembly, we will provide further updates including changes being proposed to the Statutory Short form.

[2010 Regional Rates Published](#)

The Office of Health Insurance Programs (OHIP) issued the 2010 Regional Rates for New York State effective for Medicaid Applications filed on or after January 1, 2010:

The regional rates are:

Region	Monthly Regional Rate
Central	\$7,264
Long Island	\$11,227
New York City	\$10,285
Northeastern	\$7,927
Northern Metropolitan	\$10,163
Rochester	\$9,058
Western	\$7,694

GIS 10 MA/001 dated January 11, 2010

DSS Challenge to Promissory Note on Basis That Note was Signed When A/R in Nursing Home is Denied

Appellant applied for Medicaid on December 17, 2008 with a requested pick-up date of December 1, 2008. He had been residing in a nursing facility since November 30, 2007. The Nassau County DSS denied the application, imposing a penalty period of 24.84 months on two transfers: \$114,400 on November 22, 1008, and \$147,770 on November 22, 2008. The penalty period was calculated by taking the total value of the transferred assets and dividing by \$10,555, the applicable regional rate, resulting in a 24.85 month penalty period ($\$262,170/\$10,555$).

The Appellant conceded that there was an uncompensated transfer of \$147,770, and that this transfer is subject to a penalty period. The Appellant challenged the imposition of a penalty period on the \$114,400 transfer inasmuch as this was a fully compensated transfer pursuant to a DRA compliant promissory note. The Appellant transferred the funds in exchange for a promissory note providing for 14 equal monthly payments of \$8,598.18. And, although Nassau County DSS determined that the promissory note met the requirements of the DRA, Social Services Law Section 366.5(e) and 06 OMM/ADM-5, they still treated the transaction as a transfer because the Appellant was residing in a nursing home and there was "no satisfactory reason why an elderly applicant in a nursing home would require the income."

The Administrative Law Judge concluded that there are no Department of Agency regulations that would prevent an individual residing in a nursing home from executing a DRA compliant promissory note, and reversed the agency's decision to impose a penalty period on the \$114,400 amount transferred pursuant to the note.

NYSBA Elder Law Section member Louis Pugliese, Esq. represented the Appellant at this Fair Hearing.

In the Matter of the Appeal of Else _____ (FH # 5313861K, Nassau County, November 20, 2009).

Administrative Law Judge Authorizes the Use of IRA Tables in Determining Required Minimum Distributions Rather Than DSS Life Expectancy Table

In this case, the Department of Health reversed the Agency's determination and directed the Agency to give the Appellant reasonable opportunity to establish the amount of the required minimum distributions ("RMDs") of his IRAs pursuant to GIS 98 MA/024 and the applicable Internal Revenue Code table. The Department of Health determined that GIS 98 MA/024 governs IRAs or retirement funds and found the Agency's reliance on the Life Expectancy tables attached to 06 OMM/ADM-5 to be an error of law. The Life Expectancy table is applicable to annuities governed by 06 OMM/ADM-5 (non-qualified funds); however, qualified funds are not governed by 06 OMM/ADM-5 because they fall within Section 408 of the Internal Revenue Code and 98 GIS MA/024. Distributions from qualified

funds such as IRAs should be based on the Required Minimum Distributions Table under the Internal Revenue Code.

The Agency decision being appealed was that the Appellant's resources exceeded the allowable limit because his retirement accounts were not based on the Agency's Life Expectancy Table. The Agency erroneously interpreted the GIS 98 MA/024 and applied its own life expectancy table. Appellant argued the GIS 98 MA/024 specifically referred to the Federal Required Minimum Distribution Table. The Appellant argued that this chart is applicable to IRA distributions as clearly set forth in the Deficit Reduction Act of 2005 and, further, that the Agency's Form MA-174 outlining the rules for Treatment of Annuities excepts annuities described in section 408 of the Internal Revenue Code. Therefore, the reason that the Agency's Life Expectancy Chart should not be used is because Section 408 of the IRC refers to IRAs which have their own distribution rules, namely "required minimum distributions" or RMDs.

NYSBA Elder Law Section member Tara Scully represented Appellant at this Fair Hearing.

FH # 5337190Z, December 10, 2009.

Transfer of Assets Deemed Not to Have Been Made for the Purpose of Qualifying for Medicaid

An uncompensated transfer made one year before entering a nursing home by an eighty-four (84) year old individual living independently prior to institutionalization was found to have been made *not* for the purpose of qualifying for Medicaid.

In December of 2007, the Medicaid applicant was admitted to the hospital after suffering a fall related to dizziness and subsequently transferred to a skilled nursing facility for short term rehabilitation. **The Medicaid applicant had no history of any chronic illnesses.**

The Suffolk County DSS denied Medicaid due to a \$30,000 uncompensated transfer to three family members and imposed a 2.8 month penalty period. No dispute arose as to the uncompensated transfer or its calculation, only whether the transfer penalty was incorrectly imposed.

Section 366.5 (d) (ii) of the Social Services Law provides that an individual will not be ineligible for Medicaid as a result of a transfer of assets if:

(d) (ii) a satisfactory showing is made that the asset was transferred exclusively for a purpose other than to qualify for Medicaid.

At the fair hearing, statements by the housing manager where the applicant resided, a registered nurse, the applicant's dentist, the applicant's next door neighbor, and family members attested to the applicant's good health and ability to maintain an independent lifestyle in the year preceding her institutionalization. Additionally, prior to the gifts being made in December 2006, the applicant consulted an accountant to determine the tax ramifications of such a gift. The applicant's accountant submitted a statement to that effect. Each recipient stated the monies had been spent and could not be returned.

The Court found that while the Agency's determination of the applicant's ineligibility was proper due to the uncompensated transfer of assets, DSS was directed to re-assess the application and, if found to

be otherwise eligible, provide Medicaid on the basis that the transfers were made for a purpose other than to qualify for Medicaid.

Appellant was represented in this case by Section member Shannon Falcone-Macleod, Esq.

In the Matter of the Appeal of Violet T. (FH # 5355873N), dated October 28, 2009.

Article 81 Court Authorizes Medicaid Promissory Note Planning

A Guardianship Court in Bronx County, New York, upon reconsideration, permitted the Court-appointed guardians to gift a portion of the IP's assets and to loan the remainder for Medicaid planning purposes. In this case, at the original hearing held in 2006, the Court had directed the establishment of a trust, with the assets being held by the IP's niece. It was argued that the "illusory trust" created by the Court's order would be deemed available to pay for the IP's care and would prevent the IP from obtaining Medicaid benefits.

Counsel for the guardians requested a reconsideration of the case, arguing that the plan of gifting and loaning the monies was the most appropriate plan as the gifting was in accordance with the IP's testamentary intentions. The Court Examiner argued that the funds should be reserved for the IP's care only and questioned whether a gift and loan was in the IP's best interest.

The counsel for the guardians argued that, in Medicaid matters, the correct test is the common law doctrine of substituted judgment pursuant to Mental Hygiene Law § 81.21 (*i.e.*, whether a competent reasonable person in the IP's position would make the same decision), not whether the proposed action is in the IP's best interest.

After considering the arguments, the Court allowed the Medicaid planning proposed by the guardians, with the use of a gift and an actuarially-sound, DRA compliant promissory note.

The guardians in this case were represented by NYSBA Elder Law Section member Gina Danetti, Esq.

In the Matter of M.L., an Incapacitated Person, for leave to expand Guardianship powers to permit Guardians to execute a Medicaid Asset Protection Plan., Index 92475/08, Supreme Court of New York, Bronx County, 2009 NY Slip Op 52160U; 2009 N.Y. Misc. LEXIS 2917, decided October 23, 2009.

Third Department finds that the AIP's Presence at a Hearing is Necessary, Even if the AIP Resides Out of State

The Appellate Division, Third Department, found that the mere fact that an AIP resides out of the state is not sufficient reason to dispense with her presence at the incapacity hearing.

At the original hearing in 2006, the Supreme Court held the hearing in the presence of the AIP and her court-appointed attorney. Subsequently, the AIP was found to be incapacitated and the petitioner was appointed guardian of her person and property for the period of one year. Following the appointment, petitioner placed the IP in a Massachusetts facility that was expected to provide more suitable care

than a New York facility.

Prior to the expiration of the guardianship term, the guardian petitioned for an indefinite extension of the guardianship. After a hearing, where the IP was not present, but the IP's counsel was (and who objected to the hearing being held without the IP), the Court found that the IP continued to require a guardian of her person and property and that her presence could be waived because she was outside of the state. The IP appealed, objecting to the waiver of appearance.

On appeal, the Third Department found that the order appointing the guardian did not include any findings as to the IP's physical ability or her willingness to attend the hearing; it merely concluded that her presence was waived because she was residing outside the state when the hearing was held.

Absent a clear finding that the IP was physically unable to attend or refused to attend, the hearing should not have been conducted in her absence. See Mental Hygiene Law § [81.11](#) [c].

In The Matter of Lillian U., 506942 [A.D. 3rd Dept., October 22, 2009], 2009 NY Slip Op 07563

Court Approves Sale of Infant's Share of Real Estate to Father and Requires SNT Trustee to Send Proof of Mortgage Payments by Father to GAL

In this pending accounting proceeding wherein a request to sell an incapacitated infant's share of real property was contained, the Court conducted an examination of the proposed buyer of the real property. The proposed buyer was the father of the incapacitated infant, who suffers from autism.

Upon hearing the testimony of the father and upon review of the entire file, the application to sell the real property of the infant was approved upon the terms and conditions as indicated in the application within the accounting. The Court, however, added the following condition of annual proof of mortgage payments by the father to the Supplemental Needs Trust of the infant. Annually, the Trustee of the Supplemental Needs Trust was ordered to send the proof of payment and proper deposits to the Guardian ad Litem. The Guardian ad Litem was then ordered to indicate to the Court the payment of the proper yearly amounts.

Estate of Bernard Petosa, Deceased (Surrogate's Court, Richmond County, Surrogate Gigante) NYLJ, October 9, 2009, Vol. 242, p. 38, col. 5.

Due Process Rights of Alleged Incapacitated Person Held Not to be Violated When Required to Testify

The Appellate Division, Fourth Department, found an Incapacitated Person (IP)'s due process rights were not violated when the IP was required to testify at the guardianship hearing. Mental Hygiene Law Section 81.11(c) requires an Alleged Incapacitated Person (AIP)'s presence at the hearing in order for the Court to personally observe the AIP. The Court can then "obtain its own impression of the person's capacity." The Court noted that where the Court's responsibility is to make a determination of the IP's best interests, the IP's due process rights are not violated by requiring the IP to testify.

Matter of Heckl, Appellate Division, Fourth Department, 2009 NY Slip Op 6897 (October 2, 2009).

[Income and Resource Levels for 2010 Remain the Same as 2009](#)

On November 20, 2009, the Department of Health released GIS 09 MA/026, announcing that, because of a decrease in consumer prices over the past year, there would be no change in medically needy income and resource levels for 2010. The income standard for Single/Childless Couples and Low Income families (non-medically needy) has been minimally adjusted. In addition, the basic Medicare Part B premium remains at \$96.40 for 2010; however, for new enrollees to the Medicare program and enrollees with incomes in excess of \$85,000, the monthly premium will rise to \$110.50.

[Elimination of Resource Levels for Community Medicaid](#)

Also on November 20, 2009, the Department of Health released GIS 09 MA/027, announcing the elimination of the resource test for Medicaid applicants/recipients (A/Rs) who are not aged (65 or over), certified blind or certified disabled and for all Family Health Plus (FHPlus) A/Rs effective January 1, 2010. In addition, for applications and renewals, the local Districts are instructed not to seek financial documentation of resources. Further information is expected in a forthcoming Administrative Directive.

Save the Date

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

April, 22-23, 2010, Elder Law Unprogram, The Hampton Inn, Poughkeepsie

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

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

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