Elder Law eNews

A Production of the Elder Law Section Communications Committee
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July/August 2008

Just The Facts: New 2008 Medicaid Numbers

Resource Allowance:	Individual	= $13,050*
	Married	= $19,200*
Income Allowance:	Individual	= $725
	Married	= $1,067

MMMNA: $2,610
CSRA: $74,820 (Minimum), $104,400 (Maximum)
Medicare Part B Premium: $96.40

Regional Rates:	New York City	= $9,636
	Northeastern	= $7,431
	Western	= $7,066
	Central	= $6,696
	Long Island	= $10,555
	Northern Metro	= $9.316
	Rochester	= $8,089

* The Resource Allowance in New York State was increased by 08 MA/013 (dated April 1, 2008). Previously, the Individual Resource Allowance was $4,350 and the Resource Allowance for Couples was $6,400.

Court Decisions

Rockland County Authorizes Guardian to Engage in Post-DRA Medicaid Planning

The Guardian of the Property petitioned the Court to engage in Medicaid planning for his ward. The Guardian requested that he be permitted to fund a Pooled Supplemental Needs Trust on behalf of his ward, authorize payment of funds to a third party to be returned pursuant to the terms of a promissory note, and establish a guardianship fund for administrative expenses. The Court allowed the Guardian of the Property to gift assets of the incapacitated person ("IP") resulting in a period of ineligibility for Medicaid nursing home care. The Court also allowed a transfer of the IP's assets to a third party, as consideration for a DRA-compliant promissory note to be used to pay for the cost of the IP's nursing home care during the period of Medicaid ineligibility. The Court also allowed for the funding of a guardianship account for administrative costs in connection with the guardianship, and ruled that the

account was not an available Medicaid asset.

Matter of the Application of Mary G. Chaber, Index No. 8354/05 (Supreme Court, Rockland County, November 26, 2007)

Part 36 Fees Allocated to the Year Earned Rather than the Year in Which the Fees Were Awarded

In this case, the court considered under what circumstances the specific provisions of the Rules of the Chief Judge §36.2(d)(2) would not apply to attorney fiduciary appointees. The Rules of the Chief Judge §36.2(d)(2), effective January 1, 2008, state that: "If a Person or entity has been awarded more than an aggregate of $75,000.00 in compensation by all Courts during any calendar year, the person or entity shall not be eligible for compensated appointments by any court during next calendar year."

The attorney/fiduciary in the case made an application to exclude commissions awarded in 2007 but earned in the years 2004, 2005 and 2006 from the above provision of the Part 36 Rules of the Chief Judge based upon the fact that application of the Part 36 rules to this situation would preclude the attorney/fiduciary from taking appointments in 2008 if the fees awarded in 2007 exceeded $75,000.00. The Court opined that this interpretation of the Part 36 Rules is unrealistic where the guardian is subject to events that are beyond the guardian's control. The annual commissions should be attributed to the year in which they should have been paid. This approach of applying the fees to the year in which they are earned rather than awarded assists the attorney/fiduciary who would otherwise be deprived of professional opportunities for a full year and assists the Court by increasing its ability to find qualified, able, hardworking, experienced Guardians. The Court's decision then attributed fees that were awarded in 2007 for 2005 and 2006 to those years and reduced the fee attributed to 2007 accordingly. This case is the first decision that acknowledges that Courts are having difficulty finding qualified and experienced fiduciaries and that delays in processing annual accountings and final accountings should not inure to the detriment of attorney fiduciaries.

Matter of Rehild Matacha, Index No. 500041/04 (Supreme Court, New York County.

DSS's Refusal to Act as Guardian Does Not Warrant Dismissal of Guardianship Petition

The trial court found that the respondent in the guardianship proceeding needed help but dismissed the hospital's petition because of the testimony of the representative of DSS that "DSS was not willing to accept the guardianship of respondent because he did not know if DSS could 'adequately or appropriately meet every one of' respondent's needs.'" The Appellate Division found that the dismissal was in error and remitted the matter to the trial court for the appointment of a guardian, noting that the hospital petitioner was a potential guardian pursuant to section 81.19(e). The court did not comment on the eligibility of DSS as guardian. This result might well raise eyebrows among readers who regard Adult Protective Services as the "safety net' for individuals who are in need of guardianship but lack family or other individuals willing to take that responsibility. In fact, DSS's refusal to serve as guardian seems contrary to the mandates of its regulations, which provide that PSA services include "functioning as a guardian . . . where it is determined such services are needed and there is no one else available or capable of acting in this capacity . . . ." 18 N.Y.C.R.R. 457.1(d)(9). *See also* N.Y Soc. Serv. Law §§473(1)(c)(f); *cf,* N.Y Men. Hyg. Law §81.19(a)(2)(providing that a social services official is eligible to act as guardian).

However, a recent report by the New York Public Welfare Association suggests that DSS's posture in this case may occur with more frequency or at the very least is not unique to this case. The Report discusses the challenges facing Adult Protective Services in face of a rising aging population, a shift in policy from institutionalization to supporting vulnerable individuals in the community, the complexity of their clients'

needs, and a dramatic decline in available resources. *See Building a Shared Commitment to Protect & Support Vulnerable Adults* 5 -6 (New York Public Welfare Association December 2007). In light of these burdens, the Report, among other things, specifically notes that more attention should be given to development of community guardianship programs in which a not-for-profit organization accepts the guardianship appointment in regions outside of New York City where their creation has proved difficult. *Id.* at 12. How policy makers respond to the challenges presented in *Samaritan Medical Center* and the NYPWA Report remain to be seen.

Matter of Samaritan Medical Center, 38 A.D.3d 1204, 832 N.Y.S.2d 374 (4th 2007).

Fair Hearing Decisions

Request for Increased MMMNA and a Corresponding Decrease in NAMI Allowed

This Fair Hearing involved a request for an enhanced (increased) MMMNA for the community spouse (and a corresponding reduction in the NAMI for the institutionalized spouse) based upon exceptional circumstances resulting in significant financial distress. The Fair Hearing decision found that out-of-pocket medical and transportation expenses, plus home repair expenses incurred and paid, met the requirements of exceptional circumstances resulting in significant financial distress. Evidence of additional repair and maintenance was submitted in the form of estimates.

The Fair Hearing decision contains two directions of general applicability. First, the decision clarifies that "... any additional income awarded to the community spouse from the appellant [institutionalized spouse] (above the level established by the Agency) to avoid significant financial distress is to be added to the [statutory] MMMNA." There is simple addition, not any kind of rebudgeting. (Material in [ ] added for clarification.)

Second, the decision directed that, upon a finding by the Commissioner that pending home repairs are extraordinary expenses constituting significant financial distress, "...once these expenses are actually paid, the community spouse must similarly be credited against any remaining NAMI." This means that the community spouse can get, in effect, prior authorization for extraordinary expenses and know that the MMMNA will be increased to cover the cost once the expense is incurred.

George W. Fair Hearing (FH #4903688U)(December 19, 2007).

This Fair Hearing was handled by Section member Lee A. Hoffman, Jr. CELA. Lee also provided this summary to the E-News.

Two Favorable Fair Hearing Decisions that Permit the Use of Grantor Retained Annuity Trusts Post-DRA are REVERSED by DOH

The DOH has reversed its previous approval of using a Medicaid Grantor Retained Annuity Trust ("Medicaid GRAT") in Matter of Joan S, (FH #4813356Q) and Matter of VD (FH #4811493M)(Dated December 21, 2007). The DOH declared that its policy is to treat the Medicaid GRAT as a Medical Assistance qualifying trust in Section 360-4.4 and 360-4.5 of 18 NYCRR. Thus, any portion of the income or principal of the trust that can be paid to or for the benefit of the Medicaid applicant must be deemed an available resource.

By way of background, Matter of Joan S. and Matter of V.D., both from Onondaga County, are fair hearing decisions that addressed a number of open issues regarding the use of Medicaid GRATs under the Deficit Reduction Act of 2005 ("DRA"). Rene Reixach, Ami Longstreet and Stephen McMahon

represented the appellants in both matters.

In each case, the Onondaga County Department of Social Services (“DSS”) denied an application for Medicaid because the appellant had established an annuity termed in one case as a "Grantor Retained Annuity Trust" and in the other as a "Long Term Care Agreement" (both instruments referred to hereinafter as a "GRAT"). In each case, a sum of money was transferred from the appellant to the GRAT, while the appellant was in a skilled nursing facility. Under the terms of the GRAT, the money was paid back to the appellant over a specified time period together with an interest component. One GRAT was in the amount of $60,000 with a 16-month term, and a 5.6% income component. The other GRAT was in the amount of $82,000 with a 13-month term and a 4.8% interest component. DSS based its denials on the grounds that the GRATs were available resources or, in the alternative, their creation involved uncompensated transfers of assets.

The decisions reversed DSS’s denials of Medicaid and held that the creation of the GRATs were not uncompensated transfers of assets which resulting in a penalty period. By implication, the decisions also held that the GRATS were not an available resource in the hands of the appellants.

(1) Did the Creation of the GRAT result in an uncompensated transfer of assets?

As to whether there was an uncompensated transfer, the Department considered the application of section 6012(c)(G) of the DRA and section 6012(b).

Section 6012(c) (G) of the DRA provides that the creation of an annuity is an uncompensated transfer, creating a penalty period unless the annuity satisfies the requirements of subparagraph (i) or subparagraph (ii).

The requirements of subparagraph (ii) , at issue in these matters, are that

(ii) the annuity—

> (I) is irrevocable and nonassignable;
>
> (II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and
>
> (III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

In addition, section 6012(b) of the DRA requires that the State be named the beneficiary of any money available in the annuity at the time of the death of the Grantor. That provision states the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless—

> (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or
>
> (ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.
> The decisions held that the creation of the GRATs were not uncompensated transfers because the requirements of both sections were satisfied.

The actuarial soundness requirement was satisfied even though the terms of the GRATS were well under the life expectancy of the Applicant/appellant; the payments were in equal amounts, with no deferrals or balloon payments, and they required any balance in the GRAT on the death of the applicant/appellant to be paid to New York State in the total amount of Medicaid paid to the individual.

The decisions did not focus on the fact that the annuities had an interest component or the adequacy of the interest rate, although in one case DSS had alleged that there was no interest component.

(2) Were the GRATs available resources?

As to whether the GRATs were available resources, the DRA is silent on this issue. If the annuity was a resource, the applicant would likely 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. However, the decisions did not explicitly rule on the resource issue. Rather, they held that the monthly payments were treated as income in the month received. The implicit corollary of this finding was that because they were treated as income, they should not be treated as an available resource, which had been a contention of DSS.

Matter of Joan S. (FH #4813356Q) and *Matter of VD* (FH #4811493M)(Dated December 21, 2007)

Promissory Note Transaction Upheld at Fair Hearing

In this decision, it was determined that a "Non-Negotiable" Promissory Note that stated that it was non-assignable and which “meets the criteria set forth in the Social Services law and in Departmental policy for exclusion as a transfer of resources -- an actuarially sound repayment term, payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments, and no cancellation of the loan upon the death of the applicant/recipient -- cannot be considered to be an uncompensated transfer of resources." [Decision, p. 6, 5th full paragraph.]

In this case, representatives of Edward H. submitted a Medicaid application to the Albany County Department of Social Services [ACDSS] in which there was shown to be a transfer [in the nature of a gift] of $113,528.44 to his daughter and an additional transfer of $106,000.00 to the same daughter in return for receiving a Promissory Note that stated that it was "Non-Negotiable" and non-assignable, but which was payable in 14 equal monthly installments, allowed no prepayment and could not be cancelled upon death. ACDSS determined that the applicant was not eligible for Medical Assistance for his nursing home costs for a penalty period of 30 months because he transferred $219,528.44 without compensation. The decision determined that the denial of the application on the grounds that assets were transferred for less than fair market value was correct, but held that the "Agency is directed to re-calculate and modify the penalty period by deducting the $106,000.00 promissory note." [Decision, p.7, 3rd paragraph.]

The Fair Hearing Decision does not discuss or make any determination as to whether the $106,000.00 Promissory Note could or could not be considered a resource; however, in the earlier decision of Matter of Mary K. (FH #4733465H - dated August 29, 2007), it was determined that a Promissory Note that failed to state that it was "non-negotiable" was in essence a "non-negotiable" instrument, because "for the Note to be considered a resource per se, it must be possible to demonstrate that the Note has a quantifiable value on the open market." [Decision in Matter of Mary K. at p. 7, 6th paragraph.] If a note that fails to state that it is "non-negotiable" is nevertheless deemed to be "non-negotiable", it would appear to follow that a note that states on its face that it is "non-negotiable" would ipso facto be "non-negotiable" and not be considered a resource. [If a Promissory Note were determined to be a resource, it would delay the inception of the penalty period until the resource was spent down.]

Matter of Edward H. (FH #4819798M)(November 21, 2007)

Personal Care Contract Disallowed Where Services Deemed Duplicative of Services Provided by Nursing Home

This Fair Hearing decision determined that a Medicaid applicant "was not eligible under Medical Assistance ("Medicaid") for skilled nursing facilities, nursing facility services provided in a hospital, including home waiver services under the Long Term Home Care Program, because the Appellant transferred assets in the amount of $106,860.00 for uncompensated value [Decision, p. 17, 4th paragraph]" pursuant to the terms of a personal care contract under which "the services expected to be performed under the terms of the caregiver agreement are already being performed by the skilled nursing system and built into the total cost of care [Decision, p. 17, 1st paragraph]."

In this case, representatives of Basil E. submitted a Medicaid application to the Albany County Department of Social Services [ACDSS] which showed a transfer of $106,860.00 to his two daughters in return for future personal care services yet to be rendered for the alleged benefit of their father after his admission to a nursing home. ACDSS determined that this was an uncompensated transfer and that a 14-month penalty period should be imposed before the "otherwise eligible" applicant could receive long term care services pursuant to the provisions of 06 OMM/ADM-5. Like the referenced Oneida County Fair Hearing Decision dated May 3, 2007, this decision distinguished the facts in this case from those in the Matter of Jerome Carolla "in that Jerome Carolla was not in a nursing facility at the time the subject personal care services were provided to him....His son took care of him in the son's home; then Carolla moved from his son's residence to his daughter's residence. He compensated them by payment, according to the PCS contract he entered into with them, prior to entering the nursing home. In the case at hand, the Caregiver Agreement for services to be provided was entered into after the father had already been admitted to [the nursing home] eleven weeks earlier. Additionally, the PCS contract was entered into only four weeks prior to application for Medicaid. The personal care services that [the daughters] provided for their father, they commenced performing while their father was at the nursing home, where equivalent services are currently being provided to him. [Decision, p. 16, last paragraph]." Note - This Fair Hearing was held on August 17, 2007, prior to the issuance of GIS 07 MA/019, "Evaluating Personal Service Contracts for Medicaid Eligibility," on September 24, 2007. The principles set forth in the GIS are similar to, if not the same as, those set forth in this decision and in the earlier Oneida County Decision.

Matter of Basil E. (FH #4832282L)(November 14, 2007)

FINALLY! The Medically Needy Income Level for Two is Increased

The income level for a couple had been frozen for the last 2 years - 2005 and 2006, despite increases in income levels for singles. This freeze had occurred because State DOH, under the previous Pataki Administration, said they were under pressure from CMS to reduce the levels to comply with a federal regulation. The Blair lawsuit was brought challenging this by the Empire Justice Center, Legal Services of Central New York, the law firm of Nixon, Peabody and the Legal Aid Society in NYC. The lawsuit is based on the fact that the Medicaid levels for couples had now fallen below the SSI levels, which are composed of a federal base rate and a State supplement, which is set by state legislation. The Blair lawsuit claimed that this disparity violated the State Constitution by failing to give aid to the needy at the minimum amount determined by the state legislature, using the State SSI supplement as a minimum benchmark. When the Spitzer Administration began, the parties agreed to settle the lawsuit with the State submitting a State Plan Amendment to exempt a certain amount of income, which would increase the couple's income level. As a result, the 2008 levels were just announced, with couples' limit increasing from $900 to $1067. The complete chart of 2008 levels is posted at http://www.nyc.gov/html/hra/downloads/pdf/income_level.pdf. A link to this chart can also be found on the wnylc.net health care resource page at

http://onlineresources.wnylc.net/healthcare/health_care.asp. Scroll down to Section D. Medicaid Financial Eligibility. The increase in eligibility for 2008 will most likely be funded with state only dollars at this juncture, since DOH has not yet received federal approval for the state plan amendment authorizing the increase.

Counsel for plaintiffs will be pressing on with issues that remain outstanding in Blair, including retroactive relief, and working with DOH to help maximize federal contributions to the medically needy program. Counsel in Blair are pleased that the State has given this relief to couples, but unfortunately, eligibility levels for households larger than two are frozen at the 2007 levels. That freeze may be due to concern on the state's part re whether CMS will ever approve (and contribute federal financial participation to) the expansion for households of one and two.

AS SUMMER APPROACHES GOVERNOR PATERSON ANNOUNCES COOLING ASSISTANCE AVAILABLE FOR THOSE MOST IN NEED

New Yorkers Facing Serious Heat-Related Health Problems May Be Eligible to Receive Air Conditioners from State

Hundreds Die Every Year in United States from Heat-Related Illnesses

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Governor David A. Paterson today announced New York State residents who are susceptible to heat-related illnesses can apply for home air conditioners. Some of the state's most vulnerable low-income residents, whose health problems can be exacerbated by heat emergencies, may be eligible for assistance this summer through a multi-agency cooling initiative that will make the air conditioners available.

The Office of Temporary and Disability Assistance (OTDA), together with the Division of Housing and Community Renewal (DHCR) and the State Office for the Aging (SOFA) are sponsoring the program, which will allocate $2.4 million in federal Home Energy Assistance Program (HEAP) funds for the purchase and installation of energy-efficient air conditioners to eligible individuals.

"In a typical year, about 400 Americans die from heat-related illness, and by simply providing an air conditioner, we can protect some of our most vulnerable residents," said Governor Paterson. "Typically, it is the elderly who are disproportionately affected by heat-waves, and New York needs to do what it can to protect them. The last HEAP cooling initiative in New York that was targeted to medically-needy households occurred nine years ago, so there is a real need for this program."

To be eligible for the program, clients must meet existing HEAP income guidelines and have at least one member of the household that suffers from an acute medical condition that is exacerbated by extreme heat. Written documentation from a physician clearly indicating the need for an air conditioner is required and must be dated within the previous six months.
OTDA Commissioner David Hansell said: "Exposure to extreme heat can be deadly for those who suffer from certain medical conditions. This program is designed specifically as a health intervention, targeted for those who are at high risk in heat emergencies, but do not have an air conditioner or the resources to purchase one."

DHCR Commissioner Deborah VanAmerongen, said: "Senior citizens with health issues face grave danger in the summer heat, even in their own homes. This program will provide safety and comfort for those facing the greatest risk. In addition, the DHCR administered portion of the program includes measures designed to assist households in reducing electrical consumption, such as installing compact

fluorescent lamps, cleaning the refrigerator coil and insulating the hot water heater."

OFA Director Michael Burgess said: "Each year in the United States, more people die from excessive heat events than from hurricanes, tornados, floods and earthquakes combined, and older people are particularly vulnerable. This program will help this vulnerable population remain safely in their homes through heat emergencies as well alleviate the dangers of extreme heat-related health problems that are commonly aggravated by those hot, humid summer days."

Installations will begin during the month of June. Local social services districts will target outreach to medically-needy households that would receive the greatest benefit from cooling services. New York City agencies are working collaboratively to target outreach to those households that are the most in need. New York City clients over the age of 60 should apply at the New York City Department for the Aging. All other New York State and New York City residents can apply through their local Department of Social Services.

Households will not be eligible if they currently have a working air conditioner, or received one through a DHCR or New York State Energy Research and Development Authority funded initiative in the last 10 years.

Only one air conditioner will be provided per household or dwelling unit. Installation, labor and other measures designed to conserve energy, such as insulating the hot water heater and cleaning the refrigerator coil, will also be provided. Grants do not include an additional HEAP cash benefit to fund operation of the air conditioner.

For more information about the HEAP program, please visit http://www.otda.state.ny.us/main/.

Save the Date

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
January 27, 2009, Annual Meeting, Marriott Marquis, NYC
July 23-26, 2009, Elder Law Summer Meeting, Ritz Carlton Hotel, Washington, D.C.

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