

Being Prepared
Medicaid Updates 2021-2022

Ronald Fatoullah, Esq.
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www.fatoullahlaw.com

1-877-ELDER-LAW or 1-877-ESTATES
212-751-7600 - 516-466-4422 - 718-261-1700

Getting Your Team Together

Attorney

- Estate Planning
- Document Preparation
- Elder Care Planning
- Planning for Incapacity

Financial Advisor

- Wealth Management
- Investments
- **Maintenance of the legal and financial plan**
- Retirement Planning
- Projection of long term income and expenses
- Long Term Care Insurance

CPA

- Tax planning and preparation
- Financial record-keeping

Geriatric Care Manager

- Assess, plan, coordinate, monitor and provide services for the older adult

Important Planning Documents

- Last Will & Testament
- Elder Care Planning Power of Attorney & Statutory Gifts Rider
- Health Care Proxy
- Living Will
- Living Trusts

**- NY'S STATE OF EMERGENCY HAS EXPIRED –
GOV. CUOMO'S ORDERS REGARDING REMOTE NOTARIZATION
AND WITNESSING ARE NO LONGER ACTIVE**

- New York's State of Emergency expired on June 24, 2021. Therefore, Gov. Cuomo's Executive Orders authorizing remote notarization and remote witnessing are no longer active. The state of emergency had been in place since March 7, 2020.
- Going forward, all notarization and witnessing of documentation will take place in person with your respective attorney and/or legal professional.
- Please call our office should you have any questions or comments. As always, we are there for all of our clients' legal needs, and will continue to be a resource to our colleagues and friends.

Expanded Planning Power of Attorney

- We are also confronted with the possibility of our incapacity as we get older or as a result of the virus.
- A good Expanded Planning Power of Attorney is a document in which an individual gives the right to another individual(s) to handle their finances, protect assets, write checks, create, modify and revoke trusts, do Medicaid planning, do estate planning, make tax elections, disclaim assets, protect the family home, make gifts, etc.
- Control the family dynamics you want to see by appointing the agent(s) that you want name;
- A POA is a Principal/Agency relationship;
- Can name one or more agents, either together or successively;
- New Power of Attorney effective June 13, 2021 does eliminate the Statutory Gifts Rider and encourages institutions to honor the Power;
- Provisions that the Elder Law Attorney adds to the Power of Attorney is key;
- A FORM POA IS NOT GOOD ENOUGH FOR ESTATE OR LONG-TERM CARE PLANNING

New Power of Attorney Law Effective June 13, 2021

- Why reforms were needed:
 - Complicated for individuals and even attorneys
 - Not easy to sign correctly
 - Simply unwieldy
 - A minor error in the POA could have dire consequences
 - Banks sometimes refuse to accept statutory POAs

Major Changes - New POA Law

- Statutory Gifts Rider is eliminated
- The new law provides for substantial conformance with the statutory language instead of exact wording
- Signing requirement changes
- Acceptance and reliance requirements
- Damages and Attorney fees

Statutory Gifts Rider Eliminated BUT Beware

- Statutory Gifts Rider is eliminated, BUT
- In order to do most Elder Law and/or Estate Planning, gifting must be included
- Gifting authority to be included in the Modifications Section
- Under new law there is no need to separately sign and witness a gifts rider
- Signing requirement changes
- Acceptance and reliance requirements
- Damages and Attorney fees
- NOTE: If you name 2 agents to act but don't specify if they act separately or together, they must act together

Signing Requirements of New POA

- A Principal with capacity can direct a 3rd party to sign the POA. Important for a physically disabled individual
- Two witnesses are required but one of the witnesses can act as the notary
- A Principal or the potential recipient of a gift cannot serve as a witness

Acceptance and Reliance of POA

- A third party located or doing business in NY cannot refuse to honor the POA without reasonable cause for a statutory short form Power of Attorney that was correctly executed at the time of its signing
- Financial institution has a 10-day period to honor or reject the POA
- A rejection must be in writing and sent to the Principal and the Agent
- No deadline for the proponent of the POA to respond, BUT after a response, the financial institution has 7 days to accept or finally reject the POA
- Some exceptions to the Acceptance/Reliance Rule
- Once accepted, if a third party relies on a properly executed POA, that third party is held harmless

Planning POA is NOT a DIY Document

- A well-crafted planning Power of Attorney is a complex document and should be drafted by a qualified Elder Law and Estate Planning attorney
- Depending on an individual's situation, there may be dozens of additions that must be added to the Power of Attorney for the Power to be effective
- Without these additional provisions, Medicaid and/or Estate Planning likely will not be able to be done by the Agent, defeating the purpose of the POA to begin with
- NOTE: All existing, validly executed POAs will remain effective

Some of the Extra Trust Provisions to be included in a POA

- Provisions that typically must be included in the 'Modifications' section of the POA
- Power to create a trust
- Power to modify a trust
- Power to revoke a trust
- Right to exercise a power of appointment in a will
- Right to make gifts (transfer assets) into a living trust

Long-Term Care



Who Pays for Long-Term Care?

- Private Pay - Unaffordable for most
- Medicare - Typically will not pay for LTC
- Long-term Care Insurance - Most don't have it
- Veteran's Benefits - Aid & Attendance Benefits watered down with 3 year lookback period for transfers and a potential 5 year wait as of October 18, 2018
- Spousal Liability- Spouse is liable for the cost of long-term care of his/her spouse, even costs paid for by Medicaid. Advance planning is essential to protect the assets of the well spouse
- Medicaid

Overview of the Medicaid Asset and Income Requirements

Assets:

- **In New York**
 - Medicaid applicant may keep up to \$15,900 plus exempt assets
 - Well spouse may keep \$74,820 or ½ of the couple's assets, but no greater than \$130,380
 - Can appeal Medicaid's CSRA level if more assets needed to generate income to reach the MMNA
- **In many states**
 - Individual asset limit is only the SSI limit of only \$2,000
 - Minimum CSRA is \$26,076 for 2021, and the maximum CSRA is \$130,380

Income:

- For Nursing Home care (Institutional Medicaid), may only keep a \$50 personal needs allowance plus any cost of health insurance premiums in NY
- Well spouse can keep up to \$3,259.50 (in most states) of total household income
- For Home Care (Community Medicaid), may only keep \$884/month (\$1,300 /month for a couple) + \$20 disregard for a total of \$904/month
 - Applicant may keep income in excess of the Medicaid allowable limits through use of a Pooled Trust, but new issues will arise under new law

Overview of the Medicaid Asset & Income Requirements, Cont.

- Spouse can sign a Spousal Refusal (in NY and select states)
 - Beware of spousal suits
- 5-year look-back period applies to nursing home Medicaid
 - Currently, no look-back period for Medicaid home care or community-based applications submitted prior to April 1, 2022
 - New: For applications submitted on or after April 1, 2022, 30-month look-back period applied to Medicaid home care and community-based services, going back to transfers made on or after October 1, 2020
- Advocacy of Elder Law Attorney is critical
- Immediate planning is essential in light of the new law

Exempt Assets

Assets:

- In New York, Medicaid applicant may keep up to \$15,900 (\$2,000 in most states) plus exempt assets:
 - Retirement Accounts in payout status (mimics SSI rules in many states)
 - Burial funds
 - Burial pre-need agreement
 - Reparation payments as a result of Nazi persecution
 - Payments for Agent Orange as a result of the Vietnam war
 - The homestead (applicant's primary residence)
- Beware of Medicaid recovery issues!

UNPRECEDENTED PLANNING OPPORTUNITY – THE WINDOW WILL SHUT IN BY YEAR'S END

VERY IMPORTANT: Implementation of the lookback for Community based Home Care has been postponed to April 1, 2022 (possibly July 1, 2022), and asset transfers prior to October 1, 2020 (possibly later) will likely not be penalized.

What Does This Mean?

Unprecedented opportunity for planning if you are going to need Medicaid Home Care Services. You now have a short period of time to make transfers and ensure financial eligibility. Don't wait take action NOW!

2021 Regional Rates for Medicaid (NY)

- New York State Department of Health (DOH) issued Regional Rates to determine penalty periods for institutionalized individuals
 - Rates change every year; current rates for Medicaid applicants on or after January 1, 2021
 - Rates now apply to transfers made by home care Medicaid applicants
 - Higher regional rates = shorter waiting or penalty period for Medicaid purposes
- Medicaid districts use rate of the region in which the facility is located
 - Medicaid application is submitted in the Medicaid region of the applicant's residence
- *Most states have just one rate for the entire state*

2021 Regional Rates Used To Calculate Medicaid Penalty Periods

- New York State Department of Health (DOH) issued Regional Rates to determine penalty periods for institutionalized individuals. Said rates change every year. Current rates for Medicaid applicants on or after January 1, 2021.
 - **New York City - \$13,307**
 - **Long Island - \$13,834**
 - **Northern Metropolitan - \$13,206**
 - **Northeastern - \$11,689**
 - **Central - \$10,857**
 - **Rochester - \$13,020**
 - **Western - \$11,054**
 - **RATES WILL NOW APPLY TO TRANSFERS MADE BY HOME CARE MEDICAID APPLICANTS**
- The rates have increased for 2021 in all regions. Higher regional rates translate into a shorter waiting or penalty period for Medicaid purposes
- Medicaid districts will use the rate of the region in which the facility is located. The Medicaid application is submitted in the Medicaid region of the applicant's residence

Exempt Transfers

- What are “exempt transfers”?
- Exempt transfers include those:
 - To the well spouse
 - To applicant’s blind or disabled child of any age
 - For fair market value
 - Made exclusively for a purpose other than qualifying for Medicaid
 - That have been returned (“Return of Gift”)

ADDITIONAL EXEMPT TRANSFERS

- All of the transferred assets have been returned to the individual
 - Partial return reduces penalty proportionally*
- Individual used assets to purchase:
 - an annuity
 - life estate
 - promissory note, loan, or mortgage

Exempt Transfers of the Home

- Exempt transfers of the primary residence (the “Homestead”)
 1. Transfer of the home to a spouse
 2. Transfer of the home to a disabled, blind or minor child (but consider the child’s benefits!)
 3. Transfer of the home to a sibling of the A/R with an equity interest and who resided in the home for one year prior to institutionalization
 4. Transfer of the home to an adult caregiver child who resided in the home for at least two years prior to institutionalization (“Caretaker Child” exception)

Home Equity Limitation: The Deficit Reduction Act of 2005 signed by President Bush on February 8, 2006 expanded the look-back to 5 years and also provided for a limitation on the equity value of a home in order to qualify for Medicaid

- The equity limitation is currently \$906,000
- Value of homes, condos & co-ops in NYC, Westchester and Long Island often exceed \$906,000
- Equity limitation does not apply if there is a spouse or a minor, blind or disabled child living in the home

Pooled Income Trusts & Community Medicaid

- A trust organized and operated by a non-profit organization that pools the funds of many Grantors, and uses these funds to pay certain expenses of the various Grantors
- Permits Grantor/Medicaid applicant-recipient to reduce monthly income so that there is no spend down (income in excess of Medicaid income levels - \$884/mo. +\$20) plus health insurance premiums
- Without the pooled income trust, Medicaid recipient would have to spend down any excess income before Medicaid will pay for services

Pooled Income Trust cont.

- Trust must be irrevocable, but Grantor may leave the trust upon:
 - Death
 - Admission to a nursing home
 - Failure to make monthly deposits into trust
- Each month the Medicaid recipient submits expenses to the trust to be paid on his/her behalf
- Expenses the trust can pay include:
 - Rent or mortgage
 - Utility bills
 - Approved reimbursement for third parties who paid Grantor's expenses
 - Credit card payments (no past due charges)

Can A Pooled Income Trust Be Used After The Likely Implementation date of April 1, 2022?

- YES! BUT, care must be taken to avoid a gift of income into the Trust
- Transfer penalties apply to income as well as assets
So, monthly transfers of income to a pooled income trust are, indeed, considered transfers; however, it will not be considered a transfer if the income contributed is used for the benefit of the applicant
- However, a compensated transfer is not considered a gift, **and is therefore exempt from the transfer rules as long as the money in the pooled income trust *is used for the applicant***

New ADL Requirements for Home Care

- Applicants for personal care or CDPAP after the likely implementation date of April 1, 2022 must need:
 - “Limited assistance with physical maneuvering with more than two” ADL’s (3+ ADLs) or
 - Persons with dementia or Alzheimer's diagnosis must need “at least supervision with more than one ADL” (2+ ADLs)
- After a likely implementation date of April 1, 2022, a new Assessment Instrument will be used and it will be an evidence-based validation
- NY Medicaid Choice will use the new standard (ADLs) & new assessment instrument in the conflict-free MLTC determination, and local districts/HRA and mainstream Managed care plans will use it for those not eligible for MLTC

New Standardized Task-based Assessment Tool Will Be Used to Determine Hours

- Tool will be “evidence-based” and used to assist the local DSS to make appropriate and individualized determinations for the number of personal care services and CDPAP hours of care each day
 - currently, the number of hours is determined by each plan using their own “tasking tool”
- The new tool should identify how need for assistance with ADL’s can be met through:
 - Telehealth- Unclear how telehealth may assist with assisting a consumer with transferring, dressing, and toileting
 - Family and social supports-- Now, their assistance is voluntary. Often plans wrongly presume family is available. Even if they are, their assistance must be acceptable to consumer. 18 NYCRR 505.14(b)(3)(ii)(b), 12 OHIP-ADM-01, GIS 97 MA/033

TREATING PHYSICIAN'S ROLE IN PRESCRIBING PERSONAL CARE OR CDPAP IS REPLACED

NEW: Personal care and CDPAP services must be prescribed by a “qualified independent physician selected or approved by” DOH. DOH may use Maximus (NY Medicaid Choice). This will likely be effective November 8, 2021

Concerns:

- A contract physician lacks familiarity with the consumer's condition, compared to a long-time trusted physician and may not specialize in the consumer's particular diagnosis,
- Will add more delays to applying for services – must arrange an assessment by independent physician to apply
- Though a physician's order is now required for both personal care and CDPAP, MLTC plans have generally not required them for personal care, but have required them for CDPAP

Extra Review of High-Hour Consumers to Determine Safely Living in the Community

For personal care recipients, the law goes a step further in its stated concern for “safety.” The law authorizes DOH to adopt standards and assessment of services for individuals “whose need for such services exceeds a specified level to be determined by DOH”:

- MRT recommended this level as 12+ hours/day
- Assessor will consider whether consumer, with the provision of such services, is capable of safely remaining in the community in accordance with the standards in *Olmstead*, 527 US 581 (1999)
- Who determines “safety?” What about the consumer’s autonomy – their right to the “dignity of risk” in choosing to accept some risks that may exist in the community in order to live at home as they choose- if provided enough hours of care, safety can be reasonably ensured

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