

SPRING 2010 EDITION

## MESSAGE FROM THE EDITOR

The New York State Legislature recently approved and Governor Patterson signed into law legislation that dramatically changed the laws pertaining to powers of attorney. The changes were intended to stave off financial abuse of the elderly. Some of the changes are beneficial. Other changes may prove to be problematical. **The new power of attorney became effective on September 1, 2009. Note that all powers of attorney executed prior to that date remain valid.** In sharp contrast to the old power of attorney, the execution of a power of attorney by the principal alone is no longer adequate. All new powers of attorney must be signed by both the principal and the agent and their signatures must be acknowledged before a notary public.

The new power of attorney law requires that the agent sign the power of attorney, acknowledging his legal responsibilities, and keep detailed records of all receipts, transactions, etc.

The new law eliminates all gift-giving authority of the agent except to continue a principal's history of gift-giving, and then not to exceed \$500 per person or charitable organization per year. (Legislation that would change this provision is pending.)

All other gift-giving may only be accomplished through a separate document, the Statutory Major Gifts Rider. Using this supplemental form the principal "may authorize major gift



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### FREE PROGRAM NOW AVAILABLE

#### PLANNING & PAYING FOR LONG-TERM CARE

The law firm is now offering a seminar, MEDICAID 2010!, for professionals only, to be presented at social-service agencies, nursing homes, adult-day-care centers, hospital and assisted-living facilities. There is no charge for this program, which is presented by Martin Petroff. Topics to be covered include current Medicaid transfer-of-assets rules, look-back and penalty periods, pooled-income trusts, supplemental-needs trusts for disabled persons, and the rules for primary residence.

To schedule a presentation at your office or to reserve a place for the same program at the law offices of Martin Petroff & Associates at 270 Madison Avenue, between 39th & 40th Streets, please call (212) 679-5800. ■

## MEDICAID: FREQUENTLY ASKED QUESTIONS

*Individuals in need of homecare or nursing-home care should understand that despite on-going changes in the Medicaid eligibility rules, they do not have to spend down their savings to qualify for Medicaid services. Valuable planning options exist. The following questions and answers illustrate some of these options:*

**Q.** My mother suffered a stroke several months ago. She has been managing with four hours of homecare five days a week that she has been paying for herself. My sisters and I believe her condition has taken a downturn and that she now needs more hours of homecare. We are concerned that increasing her homecare will deplete her savings. Will Medicaid help her?

**A.** If your mother needs homecare and the costs are so significant that she will be spending down her lifetime savings, she needs to know that she may be made eligible for Medicaid homecare services that will provide her with as much as 24-hours/7-days-a-week services at no cost to her. Such a plan will allow her to conserve her savings to help pay for expenses other than homecare. Expenses may include luxuries and necessities, such as vacations, theater and clothes as well as rent, food, telephone, electric, cable, transportation, etc.

**Q.** My brother has dementia and needs round-the-clock homecare. I believe he has between \$70,000-\$80,000 in savings and stocks. His Social Security and pension income is \$2,000 per month. Currently, he is paying \$700 a month for 10 hours of homecare a week and \$850 for rent. He is just barely able to cover his other expenses. Can we protect his savings and income and still have him qualify for Medicaid homecare?

**A.** The answer is a very affirmative "Yes" to both parts of your question. Under the Medicaid program, the value of his assets – bank savings, stocks, bonds, etc. – cannot exceed \$13,800. However, the law permits him to reduce his assets down to the required limit and apply for Medicaid homecare for such services. If he gives away (i.e., transfers to an individual or to a trust) in any one month that portion of his savings above \$13,800, he will be eligible resource-wise for free Medicaid homecare, day care, prescription drugs, etc. on the first day of the following month. **Note: There is no penalty period for transferring assets to become eligible for non-institutional Medicaid.**

With regard to your brother's monthly income: the

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## MEDICAID: FREQUENTLY ASKED QUESTIONS

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Medicaid limit is \$787. In effect, your brother has \$1,213 in monthly income that Medicaid characterizes as “excess.” Medicaid will require him to contribute this amount to Medicaid to help cover his homecare expenses. However, if your brother joins a pooled-income trust he will be able to conserve almost all of the \$1,213 plus \$787 to pay his expenses. (Please see the article on pooled-income trusts on page 3.)

**Q.** Would you please summarize the Medicaid rules under which it is possible to conserve approximately 50 percent of an individual’s assets should that individual require nursing-home care?

**A.** Under the Medicaid law in New York State an individual may be eligible for Medicaid nursing-home coverage if his savings do not exceed \$13,800 and all his income except for a personal-needs allowance of \$50 per month is paid to the facility to defray the cost of his care. If the individual has assets in excess of \$13,800 he may transfer (i.e., give away) his assets to an individual or trust. For example: assume the individual has \$113,800. If, in an attempt to become eligible for Medicaid-nursing-home coverage, he transfers away \$100,000, leaving him with \$13,800, he will incur a 10-month penalty period during which time Medicaid will not pay for his nursing-home care if he should require that care at any time during the next five years.

Medicaid arrives at the penalty period by dividing the amount of money transferred (\$100,000) by the average monthly cost of a nursing home in the county in which he lives. In New York City the average monthly cost is approximately \$10,000, resulting in a 10-month penalty period ( $\$100,000 / \$10,000 = 10$ ) during which time Medicaid will not pay for the Medicaid applicant’s care in the nursing home. In that case, the person who received the original \$100,000 returns 50 percent, that is, \$50,000, to the Medicaid applicant.

History now has been rewritten, and the Medicaid applicant has only transferred \$50,000 and therefore incurred only a five-month penalty. With the \$50,000 returned to him the applicant pays for his nursing-home care for five months. By the sixth month he has lived through his five-month penalty, he is impoverished, and he is eligible for Medicaid. The process requires the utilization of a promissory note or annuity in conformity with Medicaid law.

**Q.** Will Medicaid take our home if my wife or I should ever need Medicaid nursing-home care or homecare?

**A.** In most instances a home – a house, cooperative or condominium apartment – remains an exempt asset for purposes of determining initial Medicaid eligibility. However, ultimately, Medicaid may impose a lien on the sale proceeds of the property for all it spent on behalf of

your wife. If your home is transferred to a non-exempt individual, a penalty period will be incurred during which time your wife will be ineligible for Medicaid nursing-home coverage.

Significantly, there is no penalty period if the home is transferred to a spouse; to a “caretaker” child who resided there for at least two years before the parent required nursing home placement and provided care to maintain the parent at home; to a child who is disabled, blind or under age 21; or to a brother or sister who has an equity interest in the home and resided there for at least one year before the individual entered a nursing home.

**Q.** If my father transfers \$13,000 each to me and my three children this year, will that transfer count if he should need to apply for Medicaid nursing home coverage?

**A.** The transfer you are proposing is counter-productive for Medicaid but may be a useful for a person wishing to reduce the size of his taxable estate. You are referring to a tax-planning option which permits an individual to make gifts of \$13,000 to any number of persons in any one year without filing a gift-tax return. Such gifts are exempt from gift and estate taxation, but they are not exempt under the Medicaid nursing-home rules. The transfer of \$52,000 (4 persons x \$13,000) will generate a five-month-plus penalty period during which time your father will not be eligible for Medicaid in a nursing home.

**Q.** I recently realized that I am eligible for Medicaid, but I already have Medicare. Can I have both at the same time?

**A.** Yes. As long as you meet Medicaid’s income and asset limits, you can have both Medicare and Medicaid benefits, but Medicare will always be the primary payer and Medicaid will pay second. Medicaid can pay for many medical expenses not covered by Medicare, such as personal care at home, long-term nursing-home care or transportation to the doctor. ■

## MEDICAID HOMECARE: THE CONSUMER IN CHARGE

Individuals who have an aide in place when entering the Medicaid homecare program may continue to employ that person within the Consumer Directed Personal Assistance Program (CDPAP). The program is available for elderly and disabled individuals who are able to direct their own care or have someone who can assist them in providing that direction. CDPAP provides an opportunity to obtain government financial assistance while maintaining a level of independence that is not possible when a government agency takes responsibility. Available services range from skilled private-duty nursing to personal care or home-health aide services by paraprofessionals.

The recipient or the person acting on the recipient’s behalf assumes full responsibility for hiring (and firing), training and supervising the person or persons providing the services. ■

## ASSISTED LIVING PROGRAM

An Assisted Living Program (ALP) serves persons who are medically eligible for nursing-home placement but serves them in a less-medically-intensive, lower-cost setting. ALPs provide personal care, room, board, housekeeping, supervision, home-health aides, personal emergency response services, nursing, physical therapy, occupational therapy, speech therapy, medical supplies and equipment, adult day health care, a range of home-health services, and the case management services of a registered professional nurse.

To be eligible, both Medicaid recipients and private-payers must be medically eligible for, and would otherwise require, placement in a nursing home due to the lack of a home or suitable home environment. However, eligible ALP residents must not require continual nursing care, be chronically bedfast or chairfast, or be impaired to the degree that they endanger the safety of other ALP residents.

ALP eligibility requires that applicants qualify under the financial limits for Medicaid community services. It is not necessary for persons to qualify under the more complex, punitive rules for Medicaid nursing-home eligibility. An applicant with income in excess of the allowed monthly Medicaid rate may utilize the pooled-income trust to enhance his or her budget.

The following is a partial list of state-approved ALP providers in the New York metropolitan region: Village at 46th & 10th, 510 West 46 Street, Manhattan, (212) 977-4600; Lott Residence, 1261 Fifth Avenue, Manhattan, (212) 534-6464; Amber Court of Westbury, 3400 Brush Hollow Road, Westbury, Long Island, (516) 334-3838; Boulevard ALP, 71-61 159 Street, Flushing (718) 969-8102; Amber Court of Brooklyn, 650 East 104 Street, Brooklyn (718) 649-0700. Note that the number of facilities offering this program is expanding throughout New York State.

ALPs are regulated by the New York State Department of Health. The regulations require that the appropriateness of ALP services be determined by initial and periodic reassessments provided by the ALP. Facility operators are required to provide sufficient staff to perform case-management functions for assisted living residents and to ensure their health, safety and well-being. ALPs are required to provide a staffing plan for review by the Department of Health. ■

## NEW HOUSING SUBSIDY PROGRAM

The Nursing Home Transition and Diversion Housing Subsidy Program provides rental assistance to approved individual participants in New York State.

The goal of this program, jointly administered by the New York State Department of Housing and Community Renewal (DHCR) and the New York State Department of

Health (DOH), is to provide alternatives to nursing-home placement for disabled people ages 18 or over and seniors by assisting them with at-home services appropriate to their needs, and safe, decent, accessible and affordable housing.

After a household has been approved for receipt of a housing subsidy it remains with the participant as long as he or she remains eligible, even if there is a change of residence. The amount of subsidy assistance will vary depending on the income of the family or individual and the approved rent for the unit. Participants pay approximately 30 percent of their income toward rent, and the program pays the balance.

Individuals interested in applying for this program must complete the eligibility process with Regional Resource Development Center (RRDC). In New York City the RRDC is the VNA of Staten Island, (718) 816-3555.

Once an applicant has been issued a notice affirming his or her eligibility to participate in the program and an appropriate unit has been chosen, the unit will be inspected by a Housing Quality Standards (HQS) inspector and the amount of subsidy will be determined by the local authority, a unit of the DHCR.

Households must meet eligibility requirements and the unit must pass the HQS inspection before DHCR can approve monthly subsidy payments. The payments are sent directly to homeowners or authorized managing agents via direct deposit. ■

## POOLED INCOME TRUSTS & MEDICAID HOME CARE

Disabled persons of any age receiving community Medicaid services – including home care, adult day care and prescription drugs – are now able to use virtually all of their income to pay for their living expenses by participating in a pooled-income trust. It is no longer necessary for consumers to contribute their “excess” income to the Medicaid system as a “spend-down.” The pooled-income trust is proving to be a popular planning tool for persons in need of long-term health-care services for whom the excess-income option does not work because it would not allow them sufficient money to live in the community and qualify for Medicaid. The pooled-income trust works as follows:

- Suppose an individual has a monthly income of \$1,787 in Social Security and pension income and is utilizing Medicaid home care and adult day care services. Under present (2010) Medicaid guidelines he is only allowed to keep \$787 of that income.

- Currently his monthly surplus is \$1,000 (\$1,787 - \$787 = \$1,000). He is sending a check each month for that amount to the appropriate health-care provider as a contribution toward the cost of his care.

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## POOLED INCOME TRUSTS & MEDICAID HOME CARE *continued from page 3*

- After the individual joins the pooled-income trust his \$1,000 check will be sent to the trust office. The individual will keep \$787 as he does now. His expenses for rent, food, utilities, clothing, etc. will be paid by the trust according to instructions from the individual or his representative. The individual's Medicaid services will not be affected. The pooled-income trust contains the assets of a number of disabled individuals and is managed by a non-profit organization that maintains separate accounts for each individual. It is effectively a supplemental-needs trust that receives the beneficiary's monthly income and redistributes it on his behalf as directed by the beneficiary or his representative. ■

## NEW PRESCRIPTION DRUG DISCOUNT PROGRAM

New York State is now offering discounts on nearly all prescription drugs to low-income persons between the ages of 50 and 65. More than 2,500 pharmacies across the state are participating. Applications are being accepted online at [www.nyprescriptionsaver.fhsc.com](http://www.nyprescriptionsaver.fhsc.com) or by phone at (800) 788-6917. Applications are also available at pharmacies and through community organizations. Approved participants receive a New York Prescription Saver Card, usually within two weeks of filing their application.

To be eligible for the card, annual income must be at or below \$35,000 for single persons and at or below \$50,000 for married individuals. Individuals enrolled in Medicaid or in New York State's Elderly Pharmaceutical Insurance Coverage (EPIC) program are not eligible for the Prescription Saver Card.

The program, administered through the State Department of Health, is expected to provide lower-income New Yorkers with average savings of 30 to 40 percent off the price of generic prescriptions, and at least 25 percent off the full retail price of brand name prescriptions. Savings will vary depending on the quantity, type and brand of drug purchased. ■

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transactions and other transfers." The form requires that it be acknowledged and witnessed by two disinterested witnesses.

At one time, a power of attorney was among the most straightforward and easily executable legal tools an attorney could recommend to a client. A power of attorney granted to a trusted loved one or friend generally simply meant that a client (the principal) could be secure in the knowledge that if he was ever unable to act for himself, another person (an agent) could act on his behalf. However, the new law's requirements are so complex that they virtually require that a principal have an attorney or risk executing a power of attorney which is invalid or has unintended results. In fact, the new law recommends that the principal should have an attorney supervise the execution of a power of attorney and, particularly, the new Statutory Major Gifts Rider. ■

**ABOUT THE EDITOR:** The law practice of Martin Petroff & Associates provides a broad range of services concentrating on the rights of the elderly and disabled. Martin Petroff, formerly staff attorney for health affairs at the New York City Department for the Aging, is a member of the Executive Committee of the New York State Elder Law Section. He is a member of the Long Term Care Community Coalition where he serves as a director. He is also a member of the advisory councils of the Henry Street Settlement House Senior Companion Program and CIDNY-Independent Living Services. *The Elder Law Report* is published to provide an informative summary of current legal issues and new programs affecting disabled individuals and seniors. Those persons concerned about legal issues discussed in this publication are advised to consult an elder-law attorney. ATTORNEY ADVERTISING pursuant to NY DR2-101(f). Copyright © Spring 2010 Martin Petroff & Associates. All rights reserved. ■