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GUARDIANSHIPS AND MEDICAID PLANNING

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INTRODUCTION

The concept of Medicaid planning, involving the strategic transfer of assets aimed at accelerating an individual's eligibility for Medicaid, is generally viewed as a prudent estate planning technique by which an individual may preserve assets for his or her loved ones.

However, when an individual becomes incapacitated, and an appropriate power of attorney is not in place, a guardian contemplating Medicaid planning on the ward's behalf must be careful in order to avoid running afoul of his or her duties as guardian.

POWER OF ATTORNEY AS ALTERATIVE TO GUARDIANSHIP

Before proceeding with a guardianship application, consider whether the incapacitated person has made an effective alternate voluntary arrangement: a power of attorney. A power of attorney is a legal instrument by which an individual (the "principal") authorizes another person or persons (the "agent(s)") to act on behalf of the principal with respect to financial matters.

Through the use of a "durable" power of attorney, an agent may act on the principal's behalf from the time the power of attorney is executed, even after the principal's disability or incapacity. Through the use of a "springing" power of attorney, an agent may begin acting on the principal's behalf at the time the principal becomes disabled or incapacitated.

In order to conduct Medicaid planning by transferring the principal's assets under a power of attorney, New Jersey statute requires that the power of attorney document "expressly and specifically" authorize the agent to make gifts (to "gratuitously transfer property of the principal"); an authorization to generally "perform all acts which the principal could perform if personally present and capable of acting," or similar words, is not sufficient to authorize the agent to do so. N.J.S.A. 46:2B-8.13a.

However, an appropriate power of attorney that contains the appropriate gifting powers could obviate the need to file for guardianship, if the ultimate goal is to conduct Medicaid planning.

MEDICAID PLANNING IN THE CONTEXT OF A GUARDIANSHIP

Unfortunately, an elder often fails to take the appropriate steps to allow for Medicaid planning before becoming incapable of doing so: either the elder has no power of attorney at all, or a power of attorney that contains no (or limited) gifting powers. In such cases, a guardianship action is the appropriate path. In many cases, the need for Medicaid planning coincides with the need for a guardianship, in which case permission to conduct Medicaid planning may be sought in the initial guardianship application. However, an application to conduct Medicaid planning may also be filed by a guardian at any time after the guardianship appointment.

Our courts recognize that an incapacitated person is entitled to the same right of self-determination as that of a competent person. Therefore, in

appropriate cases, a court will permit long-term care planning on behalf of an incapacitated person, through a guardianship application. However, because a guardian owes a fiduciary duty to his or her ward, any proposed Medicaid plan must be shown to be in the ward's best interests.

In New Jersey, upon the appointment of a guardian for the property of an incapacitated person, the court "shall have full authority over the ward's estate, and all matters relating thereto." N.J.S.A. 3B:12-36. "The court has, for the benefit of the ward, … all the powers over the ward's estate and affairs which he could exercise, if present and not under a disability, except the power to make a will, and may confer those powers upon a guardian…." N.J.S.A. 3B:12-49. These powers include the express power to enter into contracts, id., and the right make gifts in trust or otherwise; and "to engage in planning utilizing public assistance programs consistent with current law." N.J.S.A. 3B:12-49, -50, -58. In the exercise of those powers, "the guardian or the court should take into account any known estate plan of the ward, including his will." N.J.S.A. 3B:12-62.

Pursuant to the foregoing statutory authority, a New Jersey court may permit a guardian to exercise over the ward's estate all powers that the ward could or would exercise if not under a disability, including the power to transfer assets as gifts. See Marsh v. Scott, 2 N.J. Super. 240 (Ch. Div. 1949).

In 1972, the court in In re Trott authorized the guardian of an incapacitated person to make *inter vivos* transfers of assets to her heirs to minimize estate taxes, citing the proposition that an incapacitated person should

not be denied the privilege of effective estate planning. 118 N.J. Super. 436 (Ch. Div. 1972). As the court reasoned,

> Under the doctrine of *parens patriae* the court… may intervene in the management and administration of an [incapacitated person]'s estate in a given case for the benefit of the [incapacitated person] or of his estate.

Id. at 440. Notably, the Trott court did not require an affirmative showing that the incapacitated person would have taken these particular steps with regard to her estate; instead, the court found that "'the guardian should be authorized to act as a reasonable and prudent man would act (in the management of his own estate) under the same circumstances, unless there is evidence of any settled intention of the [incapacitated person], formed while sane, to the contrary.'" Id. at 441-442 (quoting In re Christiansen, 248 Cal. App. 2d 398 (Dist. Ct. App. 1967) (emphasis supplied)).

The Trott court went on to identify the following criteria with which to consider a guardian's proposal to make gifts:

> (1) the mental and physical condition of the [incapacitated person] are such that the possibility of her restoration to competency is virtually nonexistent; (2) the assets of the estate … are more than adequate to meet all of her needs…; (3) the donees constitute the natural objects of the bounty of the [incapacitated person]…; (4) the transfer will benefit and advantage the estate of the [incapacitated person]…; (5) there is no substantial evidence that the [incapacitated person], as a reasonably prudent person, would, if competent, not make the gifts proposed….

Id. at 442-443.

In a unanimous decision of the New Jersey Supreme Court in 2004, the above-referenced Trott criteria were expressly adopted, and the Court ruled that,

"so long as the law allows competent persons to engage in Medicaid planning, [incapacitated] persons, through their guardians, should have the same right…." In re Keri, 181 N.J. 50 (2004).

When filing a guardianship application and an accompanying request for permission to permit Medicaid planning, it is important to demonstrate that the plan satisfies the criteria articulated by the Trott case and adopted by the New Jersey Supreme Court in Keri. First, that the mental and physical condition of the incapacitated person are such that the possibility of his or her restoration to competency is virtually nonexistent; secondly, that, because of state and federal safeguards in place to prevent nursing home discrimination on the basis of Medicaid pay status, the proposed transfer will not result in any decrease in the incapacitated person's quality of life; third, that the transfer benefits the natural object(s) of the incapacitated person's bounty; fourth, that the transfer will benefit the estate of the incapacitated person; and, finally, that there is no substantial evidence that the incapacitated person, as a reasonably prudent person, would, if competent, not make the transfer proposed.

In sum, the court may permit a guardian to make gifts of the ward's assets as part of a Medicaid plan. However, in order to do so, the court must be satisfied that the proposed transfers are in the ward's best interests, and must consider the above-referenced factors set forth in Trott.

THE GUARDIANSHIP APPLICATION

In general, a guardianship action is initiated by filing the following documents with the Surrogate:

- Order Fixing Hearing Date and Appointing Attorney for Alleged Incapacitated Person
- Verified Complaint
- Certification of Assets
- Certifications of Physician or Psychologist
- Case Information Statement

With the exception of the Verified Complaint (discussed separately below), all of these documents can be found on New Jersey's judicial website, www.njcourts.gov. Each of these required forms is discussed in detail below.

1. Order Fixing Guardianship Hearing

The Order Fixing Hearing Date and Appointing Attorney for Alleged Incapacitated Person ("Order Fixing Hearing") is submitted by the plaintiff, but contains blank spaces for the court to complete. It includes notice requirements, a provision for the appointment of a court-appointed attorney for the alleged incapacitated person (unless the alleged incapacitated person is represented by counsel), and provisions for parties in interest to be heard. R. 4:86-4.

The revised Rule now states that the Order Fixing Guardianship Hearing "shall require that any proposed guardian complete guardianship training." R. 4:86-4(a)(6). This training consists of materials (two written guides and one video) that the proposed guardian must review prior to being appointed as guardian:

Link to .pdf guide for Guardians of the Person:

http://www.njcourts.gov/courts/assets/guardianship/Guardianship_Person_web.pdf

Link to .pdf guide for Guardians of the Property/Estate:

http://www.njcourts.gov/courts/assets/guardianship/Guardianship_Estate_web.pdf

Link to YouTube guardianship training video:

https://www.youtube.com/watch?v=S9AowILqHAY

2. Certification of Assets

R. 4:86-2(b) requires that the guardianship filing include a certification regarding the alleged incapacitated person's assets. The Rule requires that the certification identify "the nature, description, and fair market value" of the alleged incapacitated person's:

- Real estate (including property he or she has or in which he/she may have a present or future interest);
- Personal estate (stocks, bonds, bank accounts, receivables, personal property, etc.);
- Liabilities/debts; and
- Income.

3. Certification of Physician or Psychologist

The guardianship application should include certifications from two physicians, or one physician and one practicing psychologist, who have made a personal examination of the alleged incapacitated person within thirty days of

the filing of the action; that time period may be relaxed by the court upon an *ex parte* showing of good cause.

Each doctor's certification must contain specific information, which the fill-in-the-blank design makes largely self-explanatory, but the physician/psychologist must ultimately render an opinion "of the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs." R. 4:86-2(b)(2)(F). This must include the circumstances, conduct and medical history of the alleged incapacitated person on which the opinion is based. If the alleged incapacitated person retains capacity to manage certain areas of his/her affairs (such as residential, educational, medical, legal, vocational or financial decisions), that information should be included in the certification. R. 4:86-2(b)(2)(G). Finally, if the physician/psychologist is of the opinion that the alleged incapacitated person is incapable of attending the guardianship hearing, the reasons should be set forth. R. 4:86-2(b)(2)(H).

4. Case Information Statement

The Adult Guardian Case Information Statement is required for an initial pleading with the Chancery Division, Probate Part. R. 4:86-2(b)(3). An initial pleading will be rejected from filing if the CIS is not included.

According to the Rule, the CIS "shall include the date of birth and Social Security number of the alleged incapacitated person." The instruction form accompanying the CIS form clarifies that this "is not a public document and all

information on the form will be kept confidential." The CIS includes a certification that confidential personal identifiers have been and will be redacted from documents submitted to the court in the future, in accordance with R. 1:38-7(b).

5. Proposed Judgment

No later than ten days prior to the hearing, the plaintiff must file with the Surrogate a proposed Judgment of Legal Incapacity and Appointment of Guardian of the Person, or Guardian of the Person and Estate. R. 4:86-6(d).

Notably, if Medicaid planning is to be part of the guardianship application, care must be taken to add those provisions to the proposed Judgment submitted to the court.

6. Brief

Although a brief may not be required for a basic guardianship application, when a guardianship application includes a request to conduct Medicaid planning, a legal brief should be included to address the guardian's legal right to conduct Medicaid planning on behalf of a ward.

7. Verified Complaint

a. Basic requirements

Although a form Verified Complaint is not included on the judicial website, R. 4:86-2 sets forth the required contents:

> (1) the name, age, domicile and address of the plaintiff, of the alleged incapacitated person and of the alleged incapacitated person's spouse, if any;
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> (2) the plaintiff's relationship to the alleged incapacitated person;

(3) the plaintiff's interest in the action;

(4) the names, addresses and ages of the alleged incapacitated person's children, if any, and the names and addresses of the alleged incapacitated person's parents and nearest of kin, meaning at a minimum all persons of the same degree of relationship to the alleged incapacitated person as the plaintiff;

(5) the name and address of the person or institution having the care and custody of the alleged incapacitated person;

(6) if the alleged incapacitated person has lived in an institution, the period or periods of time the alleged incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined; and

(7) the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged incapacitated person, any person named as health care representative in any health care directed executed by the alleged incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged incapacitated person.

b. Additional requirements in the context of Medicaid planning

Where the guardianship application also seeks permission to conduct Medicaid planning, the Verified Complaint must be supplemented with information sufficient to justify that requested relief.

The simplest way to include the Medicaid planning information is to prepare the Verified Complaint with multiple counts: the first count would address the basic request for a finding of incapacity and appointment of a guardian; and the subsequent count(s) would address the request for permission to conduct Medicaid planning.

The Medicaid planning count(s) should include three basic ideas to demonstrate that the proposed plan is in the proposed ward's best interests. First, that, based on the proposed ward's condition, he or she requires or soon will require long-term care, the cost of which would ultimately exhaust the ward's resources. Second, if the proposed ward were not incapacitated, he or she would take steps now to accelerate Medicaid eligibility to preserve a portion of those assets for his or her loved ones. Third, that there are state and federal safeguards in place preventing a Medicaid-approved nursing facility from discriminating against a patient based upon payment status as a Medicaid recipient, so the proposed plan would not adversely impact the ward's quality of life.

The Medicaid planning count(s) should address the factors identified by the court in Trott, and adopted by our Supreme Court in Keri, as criteria for a court to consider when a guardian proposes to make gifts:

> (1) the mental and physical condition of the [incapacitated person] are such that the possibility of her restoration to competency is virtually nonexistent; (2) the assets of the estate … are more than adequate to meet all of her needs…; (3) the donees constitute the natural objects of the bounty of the [incapacitated person]…; (4) the transfer will benefit and advantage the estate of the [incapacitated person]…; (5) there is no substantial evidence that the [incapacitated person], as a reasonably prudent person, would, if competent, not make the gifts proposed….

It is important to include information about the proposed ward's estate plan, if any. For example, if the proposed ward has executed a Last Will and Testament, did it direct that the estate would pass in the same manner as the

funds that would be preserved through the proposed Medicaid planning transfer? If the proposed ward did not have an estate plan, such that the estate will ultimately pass pursuant to the New Jersey laws of intestacy, will the funds preserved through the proposed transfer pass to the ultimate heirs of the estate?

Finally, the Verified Complaint should address the specific type(s) of Medicaid planning transfer(s) proposed. Common Medicaid planning transfers are discussed below.

TRANSFER OF PRINCIPAL RESIDENCE TO COMMUNITY SPOUSE

Certain transfers of the proposed ward/Medicaid applicant's principal residence are "exempt," for purposes of determining Medicaid eligibility. One such exempt transfer is a gift of the applicant's principal residence to his or her non-institutionalized ("community") spouse. 42 U.S.C. §1396p(c)(2)(A)(i); N.J.A.C. 10:71-4.10(d)(1).

By transferring the applicant's home to the community spouse, the home will escape the imposition of a "Medicaid lien" under Medicaid's estate recovery program, by which the State of New Jersey is entitled to recover payments made on behalf of a Medicaid recipient through liens on property owned by the Medicaid recipient at death. N.J.S.A. 30:4D-7.2 et seq.; 42 U.S.C. §1396p(b)(1)(B).

Therefore, if title of the home is transferred from the Medicaid applicant to his/her spouse, Medicaid will not penalize the transfer, and Medicaid will be

unable to impose a lien on the home because the ward will have no legal interest in the home at the time of death. This allows the home will be preserved, free of a Medicaid lien, for the ward's heirs.

TRANSFER OF PRINCIPAL RESIDENCE TO CAREGIVER CHILD

Based on high level of special attention and care needed by a proposed ward, the child of a ward may have provided a sufficient level of care to allow the parent to remain at home, rather than in a nursing home, for a period of time. If medical information demonstrates that the care provided by the child exceeded normal personal support activities and was essential to the health and safety of the parent, and that the child's care allowed the parent to remain at home for more than two years preceding institutionalization, that child qualifies as a "caregiver child" under Medicaid regulations.

Transfers of the Medicaid applicant's home to a "caregiver child" are exempt under N.J.A.C. 10:71-4.10(d)(4) which provides, in pertinent part, as follows:

> [A]n individual shall not be ineligible for [Nursing Home Medicaid] because of the transfer of his or her equity interest in a home which serves … as the individual's principal place of residence and the title to the home was transferred to:
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> ***
>
> A … son or daughter of the institutionalized individual … who was residing in the individual's home for a period of at least two years immediately before the date the individual became an institutionalized individual and who has provided care to such

> individual which permitted the individual to reside at home rather than in an institution or facility.
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> The care provided by the individual's son or daughter ... shall have exceeded normal personal support activities (for example, routine transportation and shopping). The individual's physical or mental condition shall have been such as to require special attention and care. The care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual.

As with a transfer to a community spouse, a transfers of the home to the caregiver child does not result in a Medicaid transfer penalty, and the home will escape the imposition of a "Medicaid lien" as mandated by the Medicaid estate recovery program. N.J.S.A. 30:4D-7.2, et seq.; 42 U.S.C. §1396p(b)(1)(B).

TRANSFER OF PRINCIPAL RESIDENCE TO DISABLED CHILD

If the proposed ward has a child who is under 21, blind or disabled, the ward's home may be transferred to that child for less than fair market value without a Medicaid transfer penalty. Transfers of the home to a "disabled child" are exempt under N.J.A.C. 10:71-4.10(d)(2), which provides, in pertinent part, as follows:

> [A]n individual shall not be ineligible for [Nursing Home Medicaid] because of the transfer of his or her equity interest in a home which serves … as the individual's principal place of residence and the title to the home was transferred to:

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> A child of the institutionalized individual … who is blind or totally and permanently disabled.

Again, the transfer of the home will be an exempt transfer, and the home will escape the imposition of the Medicaid lien upon the parent's death. N.J.S.A. 30:4D-7.2, et seq.; 42 U.S.C. §1396p(b)(1)(B).

TRANSFER OF PRINCIPAL RESIDENCE FOR FAIR MARKET VALUE

If the ward's home is sold for fair market value, the Medicaid transfer (gifting) penalties do not apply. The guardian must present the court with certifications from real estate appraisers to establish the fair market value.

By transferring the home for fair market value, no transfer penalty will be imposed under Medicaid regulations, because the transaction will not be considered a transfer for less than fair market value. The home will also escape the imposition of the Medicaid lien as mandated by the Medicaid estate recovery program. N.J.S.A. 30:4D-7.2 et seq.; 42 U.S.C. §1396p(b)(1)(B).

Through a sale for fair market value, the home, which is probably the proposed ward's principal asset, would be converted to cash, which could then be gifted as part of a Medicaid plan.

TRANSFER OF LIQUID ASSETS

If a Medicaid applicant transfers assets for less than fair market value (makes a gift) within 60 months of the date of the application, the applicant is

subject to a Medicaid penalty period, based upon the value of the uncompensated transfer. 42 U.S.C. §1396(p).

However, through proper planning, the penalty period resulting from transfer of assets can be minimized, while protecting a portion of those assets for the applicant's loved ones.

The guardian may seek permission from the court to transfer a portion of the ward's assets to his or her loved ones, while retaining sufficient assets in the ward's name to pay for nursing home care during the penalty period resulting from the transfer. With proper planning, once that ineligibility period expires, the ward's assets will be spent down to the point where the ward will be eligible for Medicaid.