

Representing the Elder Unmarried Couple – June 14, 2016

Pauline Yeung-Ha, Esq.

GRIMALDI
&
YEUNG LLP



Medicaid Overview

- Government entitlement used as long term care coverage solution
- Part of the 1964 “War on Poverty” program - Title XIX of Social Security Act
- Funded by federal, state, and local dollars
- Medicaid was to be the payer of last resort

Medicaid Eligibility

- 18 NYCRR 360
- Available to medically or categorically needy
- Must be a US legal resident (citizenship is not a requirement)
- Must be resident of state and county (have a physical presence and intent to remain)

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Medicaid Eligibility

Individuals must be:

- Aged – over 65 years
- Blind – certified blind by NYS Commission
- Disabled – unable to gainfully employed.
Determined by SSA/SSI or State
- SSI related – receiving SSI or Public Assistance

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Types of Medicaid

- Two types in New York:
 1. Community-Based (Home Care) Medicaid
 - No lookback and no penalty period
 2. Institutional-Based (Nursing Home) Medicaid
 - **Deficit Reduction Act of 2005** changed lookback period from 3 years to **5 years**; and
 - **Penalty period** for transferred assets begin on the date the applicant is eligible, is in the nursing home and has filed a Medicaid application

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Nursing Home Penalty Period

Penalty Period is calculated as follows:

- All assets are reviewed for the prior 5 years
- Any deposits /withdrawals of \$2000 or above must be explained
- All uncompensated transfer amounts are totaled
- The total transfer amount is divided by the Medicaid regional nursing home rate (which is average cost of nursing homes per month by region) to determine the number of months the person must wait before Medicaid eligibility
- Result – the number of months the penalty is assessed

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2016 NYS Nursing Home Regional Rates

New York City	\$12,029	Central NYS	\$ 9,252
Northern Metropolitan	\$11,768	Western NYS	\$ 9,630
Long Island	\$12,633	Northeastern NYS	\$ 9,806
		Rochester	\$11,145

How Penalties are Calculated

- Dana and Diana are unmarried. Dana transferred \$200,000 to Diana in 2015 and now has \$14,850. Dana enters a NYC nursing home and applies for Medicaid effective June 1, 2016.
- The penalty period is calculated by dividing the amount transferred (\$200,000) by the regional rate (\$12,029), which equals 16.63 months. If not for the transfer to Diana, Dana would have been eligible for Medicaid on June 1st. Dana will receive Nursing Home Medicaid coverage after 16 months, on October 1, 2017.
- Dana will also have to pay \$7,578.27 toward the cost of nursing home care in October 2017. This is the monetized value of the partial month penalty (0.63 x the regional rate)

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2016 Medicaid Levels

Community-Based Medicaid

Medicaid Income Level	Monthly	Yearly	Medicaid Resource Level
One (1) person household	\$ 825*	\$ 9,900	\$14,850
Two (2) person household (if both are applicants)	\$1,209*	\$14,500	\$21,750
Married Couple	\$2,980.50	\$ 35,766	The greater of \$74,820 or one-half of the couple's total resources (up to \$119,220).

*Plus a \$20 disregard

**Higher amounts may be kept under "Spousal Refusal" provisions.

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2016 Medicaid Levels

Institutional-Based Medicaid

Medicaid Income Level	Monthly	Medicaid Resource Level
Individual	\$ 50	\$ 14,850
Non-Institutional Community Spouse	\$ 2,980.50	The greater of \$74,820 or one-half of the couple's total resources (up to \$119,220).

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Income Rules

- New York is a spend-down state
- Income in **excess** of the \$825 per person (\$1,209 per couple) will **not be a barrier to income eligibility if excess income is contributed to cost of care**
- Income can be:
 - **Spent on incurred medical expenses; or**
 - **Placed in a POOLED INCOME TRUST**

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Income Exceptions

- Twenty dollars (\$20) per month
- Health care premiums per month
- Reparations – German, Austrian, Nazi Persecution Funds, Crime Victims Funds **as long as they are segregated**

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Resources

- Cash
- Stocks
- Bonds
- Real Property
- Life Insurance (Cash Value)
- Savings Bonds
- Annuities
- Retirement Accounts
- Expectancies - PI awards, inheritances, trust benefits



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Spousal Impoverishment Protections

- Medicare Catastrophic Coverage Act of 1988 (“MCCA”) provided spousal impoverishment protections
- Federal enhanced community spouse’s income and resources standards
 - ✓ Spousal Income (MMMNA*): \$2,980.50 per month
 - ✓ Spousal Resources (CSRA**): \$74,820 or the spousal share (one-half of a married couple’s resources – up to \$119,220)

*Minimum Monthly Maintenance Needs Allowance: maximum amount of income that community spouse may keep without “spousal refusal”

**Community Spouse Resource Allowance: maximum amount of resources that a community spouse may keep without spousal refusal

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Special Rules for Married Couple

- Concept of “legally responsible relative”
 - ✓ Both Medicaid applicant’s and legally responsible relative’s assets are considered in determining eligibility (spouse responsible for other spouse)
- Married couples have special rules for eligibility:
 - ✓ Inter-spousal transfers are exempt
 - ✓ Married same-sex couples have the same rights and obligations as married heterosexual couples – GIS 08 MA/023 and MRG at page 5
 - ✓ Spousal Refusal

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Spousal Refusal Rules

- New York State position on Spousal Refusal:
 - ✓ Refusing (Community) Spouse must formally sign a refusal statement
 - ✓ No right to deem Refusing Spouse's income and resources if ill-spouse (applicant) assigns support
 - ✓ Medicaid must determine eligibility based on ill-spouse's income and resources
 - ✓ State has right to bring a support action against Refusing Spouse even without an assignment
 - ✓ New York has upheld spousal refusal in Institutional and Managed Long-Term Care Programs

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Spousal Refusal Risks

- Recovery / Liability Post-Eligibility
 - Is there "*Sufficient Ability*" to support?
- Post-Eligibility transfers by Refusing Spouse
 - Reduce the Community Spouse's income and/or resources below CSRA
 - Spousal Refusal recovery cases:
 - Matter of Shah – recognized spousal refusal and transfers
 - Dept of SS vs Frishman – supports implied contract
 - DSS vs Mandel – addressed sufficient ability to pay
 - Matter of Craig – allowed belated recovery from spouse's estate
 - Matter of Link – found spouse had sufficient ability to pay and charged interest

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Crisis Planning: To Marry or Not Marry?

- Example:

Dana owns a bank account in his own name in the amount of \$50,000 and a joint bank account with Diana in the amount of \$50,000. He has a joint brokerage account with Diana in the amount of \$150,000. He also has an IRA of \$150,000, an annuity of \$25,000, and a car valued at \$20,000.

- If married – can use Spousal Refusal and transfer assets to Diana without triggering penalty period.
- If not married – can assets be preserved?

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Special Rules on Burial and Personal Property

- Current allowance for burial costs remains \$1,500 (can have a life insurance policy with cash value of \$1,500)
- Irrevocable Preneed Agreement/Prepaid Funeral Plan – no dollar limit
- Burial Space exemption including opening costs to cemetery, headstone
- Note: Personal Property - one car rule, all other properties are exempt

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Special Rules on Joint Account

- Rebuttable presumption that joint bank account is owned 100% by the applicant
- However, presumption does not apply to brokerage accounts, therefore, each owns 50%
 - ✓ Practice Tip: Always ask client whether the joint brokerage account was held for more than 5 years. Keep in mind that this is a very useful technique to reduce the penalty period for the nursing home applicant
 - ✓ How it works:
 - Dana and Diana are unmarried. Dana entered into the nursing home in June 2016. They own a joint brokerage account together since 2010. The account has \$150,000. Since they owned the account for more than 5 years, Diana can take her \$75,000 and no penalty period will be assessed for this transfer. \$75,000 will be counted as Dana's resource.

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Retirement Account Rules

- IRAs...KEOGH...401(k)s...403(b)s etc. are exempt resources only if account is in "payout status"...the holder is receiving required minimum distributions (RMD). This payout is counted as income. See MRG at page 316; GIS 98 MA/024
 - ✓ Practice Tip #1: Always check the county where the application is to be submitted. Counties use different tables, i.e. IRS Table vs Social Security Administration's Life Expectancy table
 - IRS Table can be found in IRS Publication 590B Appendix B
 - Updated 2015 Social Security Administration's Life Expectancy Table can be found in GIS 16MA/010
 - ✓ Practice Tip #2: If applicant is under age 70 1/2, counties use the Social Security Administration's Life Expectancy table

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Retirement Account Rules (cont...)

- ✓ Practice Tip #3: The payout can be received once a year and be prorated to a monthly amount
- ✓ How it works:
 - Dana has an IRA and the balance of the account as of 12/31/2015 was \$100,000. He will turn 72 on 12/31/2016. The RMD would be \$3,906.25 (\$100,000 divided by 25.6). The monthly IRA income would be \$325.52.
 - What if Dana already took more than the RMD amount and now needs to apply for Medicaid? i.e. withdrew \$24,000. We should obtain letter from financial company to state the actual RMD amount for prospective budgeting. This way if there's a pooled trust, the amount to deposit is \$500 per month, not \$2,000 per month.
 - If Dana needs home care Medicaid, \$352.52 would be placed into a pooled trust.
 - If Dana enters into a nursing home, \$352.52 would be given up to the nursing home.
- ✓ Practice Tip #4: Always make sure there's a named beneficiary because there is no estate recovery for non-probate assets.
- ✓ Practice Tip #5: Always consult tax advisor.

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Special Rules on Annuity

- Annuities - must meet DRA rules to be exempt
 - ✓ Must be irrevocable and non-assignable, payout must be in equal amounts, actuarially sound, no balloon payments
 - ✓ Income from the annuity will be counted as available
 - ✓ Applicant must name State as the beneficiary. But, if there is a spouse or minor child, the State can then be named as contingent beneficiary
 - ✓ Practice Tip #1: Consider using annuity to convert non-exempt asset to exempt asset
 - ✓ Practice Tip #2: Consider using annuity to establish immediate Medicaid eligibility and preserve assets by combining other planning techniques

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Crisis Planning for Unmarried Couple

➤ Need immediate nursing home Medicaid coverage?

Follow these steps:

1. Purchase exempt funeral prepaid plan with excess funds
2. Purchase cemetery plot for spouse*, children and their spouses, siblings, etc.
3. Buy/use funds for necessities or exempt items
4. Pay debts owed to partner, family
5. Analyze and use available transfer techniques to bring asset down to \$14,850
6. Be creative...

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Promissory Note

➤ **Funds used to purchase a note, mortgage or create a loan will not be considered a Medicaid penalty triggering transfer if:**

- It is a written agreement;
- Its repayment terms are actuarially sound; and are payable in the lifetime of the lender (Medicaid recipient);
- Repayment is in equal amounts;
- No deferrals or balloon payments;
- No cancellation on death of the lender

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Purchase of Life Estate

- DRA permitted applicant to purchase a life estate in a property
- The purchase is a compensated transfer and will not trigger any penalty as long as the applicant has resided in the property for at least 1 year after the purchase
- No estate recovery as life estate extinguishes upon applicant's death

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Purchase of Annuity

- Conversion of a non-exempt asset to an exempt asset by purchase of an annuity
- Purchase is a compensated transfer and will not trigger any penalty
- Medicaid will have the right to the balance of the annuity because the unmarried partner is not a spouse, blind or disabled child

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Keep Home Exempt: Use of Intent to Return Home

- Eligible for Medicaid if the net equity value is under \$828,000 (N.Y. Soc. Serv. Law 366(2)(a)(1)(ii))
 - Limitation does not apply if spouse, minor or disabled child resides in home
- Intent to return home keeps the home exempt -
 - Even if person is in a nursing home;
 - Lien can be placed if applicant is considered to be in “permanent absent status” and not reasonably expected to be discharged
- It is a subjective “intent” and does not depend on the person’s actual ability to return home

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Intent to Return Home

- Exception: No lien can be placed against the home if it is occupied by spouse, minor child, disabled or blind child, or a sibling who resided at least 1 year in the home with equity interest
- Practice Tip #1: If possible, always transfer the property prior to applying for benefits to 1 of the above persons to avoid imposition of a lien
- Practice Tip #2: If transfer is not possible, you should immediately have client/applicant execute an intent to return home to keep home exempt

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Intent to Return Home (cont...)

- How it works:
 - Dana and Diana are unmarried and lived together for over 10 years. Dana owns a home and enters into the nursing home. To immediately preserve the home, Dana would need to write a statement that he “intends to return home”. This will keep the home exempt. Hopefully, after several months, Dana can return home and no lien will be attached. Even if a lien is attached, if Dana returns home, the lien will be removed.
- Practice Tip #3: Make sure your client has a valid power of attorney. If he/she lacks capacity to sign the statement, his agent can sign on his/her behalf
- Practice Tip #4: If lien was imposed and the surviving partner remains in the home, he/she should make an “undue hardship” argument. Hardship assertions would fall into the category of “compelling” reasons and is fact dependent
- Practice Tip #5: Liens are negotiable and can be reduced

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House Transfer Rules

- Homestead transfers are exempt only to*:
 - spouse
 - blind or disabled child, or minor child
 - caretaker child (reside in home for at least 2 years prior to institutionalization)
 - sibling with an equity interest (reside in home for at least 1 year prior to institutionalization)
- Value of retaining a life estate – no lien can be placed

*N. Y. Soc. Serv. Law 366 (5)(d)(3)(i)

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Transfer Options for Unmarried Couple

➤ Outright transfer (or Joint Ownership)

- Pros: Simple process and low cost
If joint ownership – may avoid Medicaid recovery, non probate
- Cons: Donee gets Donor's cost basis – capital gains issue
May lose real estate tax exemptions – Veterans, Enhanced Star, and Senior Citizen

➤ Transfer with retained life estate

- Pros: Maintain real estate tax exemptions
Step up in basis upon passing
Transfer penalty is not the full value of the property, only the remainder value
Life estate extinguishes upon passing
- Cons: Life estate has value – if property is sold during lifetime, portion of the proceeds will be returned to the life tenant – will jeopardize Medicaid benefits

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Transfer Options for Unmarried Couple (cont...)

➤ Transfer to an Irrevocable Medicaid Trust

- Pros: Maintain real estate tax exemptions
Step up in basis upon passing
Transfer is an incomplete gift
Life estate interest of property in the Trust
Property can be sold during lifetime without jeopardizing Medicaid
- Cons: Trustee to file Fiduciary Income Tax return (Form 1041)

➤ Purchase of a Life Estate

- Pros: Maintain real estate tax exemptions
It is a compensated transfer, thus, no penalty period
- Cons: Life estate has value – if property is sold during lifetime, portion of the proceeds will be returned to the life tenant – will jeopardize Medicaid
Must reside for **at least 1 year** after purchase

➤ Transfer to Revocable Trust?

- Pros: Not a transfer – keeps property exempt
What happens if recipient passed away? unclear

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Estate Recovery

- Medicaid is a preferred creditor aside from administrative costs, i.e. legal fees – N.Y. Soc. Serv. Law 104(1)
- Medicaid can only recover from the probate estate (by will or intestacy) – N.Y. Soc. Serv. Law 369(6)
- Medicaid has right to seek recovery from the Community Spouse's estate.
- Recovery is permitted at age 55 and above and is limited to 10 years preceding death of recipient - claim beyond 10 years is not permitted.
- Practice Tip #1: Attorneys should always obtain the Claims Detail Report ("CDR") to review the accuracy of the claim – the 10 year limitation can significantly reduce the claim.

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Estate Recovery

- How it works:
 - Dana received Medicaid benefits from age 34 until he died at age 75. From age 34-54, no recovery can be made. Even though he continued to receive benefits, Medicaid can only recover from age 66 to 75 (10 year limitation).
- No right to recover if:
 - Community Spouse survives the recipient by more than 10 years
 - Recipient is survived by disabled child
 - Payments are government reparations, such as payments to Holocaust survivors
- No lien should be imposed and no recovery is permitted where recipient had New York State Partnership for Long-Term Care (N. Y. Soc. Serv. Law 367-f)
- Undue Hardship if estate is sole income producing asset, homestead is of modest value, or other compelling circumstances.

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MAGI Medicaid – What is this?

- The Affordable Care Act expanded Medicaid coverage by increasing the income eligibility
- Available to those **who are under 65 and have no Medicare coverage**
 - Asset Limit: NONE
 - Income Limit: \$1,367 for single* and \$1,843 for couple
- Determined by “Modified Adjusted Gross Income”
 - Federal income tax concept of AGI with modifications
 - Many deductions available (i.e. alimony, student loan interest, flex-plan contribution, IRA deduction, etc.)
 - Workers Comp, VA benefits, Cash gifts, inheritance do not count
- No spousal refusal, SNTs or Pooled Trusts, or spend-down

*There are higher income limits (138% - 223% FPL) for Family Planning Benefit recipients, pregnant women, infants, children and young adults living with parents, and no income limit for young adults who have aged out of foster care.

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MAGI Medicaid – What is this?

- Practice Tip: It is wise to compare both MAGI and Non-MAGI scenarios for clients under 65
- How it works:
 - Dana and Diana are unmarried and are 70 and 62, respectively. Diana has multiple sclerosis and receives \$1,300 in social security disability benefits. Dana has \$200,000 in assets and Diana has a \$450,000 IRA, and \$100,000 in other assets. Both Dana and Diana have a \$300,000 joint bank account.
 - MAGI – Diana can apply for MAGI as single adult. Her income is below \$1,367. There is no resource test and her joint account with Dana is not affected
 - Non-MAGI - Diana is qualified on the income side with a spend-down of \$455 or a pooled trust. However, she would need to transfer her assets and bring it down to the \$14,850 resource limit. Any transfers to Dana would also affect his eligibility for Medicaid benefits.

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Example #1 – Home Care (Individual)

- Income:
 - ✓ SS: \$1,605.90
 - ✓ IRA #1: 1,325.00
 - ✓ IRA #2: 235.29
 - Total: 3,166.19**
 - Deductions:
 - ✓ Disregard: \$ 20.00
 - ✓ Health prem: 97.15
 - ✓ Medicare: 104.90
 - Total: 222.05**
 - Net Income: \$2,944.14
Income limit: (809.00)
 - **Surplus: \$ 2,144.14**
 - **Pooled Trust: 2,144.14**
-0-
- (See attachment for sample HRA budget)

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Example #2 – Home Care (Marry or Not?) – Case Comparison

Dana and Diana – Not Married

Dana needs home care

Single Household Budgeting:

- Dana's SS: \$ 2,168.90
- Medicare Premium: 104.90
- **Net Income: \$ 2,064.00**
- Diana's SS: \$ 1,604.90
- Medicare Premium: 104.90
- Supplemental Health: 200.00
- **Net Income: \$ 1,300.00**

- Dana will use pooled trust
- Excess Income: \$1,169
- Cannot use Spousal Refusal

Dana and Diana – Married

Same Facts:

Spousal Impoverishment Budgeting:

- Dana's SS: \$ 2,168.90
- Medicare Premium: 104.90
- **Net Income: \$ 2,064.00**
- Diana's SS: \$ 1,604.90
- Medicare Premium: 104.90
- Supplemental Health: 200.00
- **Net Income: \$ 1,300.00**

- Dana will not need to use pooled trust
- No Excess Income
- Diana will not need Spousal Refusal

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Example #2 – Home Care (Marry or Not?) – Case Comparison

Married couples can now choose the more favorable budgeting

How to Calculate:

Single Household Budgeting:

- Dana's SS: \$ 2,168.90
- Medicare Premium: (104.90)
- **Net Income:** **\$ 2,064.00**
- Less Income limit: (825.00)
- Income Disregard: (20.00)
- **Excess Income:** **\$ 1,219.00**

- Dana will use pooled trust
- Excess Income: \$1,219
- Cannot use Spousal Refusal

Spousal Impoverishment Budgeting:

- Start with MMMNA: \$ 2,980.50
- Less Diana's Net Income: (1,300.00)
- **Amount Short:** **\$ 1,680.50**

- Dana's Net Income: \$2,064.00
- Less PNA: (384.00)
- **Amount Available:** **\$1,680.00**
- Amount Diana needs: \$1,680.50
- **Excess Income:** **-0-**

- Dana will not need to use pooled trust
- No Excess Income
- Diana will not need Spousal Refusal

MMMNA (Minimum Monthly Maintenance Needs Allowance)

PNA (Personal Needs Allowance)

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Example #3 – Nursing Home (Spousal Collection Letter)

Shortly after the Husband's Medicaid application was approved, Wife received a letter from HRA Fraud Investigator requesting her income and resource information.

Application approval date: February 18, 2014

First letter: May 21, 2014 – very generic letter

Second letter: June 11, 2014 – aggressive letter stating the amount she owed, the benefits paid, and her excess resource amount

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Example #3 – Nursing Home (Spousal Collection Letter)

- **Assets: \$203,000**
- Less resource allowance: \$14,550
- Less IRA: \$6,000
- Less 401k: \$50,000
- Less H's and W's Pre Need Agreement (purchased after HRA claim): \$27,000
- **Total Resources: \$105,450**
- HRA closed matter as Wife's resource fell below \$117,240

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Medicaid Application Tips

- ✓ Timing of Applications – be careful not to prematurely apply for nursing home benefits without reviewing all 5 year statements
- ✓ Pick-Up Date – Nursing home pick up dates can be in the middle of the month, a 90 retroactive date for submission, average wait time 6 months
- ✓ Submission of Application – hand delivery vs overnight mail
- ✓ Make sure to include Supplement A form and check the appropriate box
- ✓ Submit home care application first, get it approved, then submit pooled trust to HRA for a re-budgeting to “zero” NAMI. Goal is to get ball rolling for home care
- ✓ Home Care applications – submit one month statement and ask for provisional code “6”
- ✓ Coordinate with Geriatric Care Manager or nurse to advocate for client's home care hours
- ✓ Search for information and documents - house, tax returns, 1099s, check ledger, safe deposit box
- ✓ Keep in contact with your financial advisors and local bank representatives
- ✓ Request clients to start an online profile to retrieve past bank statements – faster than waiting from the banks
- ✓ Gather documents – proof of caretaker child, disabled child, client's identity (expired passport, driver's license, access-a-ride subway card)
- ✓ Request clients to execute authorization to release financial and medical records to your firm and staff

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Advance Directives

- Advance Directives are important legal tools that allow individuals to express their wishes and appoint agents for legal, financial and healthcare decision-making in the event of future incapacity and inability to make decisions or manage their own affairs.
- Advance Directives provide an additional source of decision-making authority where marriages may not be respected.
- Additionally, in some situations, a legal marriage does not itself grant the authority for an action or decision. For these reasons and more, all competent adults are advise to engage in planning that includes Advance Directives for legal, financial and healthcare decision-making authority.

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Legal Tools for Planning

In New York State, Advance Directives and substitutes include:

- Health Care Proxy/HIPAA Release
- Living Will
- Do Not Resuscitate Order (DNR)
- Family Health Care Decisions Act
- Power of Attorney

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Health Care Proxy

The **Health Care Proxy** should be the lead document for the orderly management of medical decision-making in the event of disability. It appoints an “Agent” to make medical decisions on the behalf of the “Principal” in the event of incapacity.



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Health Care Proxy

Practice Tips:

1. No specific forms required – but should use the model form provided by the New York State Department of Health. The DOH provides forms in three other languages.
2. Artificial nutrition and hydration language should always be included – this would permit the agent to make decisions even without a living will.

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Health Care Proxy

Practice Tips:

3. Include HIPAA language in the Health Care Proxy or in a separate document – this would easily provide access to medical information and records.
4. HIPAA releases should be given to the law firm – for communication with physicians, hospitals, government organizations, i.e. Medicaid office, Social Security office, Department of Veterans Affairs

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Impact of Family Health Care Decisions Act on Health Care Proxy

Chapter 8 of FHCDA amends the HCP Law to require health care providers to:

- Comply with decisions concerning life sustaining treatment of health care agent even if opposed, pending a transfer of the patient or during judicial review
- Adopt FHCDA provision to protect conscience rights of the provider
- Adopt FHDCA definition of life-sustaining treatment

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Impact of Family Health Care Decisions Act on Health Care Proxy

Conflict between HCP and FHCDA concerning decisions on artificial nutrition and hydration.

1. Decision making standard:

1. HCP –only if authorized and with knowledge of patient wishes. May only be reasonably known not in writing.
2. FHCDA- permissible with knowledge or in the patient's best interest.

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Living Will

➤ A Living Will describes the kind of end-of-life health care measures an individual wants taken if he or she becomes seriously ill with no hope of recovery. A Living Will does not appoint an Agent for health care decision-making.

- New York does not have a Living Will statute.
- See *In re Westchester County Med. Ctr exrel. O'Connor*, 72 N.Y.2d517 (N.Y. 1988). Established “clear and convincing evidence standard” needed to determine patient’s wishes for end-of-life decisions.

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Living Will

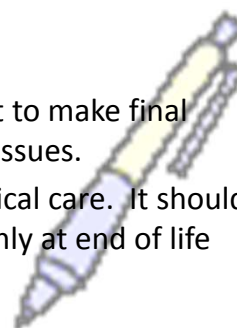
- States an individual's preference for withholding or withdrawing life sustaining treatment. Does not appoint an Agent for making end-of-life decisions.
- New York does not have a Living Will statute.
 - See *In re Westchester County Med. Ctr exrel. O'Connor*, 72 N.Y.2d517 (N.Y. 1988). Established "clear and convincing evidence standard" needed to determine patient's wishes for end-of-life decisions.
- Becomes effective when patient is determined to be terminally ill, unconscious, and with no hope of recovery.

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Living Will

Practice Tips - the Living Will document should:

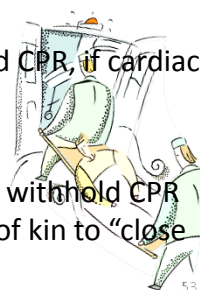
1. Avoid subjective words that are open to interpretation
2. Describe basic philosophy for treatment
3. Incorporate DNR wishes and minimize intrusive or extraordinary care
4. Be signed in the presence of two witnesses.
5. Have language permitting Health Care Agent to make final decisions in the event there are interpretation issues.
6. Not to be used in the course of routine medical care. It should serve as backup document and be presented only at end of life stage.



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Do Not Resuscitate Order (DNR)

- Provisions for DNR Orders are a result of a 1985 New York State Task Force on Life and Law, which addressed the withdrawal and withholding of life-sustaining treatment.
- Two types of DNR orders:
 - a) Hospital (Institutional)
 - b) Non-Hospital (Out of Hospital)
- DNR orders are limited to the authority to withhold CPR, if cardiac or respiratory function ceases.
- DNR orders must be written by patient's physician
- Unlike the Health Care Proxy, the DNR authority to withhold CPR may be granted to a class of individuals from next of kin to "close friend".



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Do Not Resuscitate Order (DNR)

Practice Tip:

- Remind clients that DNR order signed in the hospital or facility (i.e. nursing home) may be a limited DNR order, and thus it is specifically for that use only and does not apply to healthcare events in a patient's home, hospice, or other setting.

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DNR Laws and the FHCD

- DNR Orders in Hospitals are expanded and changed by the Family Health Care Decisions Act.
- FHCD retains existing provisions on non-hospital DNR orders
- In addition to EMS now obligates home care agencies and hospice to honor non-hospital DNR's
- Orders predating the FHCD will stand, but the presumption continues that patients consent to necessary treatment such as CPR unless there is a DNR order in place.

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FAMILY HEALTH CARE DECISIONS ACT

- Effective June 1, 2010
- Two sections in NY Public Health Law:
 - Article 29 -CC "Family Health Care Decision Act"
 - Article 29 -CCC "Nonhospital Order Not to Resuscitate"

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FAMILY HEALTH CARE DECISIONS ACT

- Allows family to make decisions for incapacitated patients who have not made their wishes known
- Applies only to hospitals and nursing home patients
- Efforts must first be made to find an appointed agent before appointing a surrogate

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FAMILY HEALTH CARE DECISIONS ACT

- A Surrogate decision-maker is appointed by the health care facility when:
- A physician finds lack of decision-making capacity
 - Assigned facility staff concurs with decision of physician
 - Patient or family and surrogate is informed
 - If patient objects, patient's wishes prevail unless contrary court order or other legal basis to override patient's decision

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FHCDA Appointment of Surrogate

➤ Statutory priority for appointments:

- Court appointed Guardian
- The spouse or domestic partner
- Son or daughter 18 or older
- Parent
- Sibling over 18 years of age
- A close friend
- From court maintained surrogate list

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FAMILY HEALTH CARE DECISIONS ACT

- Surrogate can consent to routine medical care including life sustaining treatment and artificial nutrition and hydration
- Must follow patient's wishes and beliefs
- If wishes are unknown, then may act in patient's best interest
- Disputes handled by ethics committee

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FHCDA - withholding life sustaining treatment

- Authorizes Surrogate to consent to decision on life sustaining treatment including artificial nutrition and hydration if treatment would be:
 - An extraordinary burden to patient
 - Patient is terminal or permanently unconscious
 - An irreversible or incurable condition and treatment would involve pain and suffering

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Appointment of Agent to Control Disposition of Remains

- Advance directive planning is not complete without discussions on burial and disposition of remains upon death
- Law became effective on August 2, 2006, an individual may designate an agent to make these decisions
- Execution of form is not mandatory
- If no Agent appointed to control disposition of remains, existing Public Health Law 4201 (NY CLS Pub Health § 4201 (2) (a)) provides descending priority order as follows:
 - Surviving spouse or domestic partner
 - Any children over 18
 - Either of decedent's parents
 - Any siblings over 18
 - Guardian
 - Distributee of estate having highest priority
 - Fiduciary of the estate
 - Close friend or relative
 - Chief fiscal officer or public administrator

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Appointment of Agent to Control Disposition of Remains

Practice Tip:

1. Sample form is provided in the statute.
Client may set limitations such as wish for cremation, place of burial.
2. Sensitivity to cultural, religious, and philosophical backgrounds is crucial.

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New York Statutory Power of Attorney

- Allows principal to appoint agent to handle legal and financial affairs
- Amends General Obligation Law
 - ✓ Effective September 1, 2009
- Agent must sign and accept role of agent
- Durable unless otherwise stated
- New form has separate gift rider

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Gifting Powers in the Power of Attorney

- Must be noted in the general power of attorney form and in the Statutory Gifts Rider
- Without Rider, gifts by agent are limited to \$500 or consistent with prior gifting patterns
- Principal can give “specific instructions”, if not, “best interest” standard

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Why Need the Statutory Gifts Rider?

- Estate Planning
 - Gifts and charitable gifting
- Medicaid Planning
 - Maintain income and resource eligibility
- Can never predict future
 - Planning must be flexible

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Article 81 Mental Hygiene Law - Guardianships	
Who can have a Guardian appointed for him/her:	Persons who cannot provide for their own personal and/or property management needs and who cannot appreciate the nature and consequence of the inability
	<ul style="list-style-type: none"> • No specific diagnosis required, and no age limit • Court considers functional assessment of the person's actual ability to perform activities of daily life • Need for guardian must be shown by clear and convincing evidence

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Guardian Appointment - Who
<ul style="list-style-type: none"> • AIP's preference for Guardian is to be considered even when opposed • Out of State person may be appointed if property is in state and Guardian submits to jurisdiction and gives security (bond) • Over 18 –family preferred...spouse, child, parent, sibling, relative • Non family – not for profit, social service officer, public agency, community guardian program. MHL 81.19. Conflict of interest issues/creditor considered

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Guardianship Considerations

- Preference given to AIP nomination or:
 - Agents under POA or HCP
 - Persons with close social relationship w/ AIP
 - Person providing care
 - Ability to fulfill powers
 - Education and experience
 - Nature of finances involved
 - Unique circumstances
 - Conflicts of interest
 - Consistent with testamentary plan
 - Tax and estate planning

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Property Management Powers

- Preserve and protect property, prevent risk
- Has AIP executed a will or testamentary plan, locate Will and notify persons in will at death.
- Maintain testamentary plan
- Use income and resources for support for AIP and dependents
- Deliver property to proper persons on termination
- File notice of Lien of Guardianship on real estate
- Can act to recover misappropriated property (MHL 81.43)

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MHL §81.21 (a) 1 - 20 Statutory Enumerated Powers

➤ Pertinent powers often used:

- Make gifts
- Provide support for persons dependent upon the incapacitated person for support
- Convey property
- Enter contracts
- Create revocable or irrevocable trusts
- Change beneficiaries under insurance and annuity policies
- Exercise right of election
- Renounce or disclaim in estate matters
- Access records, apply for benefits, marshal assets
- Pay funeral, debts, claims, bills, expenses
- Invest, lease or buy residence
- Retain professionals, accountants, lawyers, social workers, caregivers
- Defend legal actions

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Power of Guardian of Person MHL § 81.22 (a) 1-9

- Personal wishes and choices need to be honored
- Statutory Enumerated Powers:
 - Who provides personal care and assistance
 - Decisions on social environment, travel, license to drive, education
 - Apply for government benefits
 - Access to records
 - Consent to routine medical treatment
 - Choose place of abode - consider availability of supports and safety. Institutionalization requires specific Court Order.
 - Special issues on life sustaining & end of life choices

Least restrictive and preference in all matters which are consistent with AIP's expressed wishes

Court may revoke questionable prior POA or HCP in favor of Guardian

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Property Management and Substituted Judgment Doctrine

- MHL 81.21 - Guardian should be able to do anything the incapacitated person could have done if able, i.e. estate planning, tax planning, gifting, Medicaid planning.
- Guardian can ask for the powers to act under reasonable person standard and substituted judgment to act if capable, i.e. transfer assets to a third party or to trust
- *Matter of Shah* 95 N.Y. 2d 148, 711 N.Y.S. 2d 824, (2000) recognizes logic of asset protection planning to benefit families over the state

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Standards for Asset Transfers by Guardians

- MHL 81.21(d) In court granting power to make transfers will consider:
 - AIP's consent
 - Disability is of short duration, that delay would not be a detriment
 - Are remaining assets sufficient for support of AIP and dependents?
 - Are transfers consistent with prior testamentary plan. i.e. will or Totten trust?
 - Prior patterns of giving
 - Presumptive distributees / beneficiaries of Will affected by transfers must receive notice
 - Impact on ability to receive Medicaid and plan of care
 - Explain Medicaid rules

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Required Court Findings to Approve Asset Transfer (MHL § 81.21(e))

- AIP is unable to act or consents to the proposed disposition
- Competent/reasonable person would likely perform the transfer under the same circumstances
- No evidence that AIP has manifested an intention inconsistent with the proposed disposition

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GRIMALDI & YEUNG LLP
9201 Fourth Avenue, 6th Floor
Brooklyn, New York 11209

546 Fifth Avenue, 6th Floor
New York, New York 10036
(718) 238-6960

Pauline Yeung-Ha, Esq.
pyeung@gylawny.com
www.gylawny.com

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