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Neil V. Carbone

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DEVELOPMENTS IN THE LAW

Medicaid Planning Under Mental Hygiene Law Article 81

In determining whether an institutionalized individual is eligible for benefits, Medicaid considers the individual's assets.¹ Generally, anyone with liquid assets in excess of \$4,850.00 will be ineligible for Medicaid.² Many people with assets in excess of this amount, however, attempt to transfer away their assets in order to create eligibility. In response, the legislature created a "look back" period during which all uncompensated transfers made by the Medicaid applicant or the applicant's spouse will be considered.³ Applicants who have made uncompensated conveyances during this "look back" period will be ineligible for Medicaid benefits for a penalty period beginning with the month in

¹ See N.Y. SOC. SERV. LAW § 366 (McKinney 1992 & Supp. 1996). Under recently enacted legislation, the definition of "assets" has been expanded to include all resources and income of an individual and of the individual's spouse. *Id.* § 366(5)(d)(1)(i). This includes:

[I]ncome and resources of an individual and of the individual's spouse, including income or resources to which the individual or the individual's spouse is entitled but which are not received because of action by: the individual or the individual's spouse; a person with legal authority to act in place of or on behalf of the individual or the individual's spouse; a person acting at the direction or upon the request of the individual or the individual's spouse; or by a court or administrative body with legal authority to act in place of or on behalf of the individual or the individual's spouse or at the direction or upon the request of the individual or the individual's spouse.

Id.

² See generally N.Y. SOC. SERV. LAW § 366 (McKinney 1992 & Supp. 1996) (raising level of amount of liquid assets from \$4,700.00 to \$4,850.00).

³ There is a 36-month "look back" period that begins "immediately preceding the date that an institutionalized individual is both institutionalized and has applied for medical assistance," except in the case of payments made from a trust, for which there is a 60-month "look back" period. N.Y. SOC. SERV. LAW § 366(5)(d)(1)(vi) (McKinney 1992 & Supp. 1996); see Peter J. Strauss, *New York's New Medicaid Statute*, N.Y. L.J., June 29, 1994, at 3 (discussing implications of "look back" periods).

which the transfer occurred.⁴ Certain transfers, however, are exempt and do not trigger a penalty period. Exempt transfers include, in some circumstances, the transfer of a home.⁵

⁴ See N.Y. SOC. SERV. LAW § 366(5)(d)(4) (McKinney 1992 & Supp. 1996). In determining the penalty period, the cumulative value of uncompensated transfers is divided by the average monthly cost of maintaining someone in a nursing home. *Id.*; see also Peter J. Strauss, *Medicaid Revisions in 1993 Budget Act*, N.Y. L.J., Sept. 30, 1993, at 3 [hereinafter *Medicaid Revisions*]. The monthly cost in New York in 1993 was \$5,584.00. See Strauss, *supra* note 3, at 3. "Roughly speaking, in the New York metropolitan area the donor is ineligible for a month of Medicaid coverage for every \$6,000.[00] given away." Daniel G. Fish & Todd A. Krichmar, *Estate and Medicaid Planning by Article 81 Guardians*, N.Y. L.J., Dec. 16, 1994, at 1. In addition, the durational maximum or a "cap" on the penalty period no longer exists. See Strauss, *supra* note 3, at 3.

Although Congress has permitted the states to extend the transfer penalty to home care, see 42 U.S.C. § 1396p(c)(1)(C)(ii) (1994), New York has not adopted this option. Section 80 of the Governor's Program Bill on Medicaid Cost Containment, N.Y.S. 1805, N.Y.A. 3105, 218th Sess., would adopt this option and create a "look-back" and penalty period for long term care services for non-institutionalized individuals. See generally Peter J. Strauss, *Proposals and Interpretations that Threaten Medicaid Access*, N.Y. L.J., Mar. 31, 1995, at 3 [hereinafter *Proposals and Interpretations*] (criticizing "never-ending attempt to reduce access to Medicaid through legislative changes").

Because of the expanded definition of "assets," see *supra* note 1, disclaimers under N.Y. EST. POWERS & TRUSTS LAW § 2-1.11 would be included in the transfer of assets rules and would cause the disclaiming party to incur a penalty period of ineligibility. See N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c) (McKinney 1991 & Supp. 1996). The transfer of assets rules also apply to any action taken by an owner or any other person that reduces or eliminates the applicant's interest in property which the applicant owns in common with another in joint tenancy, tenancy in common, or similar arrangements. N.Y. SOC. SERV. LAW § 366(5)(d)(5) (McKinney 1992 & Supp. 1996). Thus, a withdrawal from a bank account held by the applicant and the applicant's spouse as joint tenants would result in a penalty period.

In addition to a period of ineligibility, a transfer within the "look-back" period may result in criminal liability. The Health Insurance Portability and Accountability Act of 1996, signed into law on August 21, 1996 and effective January 1, 1997, significantly curtails asset transfers aimed at qualifying for Medicaid covered nursing home care. The statute makes certain transfers a federal crime. The statute provides, in relevant part:

Whoever ... (6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under Title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c), shall (i) in the case of such a statement, representation, concealment, failure or conversion ... be guilty of a felony ... or ... shall be guilty of a misdemeanor.

Health Insurance Portability and Accountability Act of 1996 § 201(a), 42 U.S.C. § 1320a-7b(a)(6) (1996).

⁵ See N.Y. SOC. SERV. LAW § 366(5)(d)(3)(i) (McKinney 1992 & Supp. 1996). The exemption applies to a home transferred to:

(A) the spouse of the individual; (B) a child of the individual who is under

Individuals who fail to qualify for Medicaid have to bear the high cost of institutionalized medical care personally and, thus, could quickly exhaust their life savings. Accordingly, those who foresee the possible need for institutionalized care engage in "Medicaid planning."⁶

Medicaid planning involves the transferring of assets and has two purposes. First, it enables individuals to become eligible for Medicaid benefits, which will subsidize the cost of nursing home care. Second, this type of planning assists in the preservation of some assets for a person's spouse or heirs.⁷ For competent adults, Medicaid planning generally does not create problems. These adults are permitted to give away as much of their property as they wish, to whomever they wish, and become eligible for benefits subject to any penalty period incurred.⁸ Com-

the age of twenty-one years or blind or disabled; (C) a sibling of the individual who has an equity interest in such home and who resided in such home for a period of at least one year immediately before the date the individual became an institutionalized individual; or (4) a child of the individual who was residing in such home for a period of at least two years immediately before the date the individual became an institutionalized individual, and who provided care to the individual which permitted the individual to reside at home rather than in an institution or facility ...

Id.

Other exempt transfers include transfers to a spouse or to another for the sole benefit of the spouse, transfers from the spouse to another for the sole benefit of the spouse, transfers to a blind or disabled child or to a trust established solely for the benefit of such child, and transfers to trusts solely for the benefit of a disabled individual under the age of sixty-five. N.Y. SOC. SERV. LAW § 366(5)(d)(3)(ii) (McKinney 1992 & Supp. 1996).

Also exempted are transfers made for purposes other than qualifying for medical assistance and transfers made in exchange for fair market value. *Id.* § 366(5)(d)(3)(iii)(A), (B). If property is transferred for less than fair market value and is returned, the transfer will not result in a penalty. *Id.* § 366 (5)(d)(3)(iii)(c). An additional exception is recognized where denial of assistance would result in undue hardship. *Id.* § 366(5)(d)(3)(iv).

⁶ See *Proposals and Interpretations*, *supra* note 4, at 3 ("Medicaid has, in fact, become the source of relief from impoverishment for many middle income persons and families ...").

⁷ See *In re Baird*, 167 Misc. 2d 526, 634 N.Y.S.2d 971 (Sup. Ct. Suffolk County 1995); *In re Heller*, N.Y. L.J., July 28, 1995, at 24, col. 5 (N.Y. Sup. Ct. Kings County); *In re Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2 (N.Y. Sup. Ct. Kings County); *In re Beller*, N.Y. L.J., Aug. 31, 1994, at 23, col. 4 (N.Y. Sup. Ct. Kings County); *In re Goldberg*, N.Y. L.J., Aug. 29, 1994, at 24, col. 1 (N.Y. Sup. Ct. Kings County); *In re Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1 (N.Y. Sup. Ct. Kings County).

⁸ A gift tax may be incurred as a result of such transfers. See I.R.C. § 2511 (1994). But see I.R.C. § 2503(b) (1994) (providing annual exclusion of \$10,000.00 per donee); I.R.C. § 2010 (1994) (authorizing unified credit for every taxpayer to transfer

plications in Medicaid planning, however, arise when an individual becomes institutionalized and incapacitated but did not foresee the need for, was unaware of, or simply did not have the opportunity to engage in any preparation. As a result, the incapacitated person's loved ones are often left with the dilemma of providing for the necessary medical treatment and concurrently protecting the incompetent's assets.

In a recent series of decisions, New York courts have granted judicial approval for guardian's to engage in Medicaid planning for people who are incapacitated.⁹ Under Article 81 of New York's Mental Hygiene Law, courts have granted permission to guardians¹⁰ to transfer their wards' assets so that the wards may qualify for Medicaid. Although these cases represent the first instances of Medicaid planning by guardians of incompetents, similar relief has traditionally been granted for estate planning purposes under the common law doctrine of substituted judgment.¹¹ Article 81 of the Mental Hygiene Law has now spe-

of \$600,000.00 gift tax free for entire life).

⁹ See *In re DaRonco*, 167 Misc. 2d 140, 145, 638 N.Y.S.2d 275, 278 (Sup. Ct. Westchester County 1995) (permitting transfer of assets from incapacitated husband to wife for purpose of obtaining Medicaid eligibility); see also *In re Baird*, 167 Misc. 2d 526, 530, 634 N.Y.S.2d 971, 973 (Sup. Ct. Suffolk County 1995) (stating public policy should authorize gifts or renunciation of inheritances where alternate recipient is dependent of incapacitated person); *In re Daniels*, 162 Misc. 2d 840, 842, 618 N.Y.S.2d 499, 501 (Sup. Ct. Suffolk County 1994) (finding transfer of assets for purpose of Medicaid planning not violative of public policy).

¹⁰ See generally N.Y. MENTAL HYG. LAW § 81 (McKinney Supp. 1996).

¹¹ The doctrine of "substituted judgment" was established in England by Lord Eldon in the case of *Ex parte Whitbread*, 35 Eng. Rep. 878 (1816). In determining whether to grant needy relatives part of the surplus income of an incompetent, the court substituted its judgment for that of the "lunatic," and considered what the incompetent "would probably do." *Id.* at 879. The court then did for the incompetent's benefit what would be "wise and prudent." *Id.* This test was a combination of subjective and objective factors.

New York was the first state to adopt the substituted judgment doctrine in *In re Willoughby*, 11 Paige Ch. 257 (N.Y. Ch. 1844). The Court of Chancery permitted payments out of surplus income to provide for the incompetent's dependents because it was supposed that was how "he would act were he of sound mind." *Id.* at 259. Thus, New York adopted a subjective standard. See *In re Flagler*, 248 N.Y. 415, 418-19, 162 N.E. 471, 472 (1928) (stating court may only give weight to moral and charitable considerations as would incompetent person himself); *In re Lord*, 227 N.Y. 145, 149, 124 N.E. 727, 728 (N.Y. 1919) (denying payment to incompetent's attorney because there was no evidence that incompetent would have been under duty to do so if restored to health).

In subsequent cases the courts departed from the strictly subjective standard. See *In re Daly*, 142 Misc. 2d 85, 87, 536 N.Y.S.2d 393, 395 (Sur. Ct. Nassau County 1988). Applications to transfer assets and make gifts of an incompetent's assets became important in estate planning to preserve assets from estate taxes. An objective

cifically codified this doctrine of substituted judgment where the court substitutes its judgment for that of the incapacitated person.¹²

New York's first application of the new statutory substituted judgment doctrine was in the form of estate planning. In *In re Scheiber*,¹³ the court permitted Article 81 co-guardians to renounce an inheritance due to their ward/mother and permitted them to transfer so much of their ward's assets as would permit the estate to pass down without incurring any federal estate tax.¹⁴

standard was adopted by many courts in tax planning cases. See *In re Florence*, 140 Misc. 2d 393, 530 N.Y.S.2d 981 (Sur. Ct. Nassau County 1988) (stating authorization to make gifts will be granted where ward would act as reasonable, prudent person); *In re Myles*, 57 Misc. 2d 101, 291 N.Y.S.2d 71 (Sup. Ct. Westchester County 1968); *In re Carson*, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. Ulster County 1962). Courts emphasized a subjective standard, however, when dealing with gifts of the incompetent's property. See *In re Carson*, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. Ulster County 1962); *In re Fleming*, 173 Misc. 851, 852, 19 N.Y.S.2d 234, 236 (Sup. Ct. Kings County 1940) (noting primary consideration was if incompetent would have made payment if sane).

The required proof that the incompetent would have made the gift began with a proof "beyond all reasonable doubt" standard. *In re Heeney*, 2 Barb. Ch. 326, 328 (N.Y. Ch. 1847); see also *In re Kernochan*, 84 Misc. 565, 567, 146 N.Y.S. 1026, 1028 (Sup. Ct. N.Y. County 1914). Subsequently, the burden of proof was reduced to a clear and convincing standard for gifts of principal, *Fleming*, 173 Misc. at 854, 19 N.Y.S.2d at 237, and further reduced to a preponderance standard for gifts of surplus income, *Flagler*, 248 N.Y. at 419, 162 N.E. at 472, and gifts for estate tax benefits, *Florence*, 140 Misc. 2d at 394-95, 530 N.Y.S.2d at 982. For additional history and comments on the substituted judgment doctrine, see Joyce A. Edelman, *The Development of the "Substituted Judgment" Rule and Its Application in New York as a Vehicle for Estate Planning for Incompetents*, 33 ALB. L. REV. 597 (1969). See also N.Y. PUB. HEALTH LAW §§ 2980 et seq. (McKinney 1993 & Supp. 1996) (permitting agents appointed by health care proxy to make health care decisions on behalf of incapacitated persons upon clear and convincing standard that directions are in accordance with wishes of said person).

¹² "This section gives statutory recognition to the common law doctrine of substituted judgment recognized by the courts of this state and other jurisdictions." N.Y. MENTAL HYG. LAW § 81.21, Law Revision Commission Comments at 376 (McKinney 1996).

¹³ *In re Scheiber*, N.Y. L.J., Oct. 18, 1993, at 38, col. 5 (N.Y. Sup. Ct. Suffolk County).

¹⁴ See I.R.C. § 2010 (1994) (unified credit permits transfer of up to \$600,000.00 free of estate tax). The court permitted the renunciation and transfer to co-guardians pursuant to N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(c). In the exercise of "cautious prudence," however, the court only authorized the transfer of assets in excess of \$600,000 because the co-guardians did not include what steps, if any, were taken to determine whether their ward had an existing will. *Scheiber*, N.Y. L.J., Oct. 18, 1993, at 38, col. 5; see also *Carson*, 39 Misc. 2d at 545, 241 N.Y.S.2d at 289 (transferring of assets was initially permitted outright but later partially reversed based on provision in subsequently obtained will which required daughter's share to

In *In re Driscoll*,¹⁵ the guardian requested permission to renounce a substantial inheritance due to his ward/wife and receive it in his own name.¹⁶ The Department of Social Services objected based on the fact that the transfer to the guardian/husband would have rendered the ward/wife (who lived in a nursing home) ineligible for Medicaid.¹⁷ The court, in determining whether to grant the guardian permission to renounce the funds, noted that inter-spousal transfers do not render an institutionalized spouse ineligible for benefits.¹⁸ Furthermore, the court found that the ward, if competent, could have disclaimed the property or could have accepted the property and then transferred it to her husband without incurring a penalty.¹⁹ The court noted in dicta that the guardian had the authority to make a transfer of the property had it been previously accepted by the ward.²⁰ For these reasons, the court granted permission to the guardian to renounce the ward's inheritance and receive it in his own name.²¹

In *In re Klapper*,²² the guardian/son petitioned the court for permission to transfer virtually all of his mother's assets to him and his family.²³ Klapper had possessed assets in excess of \$300,000, thus rendering her ineligible for Medicaid.²⁴ The guardian/son wished to transfer these assets solely to qualify her

remain in trust).

¹⁵ *In re Driscoll*, N.Y. L.J., Oct. 22, 1993, at 30, col. 4 (N.Y. Sup. Ct. Nassau County).

¹⁶ *Id.* Although not explicitly stated in the opinion, this renunciation was likely sought to prevent these funds from being used to pay for the ward's nursing home care.

¹⁷ *Id.*

¹⁸ *Id.* (citing N.Y. SOC. SERV. LAW § 366(5)(c)(3)(ii) (McKinney 1992 & Supp. 1996)).

¹⁹ *Id.*

²⁰ *Driscoll*, N.Y. L.J., Oct. 22, 1993, at 30, col. 4.

²¹ *Id.*

²² *In re Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1 (N.Y. Sup. Ct. Kings County).

²³ *Id.* Fruma Klapper's income consisted of Social Security income in the amount of \$645.00 per month, German Holocaust reparation payments of approximately \$400.00 per month, and an I.L.G.W.U. pension of \$112.50 per month. *Id.* Her assets consisted of two certificates of deposit, a passbook account, mutual funds, and five annuities. She also owned jointly with her son 144 shares of stock valued at approximately \$45,000.00 allocated to the cooperative apartment in which she lived prior to her placement in a nursing home. *Id.* Finally, she owned a Dreyfus New York Tax Exempt Bond Fund jointly with her son that was valued at approximately \$250.00. *Id.*

²⁴ See N.Y. SOC. SERV. LAW § 366 (McKinney 1992 & Supp. 1996).

for Medicaid.²⁵

The threshold issue in *In re Klapper* was whether a court could authorize a guardian to transfer part of the incapacitated person's assets in order for the incapacitated person to become eligible for Medicaid or whether the guardian would have to "spend down" the assets in order to meet the eligibility requirements.²⁶ The court looked to the powers that were granted to a guardian under the Mental Hygiene Law. These powers included the authority to make gifts,²⁷ to release contingent and expectant interests in property,²⁸ and to renounce or disclaim any interest in property.²⁹ Based upon these powers and the decisions in *Scheiber* and *Driscoll*, the court concluded that a guardian was not required to "spend down" the ward's assets.³⁰

The court further evaluated the public policy considerations in permitting such a transfer.³¹ The underlying intent of Article 81 was to assist incapacitated persons and to compensate for their limitations.³² The court further noted that a rejection of the application for this transfer would deny the incapacitated person the opportunity to preserve her assets from being depleted by medical expenses when the same opportunity would be available to all competent persons. The court then concluded that such a denial would be in "direct contravention of the expressed intention of Article 81."³³

After concluding that Medicaid planning was a "proper objective" for a guardian, the *Klapper* court then evaluated the appropriateness of the suggested transfer by looking at three requirements.³⁴ First, the court must find that the incapacitated person either lacked mental capacity and was not likely to regain

²⁵ *Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1.

²⁶ *Id.*

²⁷ N.Y. MENTAL HYG. LAW § 81.21(a)(1) (McKinney Supp. 1996).

²⁸ *Id.* § 81.21(a)(3).

²⁹ *Id.* § 81.21(a)(10); see also N.Y. EST. POWERS & TRUSTS LAW § 2-1.11 (McKinney 1981 & Supp. 1996) (requiring renunciation of property to be in writing, signed and acknowledged, filed with clerk of court within nine months of disposition, and court approval for renunciations made on behalf of infant, incompetent, conservatee or decedent).

³⁰ *In re Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1 (N.Y. Sup. Ct. Kings County).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

it in the foreseeable future to make the transfer personally or possessed the requisite capacity and actually consented to the transfer.³⁵ Secondly, the court must find that a competent person would be likely to make the transfer.³⁶ Lastly, before incapacitation, the incompetent person must not have manifested an intention inconsistent with the transfer.³⁷ The court must be satisfied by clear and convincing evidence that the latter two requirements were met.³⁸

The *Klapper* court further considered the statutory factors set forth in Mental Hygiene Law section 81.21.³⁹ The court noted that the proposed transferee, Klapper's son, was presumptively the sole distributee and that her most recently executed will left her entire estate to him. Significantly, most of the assets were

³⁵ N.Y. MENTAL HYG. LAW § 81.21(e)(1) (McKinney Supp. 1996).

³⁶ *Id.* § 81.21(e)(2).

³⁷ *Id.* § 81.21(e)(3).

³⁸ *Id.* § 81.21(e). The statute adopted an objective test, i.e., whether the reasonable person would make the transfer, with a subjective element, i.e., whether there is clear and convincing evidence that *this* incapacitated person would not make the transfer to *this* proposed transferee. This standard is much less burdensome to meet than the common law subjective standard, i.e., whether *this* incapacitated person would, beyond a reasonable doubt, make the proposed gift to *this* transferee. *See supra* note 11 (discussing various standards).

³⁹ *In re Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1 (N.Y. Sup. Ct. Kings County). New York Mental Hygiene Law § 81.21(d) provides:

In determining whether to approve the application, the court shall consider:

1. whether the incapacitated person has sufficient capacity to make the proposed disposition himself or herself, and, if so, whether he or she has consented to the proposed disposition;
2. whether the disability of the incapacitated person is likely to be of sufficiently short duration such that he or she should make the determination with respect to the proposed disposition when no longer disabled;
3. whether the needs of the incapacitated person and his or her dependents or other persons depending upon the incapacitated person for support can be met from the remainder of the assets of the incapacitated person after the transfer is made;
4. whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts he or she has made;
5. whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents or other persons for whom the incapacitated person would be concerned; and
6. such other factors as the court deems relevant.

N.Y. MENTAL HYG. LAW § 81.21(d) (McKinney Supp. 1996).

either held jointly with her son, in trust for him, or named him beneficiary. Furthermore, prior to her incapacitation, Klapper provided her son's family with regular monthly support. The court ultimately concluded that the transfer would be appropriate.⁴⁰

A similar type of relief was requested in *In re Beller*.⁴¹ Dorothea Beller-Maltzman was a nursing home resident who suffered from degenerative dementia.⁴² Her guardian/son petitioned the court to permit him to convey most of her assets to himself and her grandchildren from her predeceased child so that she could qualify for Medicaid without having to "spend down" her assets.⁴³ Even though there was no history of inter vivos gifting, the court observed that upon her death all of her assets would pass to the petitioner and the other proposed transferees, all of whom were the natural objects of her bounty and her presumptive distributees.⁴⁴ The court further considered that the ward would be benefited by reduced estate taxes and would receive Medicaid upon qualifying.⁴⁵ Thus, once again the court concluded that the transfer was appropriate.⁴⁶

Decided the same day and by the same court as *Beller* was *In re Goldberg*.⁴⁷ Shirley Ginsberg was an eighty-eight year old woman who was suffering from aggressive senile dementia and residing in a nursing home.⁴⁸ Jean Goldberg, Ginsberg's guardian/daughter, sought permission to transfer her mother's assets to herself and to the children of the ward's other predeceased daughter.⁴⁹ Although in this case the ward did not have a will

⁴⁰ *Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1.

⁴¹ *In re Beller*, N.Y. L.J., Aug. 31, 1994, at 23, col. 4 (N.Y. Sup. Ct. Kings County).

⁴² *Id.*

⁴³ *Id.* Dorothea Beller-Maltzman's monthly income consisted of \$590.00 in Social Security and approximately \$670.00 in interest and dividend payments. *Id.* Her assets consisted of stocks and bank accounts totalling approximately \$164,476.47. *Id.*

⁴⁴ *Beller*, N.Y. L.J., Aug. 31, 1994 at 23, col. 4 (noting that incompetent's intention to benefit her family could be determined from arrangements she had made for disposition of her assets after her death).

⁴⁵ *Id.*

⁴⁶ *Id.* The court, in considering whether the disposition was consistent with the ward's testamentary plan, also noted that the petitioner had lived with her for the past eight years. *Id.*

⁴⁷ *In re Goldberg*, N.Y. L.J., Aug. 29, 1994, at 24, col. 1 (N.Y. Sup. Ct. Kings County).

⁴⁸ *Id.*

⁴⁹ *Id.* Shirley Ginsberg's monthly income consisted of Social Security in the

and there was no history of gift-giving by her, the court permitted the transfer. The court noted that the proposed transferees were her presumptive distributees and that most of her assets were held in Totten trust accounts with the proposed transferees as beneficiaries.⁵⁰

In *In re Daniels*,⁵¹ the guardian sought a renunciation of an inheritance due to her "profoundly disabled" ward and sought to transfer bank assets to both of the ward's two children and the ward's house to his daughter.⁵² Significantly, the ward's will left the ward's house to his son and daughter equally, rather than solely to the ward's daughter as the guardian had requested.⁵³ This discrepancy, however, was not sufficient to suggest to the court that the ward had manifested a prior contrary intent to the proposed disposition.⁵⁴ The court permitted the transfer even though it was "not wholly consistent with the testamentary plan"⁵⁵ because a competent, reasonable individual "would prefer that his property pass to his child rather than serve as a source of payment for Medicaid and nursing home care bills where a choice is available."⁵⁶

In *In re Parnes*,⁵⁷ the guardian sought to transfer nearly all

amount of \$746.00 and approximately \$57.33 in dividends. *Id.* Her assets, which consisted of shares in a cooperative apartment, stocks and bonds, a checking account, and five savings accounts, totaled approximately \$95,066.89. *Id.*

⁵⁰ *Goldberg*, N.Y. L.J., Aug. 29, 1994, at 24 col. 1. The court was apparently satisfied with the petitioner's testimony that she had personal knowledge that her mother had not prepared a will and expected her other property to pass by intestate succession. *Id.* It is submitted that Medicaid planning will become more difficult and may require the appointment of a guardian ad litem in situations involving cross-petitions for guardianship between rival siblings, lost or revoked wills, charges of fraud or undue influence, etc. It is submitted that the court in these situations may need to engage in a mini-probate trial within the context of a petition to distribute assets for Medicaid planning.

⁵¹ 162 Misc. 2d 840, 618 N.Y.S.2d 499 (Sup. Ct. Suffolk County 1994).

⁵² *Id.* at 842, 618 N.Y.S.2d at 500. The ward had over \$480,000.00 of assets including the inheritance, the realty, and some bank accounts. *In re Daniels*, N.Y. L.J., Nov. 7, 1994, at 34, col. 4 (Sup. Ct. Suffolk County). The transfer of the house to the ward's daughter would have no effect on Medicaid eligibility because she was under the age of twenty-one at the time of the transfer. *Daniels*, 162 Misc. 2d at 846, 618 N.Y.S.2d at 502; see N.Y. SOC. SERV. LAW § 366(5)(d)(3)(i)(B) (McKinney 1992 & Supp. 1996).

⁵³ *Daniels*, 162 Misc. 2d at 841, 618 N.Y.S.2d at 502.

⁵⁴ *Id.* at 847-48, 618 N.Y.S.2d at 503.

⁵⁵ *Id.* at 848, 618 N.Y.S.2d at 503.

⁵⁶ *Id.*

⁵⁷ *In re Parnes*, N.Y. L.J., Sept. 12, 1994, at 3,2 col. 2 (N.Y. Sup. Ct. Kings County), *reargument granted*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2, *motion to vacate denied*, N.Y. L.J., Apr. 7, 1995, at 33, col. 5.

of Ruth Parnes' assets to her husband.⁵⁸ An initial petition was unsuccessful because Medicaid considers the assets of both spouses in determining eligibility⁵⁹ and, thus, the inter-spousal transfer would have had no impact.⁶⁰ The guardian brought a motion to reargue⁶¹ based upon the execution by the ward's husband of a spousal refusal⁶² wherein he refused to use any of his

⁵⁸ *Parnes*, N.Y. L.J., Sept. 12, 1994, at 32, col. 2. Ruth Parnes' monthly income consisted of \$464.00 in Social Security and \$600.00 in interest payments. *Id.* She owned a one-half interest in the stock to the cooperative apartment in which she lived with her husband prior to her placement in a nursing home. *Id.* Her assets consisted of \$75,000.00 in bank accounts and \$75,000.00 in securities. *Id.* Approximately \$200,000.00 of her assets had been transferred to her husband prior to her placement in the nursing home. *Id.*

⁵⁹ The New York Social Services Law provides, in pertinent part:

[I]n determining the resources of the institutionalized spouse and the community spouse in establishing eligibility for medical assistance:

(a) All resources ... held by either the institutionalized spouse or the community spouse or both shall be considered available to the institutionalized spouse to the extent that the value of the resources exceeds the community spouse resource allowance.

N.Y. SOC. SERV. LAW § 366-c(5)(a) (McKinney 1992); see also [1996] 18 N.Y.C.R.R. § 360-4.10(c)(2). At the time of the hearing, Walter Parnes had assets of approximately \$345,000.00. See *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2 (N.Y. Sup. Ct. Kings County).

⁶⁰ *Parnes*, N.Y. L.J., Sept. 12, 1994, at 32, col.

⁶¹ *Parnes*, N.Y. L.J., Sept. 12, 1994, at 32, col. 2.

⁶² The right of spousal refusal is codified in the Federal Medicaid statute, 42 U.S.C. § 1396r-5(c)(3) (1993), and in New York Social Services Law § 366(3)(a). Section 366-c(5)(b) provides:

An institutionalized spouse shall not be ineligible for medical assistance by reason of excess resources determined under paragraph (a) of this subdivision, if the institutionalized spouse executes an assignment of support from the community spouse in favor of the social services district and department, or the institutionalized spouse is unable to execute such assignment due to physical or mental impairment, or to deny assistance would create an undue hardship, as defined by the commissioner.

N.Y. SOC. SERV. LAW § 366-c(5)(b) (McKinney 1992).

Medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law.

N.Y. SOC. SERV. LAW § 366(3)(a) (McKinney 1992). Sections 78 and 79 of the Governor's Bill on Medicaid Cost Containment, N.Y.S. 1805, N.Y.A. 3105, 218th Sess. (1995), call for changes in Social Services Law § 366(2)(b) and (3)(a) which would

resources to pay for his wife's nursing home expenses.⁶³ The court noted that the ward's husband was her presumptive distributee,⁶⁴ that her most recently executed will left everything to him, and that the ward would receive significant tax benefits.⁶⁵ Furthermore, with no support from her husband, the transfer would immediately render the ward eligible for Medicaid because there is no look back penalty period for transfers made between spouses.⁶⁶ On reargument, the court granted the application to

eliminate the right of spousal refusal in situations where the applicant is not institutionalized. Section 79 would further authorize recovery of Medicaid costs from the spouse or the spouse's estate, thus reversing *In re Craig*, 82 N.Y.2d 388, 391-92, 624 N.E.2d 1003, 1005, 604 N.Y.S.2d 908, 910 (1993)(holding no implied contract exists to repay Department of Social Services out of estate of surviving spouse for medical assistance payments made on behalf of sick spouse where surviving spouse lacked sufficient means contemporaneously with provision of medical assistance to predeceased spouse); see also N.Y.S. 1805, 218th Sess. § 79 (1995). Section 93 of the bill would redefine "estate" to include an interest at the time of death, including an interest in a joint tenancy, a tenancy-in-common, a trust or a right or cause of action. N.Y.S. 1805, 218th Sess. § 93 (1995). The bill would also allow the Department of Social Services to sell or assign for collection its Medicaid liens and recovery actions. N.Y.S. 1805, 218th Sess. § 94 (1995). Currently, Medicaid recovery from estates is mandatory in New York and the estate is defined as "all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy." N.Y. SOC. SERV. LAW § 69(6) (McKinney 1992 & Supp. 1996). Federal law also permits a state to recover medical assistance from nonprobate assets. 42 U.S.C. § 1396p(b)(2) (1994). See generally *Proposals and Interpretations*, *supra* note 4, at 3 (noting that "[i]n his 1995 Budget bill Governor Pataki has proposed draconian cuts and changes in the Medicaid program.").

⁶³ Walter Parnes also asserted that he would continue to exercise his right of spousal refusal following the transfer of his wife's assets to him. *In re Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2 (N.Y. Sup. Ct. Kings County). Where a Medicaid applicant's spouse has exercised his or her right of spousal refusal, the Government has the option of suing the community spouse for support. 42 U.S.C. § 1396r-5(c)(3) (1994); N.Y. SOC. SERV. LAW §§ 366-c(5)(a), 366-c(5)(b) (McKinney 1992 & Supp. 1996). The court noted that support proceedings are rarely instituted by the government against the community spouse. *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, n.3 col. 2.

⁶⁴ *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, n.3 col. 2. Her daughters would also be distributees but as co-petitioners herein they consented to the proposed disposition. *Id.*; see also N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1) (McKinney 1981 & Supp. 1996).

⁶⁵ *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2. The spouse's estate would be increased by the transfer, thereby risking the potential for incurring estate taxes unless the spouse engaged in proper estate planning.

⁶⁶ *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2; see 42 U.S.C. § 1396p(c)(2)(B)(i); N.Y. SOC. SERV. LAW § 366(5)(d)(3)(ii)(A) (McKinney 1992 & Supp. 1996) (indicating that there is no penalty period for inter-spousal transfers); see also *In re Driscoll*, N.Y. L.J., Oct. 22, 1993, at 30, col. 4 (N.Y. Sup. Ct. Nassau County) (noting in dicta that Article 81 guardian is authorized to transfer ward's assets to ward's spouse).

transfer assets.⁶⁷

It is submitted that the Medicaid and estate planning permitted by these decisions was appropriate, and even encouraged, under the Mental Hygiene Law. Concededly, by empowering guardians with the ability to engage in Medicaid planning, the result may seem incomprehensible in that an individual is able to pass on the family fortune while at the same time receive public assistance.⁶⁸ As Justice Rossetti stated in *In re Driscoll*, however, "[T]he new Mental Hygiene Law under which we are operating gives us no authority to consider such adverse consequences to the public fisc."⁶⁹ Importantly, when individuals transfer substantial assets, they may be required to pay a gift tax.⁷⁰ Furthermore, since there is no longer a cap on the penalty period, persons making such transfers will be subject to a longer period of ineligibility during which they will incur the cost of their own nursing home care.⁷¹

In reality, those who engage in and benefit from Medicaid planning are not millionaires but, rather, middle income persons.⁷² Thus, the extraordinary costs of financing long-term care forces them to look to Medicaid as the "payor of last resort."⁷³ It is submitted that when these individuals transfer assets, there is a benefit to society in that the ward will thereby help to prevent his dependents from requiring public assistance.

⁶⁷ *Parnes*, N.Y. L.J., Nov. 2, 1994, at 32, col. 2. The Department of Social Services moved to vacate the decision that had allowed the transfer, but the court found that its arguments were without merit and denied the motion. *In re Parnes*, N.Y. L.J., Apr. 7, 1995, at 33, col. 5 (N.Y. Sup. Ct. Kings County).

⁶⁸ In *In re Daniels*, Justice Luciano observed:

While one may choose to debate whether the authority of one to engage in Medicaid planning is sound public social or fiscal policy, less open to debate is the conclusion that the codified rules and policies to which [Justice Leone] referred in *Matter of Klapper* ... authorize, if not encourage, such Medicaid planning.

In re Daniels, 162 Misc. 2d 840, 843, 618 N.Y.S.2d 499, 500 (Sup. Ct. Suffolk County 1994).

⁶⁹ *Driscoll*, N.Y. L.J., Oct. 22, 1993, at 30, col. 4.

⁷⁰ See *supra* note 8.

⁷¹ Indeed, a transfer of 1 million dollars will result in a penalty period of 179 months (\$1,000,000.00 divided by \$5,584.00 equals 179). See *Medicaid Revisions*, *supra* note 4, at 3 (suggesting that applicants who make substantial transfers should apply for Medicaid after "look back" period expires because of unlimited penalty period).

⁷² See *Proposals and Interpretations*, *supra* note 4, at 3.

⁷³ *Id.*; see also Peter J. Strauss, *Long-Term Care and Pending Medicaid Changes*, N.Y. L.J., July 30, 1993, at 3.

In the realm of Medicaid planning by guardians of incompetents, court supervision is necessary and has been provided. For example, only those who have already been found suitable by a court to be the guardian of the property of a ward may make these applications.⁷⁴ Safeguards such as these are incorporated in the statute to protect the assets of the ward from a guardian's self-dealing,⁷⁵ to ensure that the ward has enough assets to pay for necessary nursing care during the period of ineligibility,⁷⁶ and to ensure that assets are not being passed down to persons who the ward preferred not to receive his estate.⁷⁷ Additionally, the courts have refused to permit transfers which would not assist the ward to become Medicaid eligible.⁷⁸

⁷⁴ See N.Y. MENTAL HYG. LAW § 81.19(a)(1) & (d) (McKinney Supp. 1996); *In re Roy*, N.Y. L.J., Oct. 31, 1994, at 34, col. 3 (N.Y. Sup. Ct. Suffolk County) (denying application of incapacitated person's cousin to be sole property guardian because cousin had assumed that, in exchange for necessities provided to ward, he was entitled to, and thus had appropriated, substantial amount of incapacitated person's assets); see also *In re Wingate*, N.Y. L.J., Apr. 17, 1995, at 33, col. 3 (N.Y. Sup. Ct. Suffolk County) (denying petition of forty-year friend of incapacitated woman to be appointed guardian because of questionable transfers made to herself under statutory power of attorney). *But see In re Scheiber*, N.Y. L.J., Oct. 18, 1993, at 38, col. 5 (N.Y. Sup. Ct. Suffolk County) (appointing daughter of incapacitated woman co-guardian of her mother despite concern of court evaluator who found daughter improperly secured power of attorney from incompetent mother and transferred mother's assets to herself based upon such authority). See generally Margaret Ann Bomba, *Summary Discovery, Turnover Proceedings Under Article 81 of the Mental Hygiene Law*, N.Y. L.J., Dec. 2, 1994, at 1 (discussing "virtual epidemic of financial victimization of the elderly" which often takes form of stripping elderly person of assets for ostensible purpose of attaining Medicaid eligibility).

⁷⁵ See *Wingate*, N.Y. L.J., Apr. 17, 1995, at 33, col. 3; *Roy*, N.Y. L.J., Oct. 31, 1994, at 34, col. 3 (denying petitioner's request to be appointed guardian).

⁷⁶ The amount to be transferred is calculated to provide for the needs, maintenance, support, and well-being of the incapacitated person during the penalty period. See N.Y. MENTAL HYG. LAW § 81.21(b)(2) & (d)(3) (McKinney 1996); *In re Beller*, N.Y. L.J., Aug. 31, 1994, at 23, col. 4 (N.Y. Sup. Ct. Kings County). The courts have also required that the debts of the ward be paid.

⁷⁷ See N.Y. MENTAL HYG. LAW § 81.21(e)(3) (McKinney Supp. 1996) (requiring clear and convincing evidence that transfer is not inconsistent with prior expressed intent of ward).

⁷⁸ Cases which have allowed the transfer of nearly all of the ward's assets have required the guardian to retain \$3,200.00 as a luxury fund since that amount is an exempt resource, N.Y. SOC. SERV. LAW § 366(2)(a) (McKinney 1992 & Supp. 1996), and a burial fund in the amount of \$1,500.00 because that amount is disregarded for Medicaid eligibility purposes, [1996] 18 N.Y.C.R.R. § 360-4.6(b)(1)(ii). *In re Klapper*, the court would not permit the guardian to transfer German Holocaust reparation payments because they were exempt assets for determining Medicaid eligibility. *In re Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1 (N.Y. Sup. Ct. Kings County). The initial application in *Parnes* was denied because unless the husband executed a spousal refusal, his assets would be considered and the proposed transfer would

As Medicaid planning is a readily available opportunity to competent persons, it must also be similarly available to the incapacitated.⁷⁹ Requiring incapacitated persons to "spend down" their entire life savings before becoming eligible for Medicaid while allowing those who are competent may denude themselves of all their assets to become Medicaid eligible would be patently unfair. The issue should not be whether to allow Medicaid planning by the guardians of incompetent people, but whether to allow Medicaid planning at all. Incapacitated people must be afforded the same opportunities as those not under a disability.

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have no impact at all on the ward's Medicaid eligibility. *In re Parnes*, N.Y. L.J., Sept. 12, 1994, at 32, col. 2 (N.Y. Sup. Ct. Kings County).

⁷⁹ "There is no question that Medicaid planning by competent persons is legally permissible and that proper planning benefits their estates." *Klapper*, N.Y. L.J., Aug. 9, 1994, at 26, col. 1.

