

2022 Elder Long Term Care Planning Update for the Estate Planning Council of Rochester

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Miles P. Zatkowsky, Esq., is a Rochester Elder Law attorney with the law firm of Dutcher & Zatkowsky, specializing in Elder Law, including Medicaid and Nursing Home Planning, Special Needs Planning, Veteran's Estate Planning, Probate and Estate Administration and Guardianships. Miles is one of very few Western NY attorneys accredited by the VA to counsel veterans on benefits through the VA.

In addition to various Bar Associations, Miles is a member of the Executive Committee of the Elder Law Section of the NYSBA and a past Chair of the MCBA Elder Law Section. He has been active in addressing Elder Abuse Prevention in our community and nationwide. Miles also serves on the Monroe County Older Adult Fatality Review Committee, one of only a few panels in the nation which reviews cases of deaths of older adults to assist in improving the availability of services in an effort to prevent future abuses and fatalities.

He is a past Chair of the Rochester and Finger Lakes Chapter of the Alzheimer's Association and a Founding Trustee of the Future Care Pooled Supplemental Needs Trust.

Miles is a frequent speaker on the issue of Elder Law and Medicaid Planning and other related topics for various bar associations, Judges, Office of Court Administration, Lifespan and the Alzheimer's Association. He has been selected annually by his peers as a Super Lawyer in the area of Elder Law.



Richard A. Marchese, Esq.



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- ▶ Richard A. Marchese is a Partner in the firm's Elder Law and Health Care Practice Group responsible for handling all elder law and health care issues. He concentrates his practice in Medicaid and Estate planning, Social Security, Medicare and Medicaid eligibility and recovery matters, asset protection, issues of spousal support, and the use of trusts in Medicaid planning. Prior to joining the firm, Mr. Marchese served for over fifteen years as Chief Counsel to the Monroe County, N.Y. Department of Social Services, advising the Chronic Care, Home Care and Adult Protective units at that agency.
- ▶ Mr. Marchese is Past President of the New York Chapter of the National Academy of Elder Law Attorneys, is on the Executive Committee and an officer of the Elder Law and Special Needs Section of the New York State Bar Association, and is Past President of the Elder Law Committee of the Monroe County Bar Association.

THE LONG-TERM CARE CRISIS IN OUR COMMUNITY

- ▶ Pandemic has led to a severe reduction in the workforce in hospitals and nursing homes.
- ▶ This has led to the closure of wings in some nursing homes (i.e., taking beds offline).
- ▶ Some area nursing homes have raised their rates three times already since the first of the year to make up for the lost revenue from a decrease in available beds.
- ▶ Nursing homes locally have really tightened up their financial criteria for admission, which has trickled down to assisted living facilities.

THE LONG-TERM CARE CRISIS IN OUR COMMUNITY

- ▶ The tightening up of admissions at area nursing homes has in turn led to a "bottleneck" of patients in area hospitals who are ready to be moved for rehabilitation or custodial care but have nowhere to go. Clients are spending longer in hospitals or at home waiting for nursing home beds.
- ▶ In several instances, local patients have been placed well out of county.
- ▶ Because of an inability to place patients, hospitals are encouraging families to take their parent/spouse home. This in most instances is not a safe option.

Staffing Shortages in the Community

- ▶ Difficulty in finding attendants to fill the hours authorized under Consumer-Directed Personal Care Services.
- ▶ Agencies with insufficient staffing to fill the need.
- ▶ Yes, the Medicaid Program allows children to get paid for acting as an aide for their parent, but....!!!!
- ▶ Not as rosy as it appears in the television ads.
- ▶ Fiscal intermediaries only able to pay \$12.50 to \$13.50 per hour and limiting overtime.

Nursing Home Minimum Safe Staffing Act

- ▶ Effective April 1, 2022.
- ▶ Creates minimum staffing ratios.
- ▶ Each nursing home resident must receive at least 3.5 hours per day of direct nursing care.
- ▶ 70% of each nursing home's revenue must go toward patient care. At least 40% of the revenue must go toward paying workers.

GOVERNOR HOCHUL'S MEDICAID PROPOSAL

- ▶ January 2022, Governor Hochul proposed a total overhaul of the Medicaid Program.
- ▶ Her budget entirely eliminated the asset test for Medicaid (including qualifying for long term care services in the community or in a nursing home).
- ▶ Currently, a Medicaid applicant must have less than \$16,800 in countable resources to qualify for services.
 - ▶ Proposal eliminated the term "resources" from everywhere it appeared in SSL Section 366.
 - ▶ Proposal followed the State of California, which enacted legislation to eliminate the asset test.

Proposed Legislation

- ▶ Under current law, MAGI Medicaid (for the under 65 who are not disabled) has no asset test- this Medicaid is obtained through the State Health Benefit Exchange and is strictly based upon income.
- ▶ Gov. Hochul wanted to even the playing field, and effectively have the same rules regarding assets for the non-MAGI population (blind, disabled and over 65 population).
- ▶ But what about "millionaires on Medicaid?"
- ▶ Problem is that Medicaid serves the poor, the middle class, the upper middle class and the wealthy.

Proposed to Eliminate the Resource Test rejected by the Legislature



Enacted Legislation

(Content courtesy of NYLAG- contained in Part "AAA" of the Budget Bill.).

- ▶ Using 2022 FPL, the new income limits in 2023 would be:
 - ▶ Singles - **\$1563/mo** (a big increase from \$934/mo).
 - ▶ Couples - **\$2106/mo** (a big increase from \$1367/mo).

Enacted Legislation

- ▶ Those with incomes above these limits will still be able to “spend down” excess income on medical bills or enroll in Pooled Trusts to shelter income.
- ▶ Pooled Trusts are utilized by almost every Medicaid recipient of community based long term care (i.e., home care).
- ▶ This may also obviate the need for a pooled trust for many individuals whose only income is SSD benefits.

Enacted Legislation

- ▶ **ASSET LIMIT** -Because under the law the resource level is tied to the maximum income limit, **the asset limit will increase by about 50%** in January 2023. We estimate that the levels will be:
 - ▶ Single increase from \$16,800 to **\$28,134**.
 - ▶ Couples increase from \$24,600 to **\$37,908**.

Enacted Legislation

- ▶ ***Fair Pay for Home Care/Minimum wage increase!- Part XX of the Budget Bill.***
- ▶ Increase of \$3 over two years - Oct. 1, 2022 = \$2 increase per hour; following year, an additional \$1 increase; if underpaid, individual home care worker may commence a civil action; DOH not required to develop an overtime rate.
- ▶ ***Effective October 1, 2022.***

Enacted Legislation

- ▶ Health care and mental hygiene worker bonuses; total payment not to exceed \$3,000 per employee (amount based on number of hours worked during a “vesting period”); bonuses shall not affect calculations related to public benefits or assistance; not subject to state or local income tax.
- ▶ Expanded list of eligible professions/employees; employer must be enrolled in MA, but otherwise no substantive limitations on who qualifies as an employer/provider.
- ▶ DOH to submit waiver to CMS- Goes into effect immediately.

NEW LOOKBACK FOR COMMUNITY BASED LONG TERM CARE SERVICES

- ▶ New 30 MONTH lookback period for uncompensated transfers of assets made by applicant for community based long term care services ("CBLTC"). Applies to any and all transfers made after October 1, 2020.
- ▶ **This has yet to be implemented due to the federal health care emergency! The earliest implementation date would be 60 Days after the lifting of the federal emergency.**
- ▶ **Applies to applications submitted after the implementation date of the new lookback.**
- ▶ Elder Law/Special Needs Section of the NYSBA has lobbied for the repeal of this legislation.

Changes to Community-Based Long-Term Care

- ▶ New Home Care Regulations with a planned effective date of November 8, 2021.
- ▶ Changes include:
 - ▶ Independent Assessor and Independent Review Panel - *to be implemented as of July 1st!*
 - ▶ Requiring assistance with more than two ADLs or two ADLs and diagnosis of Dementia - *DELAYED*
 - ▶ Eliminates housekeeping Level 1 services (cleaning, meal preparation, grocery shopping, laundry, etc.) - *DELAYED*

Long-Term Care Insurance

- ▶ Partnership plans no longer sold in New York.
- ▶ Inflation protection is the critical element of good long term care insurance.
- ▶ Effective long term care insurance still operates as an effective "buy in" to a good nursing home, and immensely helps in paying for care at home.
- ▶ Insurers are trying to "cull the heard" of existing policy holders by threatening huge hikes in premiums and offering incentives for insureds to drop the policy or greatly reduce the benefits under the policy.

Long Term Care Insurance

- ▶ Dear _____,
- ▶ *Your long-term care insurance policy is part of the class action settlement in Skochin et al. v. Genworth Life Insurance Company of New York(GLICNY) et al., Civil Action No. 3:19-CV-49-REP in the United States District Court of the Eastern District of Virginia. As a result, we are making 1 or more special settlement options available to you, while still providing meaningful coverage. Some options also provide for a one-time cash payment to you. You may choose one of these options or keep your policy as is.*

Long Term Care Insurance

- ▶ *As you evaluate these choices, please be aware that as of 12/31/2021 over the next 3-6 years we are planning to seek additional rate increases of up to 250.000% for lifetime benefits and up to 250.000% for limited benefits in the state where your policy was issued.*
- ▶ *What do you tell your clients? Keep paying the premiums, even at a highly increased premium, or bail out?*

Case Law Update

- ▶ ***Barrows v. Becerra* No. 20-1642 (2d Cir. 2022)**
- ▶ A win in court for Medicare beneficiaries! Patients have not had hearing rights to challenge their observation status.
- ▶ Admission vs. observation- a critical distinction with financial consequences
- ▶ In this case, the Court of Appeals affirmed the District Court and ruled that Medicare beneficiaries whose status in the hospital is changed from inpatient to observation have the right to a hearing to challenge the change, which includes the right to an administrative hearing.

Case Law Update

- ▶ *Greenberg v. Montefiore New Rochelle Hospital*, 2022 NY Slip Op 02194 (1st Dept. March 31, 2022)
- ▶ First Dept. holds that a medical malpractice claim which alleges that a hospital kept a person alive contrary to the instructions of the Health Care Proxy does state a cause of action for pain and suffering, rather than a claim for "wrongful life."
- ▶ In New York, the courts have consistently held that there is no legal claim for "wrongful life."

Case Law Update

- ▶ *Werther v. Werther*, 199 A.D.3d 546 (First Dept., 11/2021)
- ▶ Decedent changed beneficiaries of his Morgan Stanley ("MS") IRA prior to his death (removing one son as a beneficiary). His agent under Power of Attorney signed the appropriate MS forms on behalf of decedent on 10/03/17. Decedent died one year later (with no one having submitted the form to MS)! Agent then submitted the change in beneficiary form to MS on November 1, 2018.

Case Law Update

- ▶ *Werther* (cont.)
- ▶ Court held that there had been substantial compliance with MS requirements, and upheld validity and effectiveness of the change form..
- ▶ *"While it is undisputed that defendant's POA ended upon the decedent's death, defendant signed the form designating the trust as the IRA's beneficiary during the decedent's lifetime, while she had the authority to do so under the POA. The designation of beneficiaries is separate and distinct from tendering the form for changing beneficiaries"*.

Case Law Update

- ▶ *In re Bartolini, Surrogates Court, Albany County, June 25, 2021 (2021 NYLJ LEXIS 607).*
- ▶ Involves the fiduciary duty of an administrator of an estate to the distributees of an estate.
- ▶ Decedent died intestate, survived by his sister, a foreign national who was a citizen of Poland, and three nieces and nephews, the children of his other sister (pre-deceased).
- ▶ Under the laws of intestacy (EPTL 4-1.1), foreign national sister is entitled to 1/2 of his estate, nieces and nephews each entitled to 1/6. The nieces and nephews were named as the co-administrators of the estate.
- ▶ Decedent had a one million dollar IRA and had named his pre-deceased sister as the beneficiary (and never changed it after her death). Hence, the IRA is payable to his estate.

Case Law Update

- ▶ *In re Bartolini (cont.)*. The administrators created an inherited IRA for the estate, and transferred the Fidelity IRA in kind to the estate.
- ▶ Administrators then transferred one half of the value of the IRA, in kind into new inherited IRAs for each of the petitioners as beneficiaries.
- ▶ The remaining one-half of the IRA (roughly \$500,000), representing the sister's share, was liquidated and distributed outright to the estate after withholding over \$155,000 as a foreign person's U.S. source withholding tax (FATCA). That amount, \$362,000, was then distributed to the sister.

Case Law Update

- ▶ *In re Bartolini (cont.)*. Sister alleged that the administrators breached their fiduciary duty to her because they never gave her the opportunity to establish her own inherited IRA.
- ▶ Administrators claimed that Fidelity told them that they could not obtain a beneficiary account for the sister because she was a foreign citizen without a US ITIN.
- ▶ Dispute about what Fidelity stated to counsel for the administrators.
- ▶ Can a non-US citizen have an inherited IRA?- Fidelity said "YES"!
- ▶ Court held that a fiduciary has a duty of loyalty to all beneficiaries, as well as a duty to "minimize the overall tax burden on the estate and its beneficiaries." Court held that the administrators breached their fiduciary duty by not giving the decedent's sister the same opportunity to transfer her one-half share of the Fidelity IRA to an inherited IRA.

New York's New Power of Attorney

HISTORY

5 Years In The Making

- 2015 – Legislation proposed by NYSBA
- 2016 – Adopted by the NYSBA Executive Committee and House of Delegates
- 2017 – Introduced in the State Senate and Assembly
- 2018 – Re-introduced in the State Senate and Assembly
- 2019 – Re-introduced in the State Senate and Assembly again
- 2020 – Passed the Assembly & Senate (introduced by Assemblymember Helene Weinstein and Senator Brad Hoylman) and was delivered to the Governor on Dec. 3, 2020. Effective in 180 days.

New York's New Power of Attorney

MAJOR CHANGES

What's New

- “Substantially conforms to the wording” replaces “exact wording”
- Statutory Gifts Rider Eliminated (GOL § 5-1514 repealed)
- Signing Requirements:
 - Can be signed at the direction of the Principal
 - Will require two witnesses (one of whom can be the notary) for all Powers of Attorney
- Changes to construction sections (GOL §§5-1502A- 5-1502O)
- Acceptance of and Reliance Timeline for financial institutions
- Damages and Attorney Fess
- Changes to the Form (gift transactions, modification section, witnessing, agents acting together)

New York's New Power of Attorney

MAJOR CHANGES

Items to Note:

- A POA validly executed prior to the law that goes into effect on June 13, 2021 will be grandfathered and enforceable under the new law provisions. (even if principal signs but agent has not yet signed)
- The new POA form must substantially conform rather than contain the exact wording of section 5-1513 of the General Obligations Law. Previously voided POA for certain sections.
- The POA must be signed, initialed, and dated by a principal with capacity.
 - A third party may sign for the principal at the principal's direction. This provision is intended to be used by a principal who has capacity but is under a physical disability. (i.e. ALS, MS, Paraplegic)
- The Statutory Gifts Rider has been eliminated. Gifting provisions may be included in the Modifications section of the POA form itself.
 - Gifts in excess of the \$5,000 maximum allowed in section (f)(I) **personal and family maintenance** must be expressly authorized by the principal in the Modifications section.

Remote Notarization and Remote Witnessing

MAJOR CHANGES

- Any “Optional” section that does not apply can be omitted, however the section letter and title should remain with the words “Intentionally Omitted”.
- The POA must be acknowledged and witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts. The person who takes the acknowledgment under this paragraph may also serve as one of the witnesses.
- Bracketed items “[]” you desire to include must be initialed by the principal.

Please review title 15 of the General Obligations Law for the general information relating to the creation of a POA.

Remote Notarization and Remote Witnessing

- ▶ remote online notarization (RON)
- ▶ Amendment moves the effective date the state's notaries can conduct RONs from June 20, 2022, to Jan. 31, 2023.
- ▶ Immediately allows use of a highly modified version of remote ink notarizations (RIN) that were allowed through prior executive orders as a stop-gap process until RONs are allowed.
- ▶ Clarifies that signers/principals can execute documents using RIN and RON processes if they are outside of the United States where the matter involves a U.S. court or government entity, or the document involves property located in or concerns a transaction relating to the U.S. The notary, however, will have to be in the state of New York when notarizing the document.
- ▶ Adds verbiage to be included in the notary blocks for RINs and RONs to help identify that the document was remotely notarized and requires county clerks to accept RIN and RON documents for recording when a Certification of Authenticity is included in the document.

Remote Notarization and Remote Witnessing

- ▶ The notary public must be physically in New York State to notarize documents. The notary must identify the person signing the document, called the “Principal,” using any of these three methods:
- ▶ The notary’s knowledge of the person signing the document,
- ▶ Communication technology that facilitates remote presentation by the signer of an official, an acceptable form of identification, credential analysis, and identity proofing, or,
- ▶ By oath or affirmation of a credible witness who knows the signer and who is known to the notary or identified by the referenced means of communication.
- ▶ The notary must be able to see and interact in real-time with the Principal. The notary must maintain the recording and a backup copy of the remote notarization for at least ten years. The notary will also need to maintain copies of the identification used.
- ▶ The person will need to answer four out of five knowledge-based authentication questions, similar to those who log into a website.

Guardianships

- ▶ Supreme Court Filings; E-Filing now the norm;
- ▶ Hearings have been remote but starting to change;
- ▶ Acting Supreme Court Judges include Family Court, County Court and Surrogate Court;

Guardianships

- ▶ Burden of proof is “clear and convincing” evidence.
- ▶ Customized to address limitations of the Alleged Incapacitated Person; Provide as much independence as possible under the situation.
- ▶ Least Restrictive
- ▶ Time frame (indefinite or temporary)

Guardianships

- ▶ How to avoid a Guardianship
- ▶ Power of Attorney and Health Care Proxy
- ▶ Family discord
- ▶ Mediation

Thank you!

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