

LK Alert

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FAIR HEARING UPHOLDS ASSET TRANSFER PENALTY AND AGENCY FINDING OF NO UNDUE HARDSHIP— NURSING HOME STUCK WITH UNPAID BILL

In a fair hearing decision dated June 10, 2011 in the Appeal of Paul H., the New York State Dep't of Health ("DOH") affirmed a decision of the Albany County Department of Social Services ("DSS") to impose an asset transfer penalty, including the agency's determination that Appellant was not eligible for Medical Assistance ("MA") skilled nursing coverage under the undue hardship provisions of Section 366 of the Social Services Law and 18 NYCRR 360-4.4.

In this case, Appellant's attorney-in-fact used a Durable General Power of Attorney ("POA") without gift giving authority, as well as a joint account designation, to transfer approximately \$250,000 of Appellant's funds to herself and others. Appellant suffered from "senile dementia" and did not participate in any of the transactions. The nursing home made every effort to assist Appellant, including working with the attorney-in-fact to secure a return of the transferred funds (only some of the funds were recovered), securing a lien on real property owned by the attorney-in-fact, filing for guardianship to assist in recovering assets, attempting to discharge Appellant (the facility was unable to arrange for a safe discharge, since no other facility would accept Appellant without any means of payment for his care), and requesting that DSS waive the asset transfer penalty rules due to undue hardship. DSS denied the undue hardship request and instead imposed the asset transfer penalty, leaving a balance of over \$57,000 due to the nursing home for services through the date of Appellant's death.

In affirming the agency's decision, DOH pointed out that under the undue hardship provisions, it must be shown that application of the asset transfer penalty "would deprive the individual of medical care such that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter or other necessities of life." DOH further noted that "Appellant received medical care from the nursing facility, and his food and shelter needs were also fully provided by that facility." Therefore, despite the efforts of the facility to discharge Appellant, DOH concluded that DSS properly determined that the undue hardship provisions do not apply.

Potential Implications: While this decision is limited to this case, if this strict application of the undue hardship provisions is applied in other cases, it could make it virtually impossible to secure an undue hardship determination in any case where the applicant is already in a nursing home. Also, while most would agree that the wrongdoers in these cases are those who took the resident's money (and there are potential civil and criminal penalties for such individuals), decisions like this place a very heavy burden on the nursing facilities (many of which are already struggling financially) to find and secure recovery from the wrongdoers. Such a policy would make it even more difficult for nursing facilities to continue to operate and provide quality care.

Certainly, there are countervailing taxpayer burden arguments. Perhaps if enough pressure is brought to bear, nursing facilities and DOH could reach some compromise on these kinds of cases. For example, it has been suggested that DOH might direct the local DSS to authorize MA in such cases, subject to the appointment of a guardian or estate representative with the obligation to pursue recovery of assets wrongfully taken, including the obligation to make appropriate reimbursement to Medicaid from any assets recovered. Certainly, such a compromise might strike a better balance between the needs of the nursing facility, the rights of the resident and the burden on the taxpayer. In any event, our firm is available to assist in addressing these kinds of issues.

Littman Krooks LLP encourages you to share this LK Alert with anyone interested in the issues discussed herein. Please contact Nicole Garcia at (212) 490-2020 or (914) 684-2100 if you are interested in having an attorney from Littman Krooks LLP speak at your facility. Littman Krooks LLP offers legal services in several areas of law, including Accounts Receivable Management, Medicaid, Health Care, Guardianship, Elder law, Estate and Tax planning, Public Benefits, Estate Administration/Probate, and Trusts and Estates.

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