Elder Law/Trust & Estates

Irrevocable Trusts and Crisis Planning for Medicaid Benefits

For 2020, the New York State Department of Health has assessed the average monthly cost of nursing home care on Long Island at $13,407.[1] Without proper Medicaid planning, in just one year, over $150,000 of a lifetime of savings could be lost paying for nursing home care. Due to the five-year look back period, "Medicaid planning," is crucial to maximizing a client's estate by protecting assets from the cost of long-term nursing home care. While early Medicaid planning is best, all is not lost if a Medicaid crisis lands on your office doorstep.

Irrevocable Trusts and Medicaid

Utilization of an irrevocable trust is one valuable tool at the practitioner's Medicaid planning disposal. A "trust" is generally defined as "a legal instrument by which an individual gives control over his/her assets to another (the trustee) to disburse according to the instructions of the individual creating the trust."[2] Regardless of the type of trust created, all trust-related transfers are subject to the 60-month look back period.[3]

Two common types of trusts are the revocable and irrevocable trust. "A revocable trust is a trust created by an individual which the individual has the right to cancel."[4] Since Medicaid treats the "entire value of the trust" as an "available resource," revocable trusts do not assist in creating Medicaid eligibility.[5]

An irrevocable trust on the other hand, is "a trust created by an individual, over which the individual may or may not be able to exercise some control, but which may not be cancelled under any circumstances."[6] For Medicaid purposes, any portion of the principal of the trust, or the income generated from the trust that can be paid to or for the benefit of the Medicaid applicant/recipient (the "A/R"), is considered an available resource.[7] Accordingly, to be an effective Medicaid tool, the irrevocable trust must have certain basic provisions that restrict the trust principal (and, if desired, the trust income) from the A/R.

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On the most basic level, the grantor (A/R) cannot be the trustee. Moreover, to avoid the principal of the trust being deemed an available resource, the trust must prohibit invasion of the trust principal for the benefit of the A/R (or his or her spouse).[8] The trust should also provide a provision that waives the right of invasion by a court under EPTL 7-1.6(b). Absent the waiver of invasion, under certain circumstances, a court could invade the principal of the trust for the support of the A/R and the principal could become an available resource for the Department of Social Services.[9] Since access to the trust funds often becomes necessary, such trusts generally allow an invasion of principal for the benefit of a class of individuals, usually the children of the A/R.

Medicaid considers the funding of an irrevocable trust as a gift that would create a period of ineligibility based on the value of the assets funded into the trust.[10] As such, these trusts are most valuable when planning is done before the A/R becomes ill and needs long term care. Such a trust could be used at the eleventh hour in conjunction with the use of a Medicaid-compliant promissory note, as discussed below.

Crisis Planning for Medicaid

Crisis planning refers to planning that is done when the A/R is about to need or already is in need of Medicaid to fund long-term care expenses. Depending on the family makeup of the Medicaid applicant, an A/R in crisis seeking nursing home care can still protect between 40 to 100 percent of their assets.

Any asset, in any amount, can be transferred without penalty to:[12]

- the applicant's spouse, or to another for the sole benefit of the applicant's spouse;
- a blind or disabled child, or a trust established for the sole benefit of such child;
- a trust established solely for an individual under 65 years of age who is disabled.

Typically, the most valuable asset a client has is his home. Under the DRA, the primary residence occupied by the A/R is an exempt asset for purposes of Medicaid eligibility, up to a certain equity level. In New York, the equity limit in the homestead is $878,000. Homesteads with an equity above $878,000 would render an A/R ineligible. Homeowners can reduce their equity through a reverse mortgage or home equity loan, but not with medical bills.[13] Regardless of the equity, the homestead is exempt if a spouse, a child under 21, or a child who is blind or disabled resides in the home. In addition, the transfer of the homestead is an exempt transfer if made to any of the following individuals:[14]

- a spouse
- a minor child under age 21, or a blind or disabled child of any age
- a sibling of the individual who has an equity interest in the home and was residing in the home for at least one year immediately before the date of institutionalization.
- an adult non-disabled son or daughter, who was residing in the home for at least two years immediately before the date of institutionalization and who has provided care to the A/R

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General Law

New York Employers Dodge A Bullet: Governor Cuomo Vetoes New York State's "Sweat" Bill

Quietly, and without fanfare, on January 1, 2020, Governor Cuomo vetoed the Securing Wages Earned Against Theft (SWEAT) Act, which the New York State Senate and Assembly had both passed in mid-June 2019.[1] The veto was a relief for employers and their legal counsel, as the Act had the potential to radically alter the landscape of wage and hour litigation in New York State. The Act, if signed into law, would have implemented a number of changes to the New York Labor Law, New York State Lien Law, New York State Business Corporation Law, New York State Limited Liability Company Law, and the Civil Practice Laws and Rules that would have been highly advantageous to employees.

The central tenet of the Act would have allowed employees to file liens against the property of employers. Unlike a mechanic's lien in New York State, which can only be placed against real property, this bill would have allowed employees and former employees who believed they were owed wages to put a lien on an employer's real and personal property (the sole exception being "deposit accounts" or "goods," as those terms are defined in the Uniform Commercial Code) without first starting a legal action.[2-3]

Thus, employees or former employees would not have had to prove that they were actually owed the alleged unpaid wages prior to filing the lien; rather, they could file such a lien based on a mere allegation of unpaid wages. In addition, the New York State Department of Labor and New York State Attorney General would also have been able to obtain such liens against employers who were subjected to an investigation or a court or administrative action brought by the government on behalf of an individual employee or a class of employees.

The Act would have had a tremendous impact on wage-and-hour litigation in New York State, and would have tipped the scales even further in employees' favor. The threat of placing a lien upon an employer's real and personal property would have been another weapon in the negotiation arsenal of employees and their legal counsel. The hammer of an employee rightfully or wrongfully placing a lien on a business, a business owner and even on management's property would have compelled more settlements and earlier settlements, as well as more favorable settlements for employees. In addition, it would have increased attorneys' fees for employers, who would have been forced to either use their resources to post a bond in order to remove a lien or move in court to have the lien removed.

The Reasoning Behind the Proposed Legislation

According to the bill's Sponsor Memo, the justification for the bill was to increase the likelihood that victims of wage theft would be able to secure payment of wages due and owing from their employers. Further, in too many instances exploitative employers dissipate their assets or dissolve their businesses to avoid paying wages that they owe their employees. As a result, by the time an employee has filed a lawsuit and is awarded a judgment, there are few, if any, assets to be found. In addition, it is believed that plaintiffs' attorneys, who typically work on contingency when representing employees in wage-and-hour claims, are increasingly becoming hesitant to represent employees who may be owed small amounts of monies by small employers, due to the increasing difficulty of collecting against any judgment. Thus, the legislature hoped, this bill would have increased the ability of workers to secure and collect wages for work already performed.

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Governor Cuomo's Defense of the Veto

In his veto message, Governor Cuomo stated that while he supported the legislation's intent, he objected to allowing workers or the state to put a lien on employers' property before a court or state agency had issued a judgment against them. This, the Governor felt, raised issues of lack of due process, and he was concerned that the Act would not survive judicial scrutiny of its constitutionality. The Governor did, however, state that he planned to include revamped legislation in his executive budget this year.

What Legal Counsel Should Do Now

While the veto of the Act maintains the "status quo" of wage and hour law, it is anticipated that legislation to assist employees collect unpaid wages will be passed and signed into law in the foreseeable future. In the meantime, employees and their legal counsel will continue to face difficulties collecting on judgments rendered in their favor for unpaid wages, and, of course, employers will continue to face legal actions for allegedly failing to pay proper wages. Thus, there are things that both employee-side and employer-side legal counsel can and should be doing to protect and assist their clients.

Employee-side legal counsel should aggressively take advantage of Business Corporation Law §630 and Limited Liability Company Law §609.[4-5] Under those laws, the top ten shareholders and top ten members (by value of holdings) of privately held domestic and foreign corporations and limited liability companies operating in New York are personally liable for unpaid wages in the event the corporation or limited liability company cannot pay.[6]

For employees to hold any of the top ten shareholders or members of a privately held corporation or company liable under BCL §630 or Ltd. Liab. Co. Law §609, they must (1) give written notice to the applicable shareholder(s)/member(s) that they intend to hold liable within 180 days of the termination of the services performed in New York (or, if within such time period the employees demand an inspection of the corporation's records to determine the top ten shareholders, within 60 days of being granted such inspection); (2) seek to recover the amounts owed from the corporation/limited liability company and obtain a judgment against the corporation/limited liability company that remains unsatisfied prior to commencing an action against the shareholder(s)/member(s); and (3) commence such an action within 90 days after the judgment against the corporation/limited liability company is unsatisfied.

New York State Law currently allows plaintiffs in a legal action to obtain a prejudgment attachment of a defendant's property if the plaintiffs can show that the defendant is fraudulently transferring assets in order to prevent the plaintiffs from recovering monies if they are successful at trial.[7] To be successful in obtaining such an order of attachment, applicants must show (1) a high probability of success on the merits, (2) that defendant has the intent to defraud its creditors or frustrate the enforcement of a judgment that might be rendered in plaintiffs' favor, has assigned, disposed of, encumbered or secreted property, or removed property from the state, and (3) that the amount demanded from defendant is greater than the amount of all claims known to the parties seeking attachment.[8] Employee's legal counsel should take a good hard look at this statute and ascertain whether a motion to attach property prejudgment makes sense in any particular case.

Employer's legal counsel should assist their clients in regularly performing a self-audit *before* a legal action is instituted, in order to confirm that employees are being paid in accordance with federal, state and local wage and hour laws. Employer-side attorneys should also confirm that their client's employees are not misclassified as exempt, salaried employees when they should really be paid at an hourly rate, with overtime, and that workers are not misclassified as independent contractors, when they are actually employees and should be treated as such under state and federal wage laws. Finally, employer's legal counsel should periodically confirm that their clients are utilizing the correct and legally mandated wage-and-hour forms, such as the New York State Notice and Acknowledgement of Pay Rate and Payday.[9]

The Bottom Line

The inability to collect on wage-and-hour judgments is a serious and ongoing issue for employees in New York and their legal counsel. Despite Governor Cuomo's veto of the SWEAT Act, change, in the form of legislation to assist employees collect unpaid wages, is most likely going to occur. Employers, with the assistance of their legal counsel, would do well to make sure they are in compliance with the law prior to the institution of costly and time-consuming litigation.

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1. S2844B/A486B.
2. Lien Law §§ 3 and 4.
3. UCC §9-102.
4. BCL §630.
5. LLC Law §609(c).
6. LLC Law § 609(c) was recently amended to include foreign LLCs. This amendment is effective February 10, 2020.
7. CPLR §6201(3).
8. *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs.,* 306 F.Supp.2d 482 (S.D.N.Y. 2004).
9. Labor Law §195.1.

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which permitted the A/R to reside at home.

If a client does not have any of these exempt "transferees", all is not lost. If the A/R can show that the transfer/gift was done exclusively for a purpose other than to qualify for Medicaid, the transfer would not create a period of ineligibility for Medicaid.[15]

Two Crisis Planning Scenarios

The return of all or a portion of the amount gifted voids the gift and resulting penalty period, or reduces the length of the penalty period based upon the amount returned.[16] To reduce or void the penalty period, it is essential that the assets be returned directly from the person/entity to whom the gift was made. The following example illustrates this point. An applicant transfers title of her home to a revocable trust. This is not a gift and does not affect eligibility. However, when the A/R needs nursing home care, she transfers her interest in the trust to her husband. This transfer from the A/R's trust to a spouse is not an exempt transfer, however. To effectuate a proper return of this non-exempt transfer, the husband must deed title back to the wife's trust, then from the wife's trust back to the A/R (wife), and then from the A/R directly to the husband.

When an A/R does not have any exempt transferees and cannot show that the gift was done for a purpose other than to qualify for Medicaid, there is still a way to protect approximately half of the A/R's assets, depending upon the cost of the nursing home and the A/R's income. In such a case, the A/R would transfer some portion of his/her assets, keep the amount Medicaid allows (currently $15,750) while making a loan of the balance of the assets, pursuant to the terms of a Medicaid compliant promissory note.[17] The gift would create a penalty period, but the loan would not. The loan would then be repaid to the A/R, with interest, generally for a term that coincides with the penalty period. The A/R would then have funds, plus his/her monthly income, to pay the nursing home privately for the penalty period. One requirement for this plan to succeed is that the payment must be somewhat less than the actual private monthly cost.

The law provides many options for clients in need of Medicaid planning. A thorough understanding of the complexities of Medicaid law and the make-up of the A/R's family is essential for a successful plan.

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1. NYSDOH Office of Health Ins. Programs, Gen. Info. Serv., *Medicaid Regional Rates for Calculating Transfer Penalty Periods for 2020,* GIS 20 MA/01 (2020) ("GIS 20 MA/01").
2. NYSDOH Div. of Long-Term Care, Admin. Directive, *OBRA '93 Provisions on Transfers and Trusts,* 96 ADM-8 at 8 (1996) ("96 ADM-8").
3. Soc. Serv. Law § 366(5)(e)(1)(vi).
4. 96 ADM-8 at 10.
5. Soc. Serv. Law § 362(2)(b)(2)(i); 96 ADM-8 at 13.
6. 96 ADM-8 at 10.
7. *Id*. at 13.
8. Soc. Serv. Law § 360-4.5(b)(1)(ii).
9. *See Tutino v. Perales*, 153 A.D.2d 181 (2d Dept. 1990).
10. 96 ADM-8 at 13.
11. NYSDOH Office of Medicaid Mgmt., Admin. Directive: Deficit Reduction Act of 2005-- Long-Term Care Medicaid Eligibility Changes, 06 OMM/ADM-5 at 6 (2005) ("06 OMM/ADM-5").
12. 96 ADM-8 at 22.
13. 06 ADM-5 at 7.
14. 96 ADM-8 at 22.
15. *Id*. at 23.
16. 96 ADM-8 at 23.
17. O6 OMM/ADM-5 at 7.