



**SUFFOLK ACADEMY OF LAW**  
*The Educational Arm of the Suffolk County Bar Association*  
560 Wheeler Road, Hauppauge, NY 11788  
(631) 234-5588



# **ADDRESSING MEDICAID ISSUES IN AN ARTICLE 81 PROCEEDING**

## **FACULTY**

**Moriah Adamo, Esq.**  
**Nancy Burner, Esq.**

**Program Coordinator: Tarsha C. Smith, Esq.**

**November 13, 2018**  
**Suffolk County Bar Association, New York**

**Nancy Burner, Esq.** is the founder of Burner Law Group, P.C. established in 1995. She graduated in the top 2% of her class, with distinction, from Hofstra University School of Law in 1988. Nancy holds the designation of a Certified Elder Law Attorney (CELA), awarded by the National Elder Law Foundation as accredited by the American Bar Association. Nancy is a past president of the Suffolk County Women's Bar Association and a past co-chair of the Suffolk County Elder Law Committee. For 11 consecutive years, Nancy has been named as a Super Lawyer in the field of Elder Law. Nancy frequently lectures on the legislative changes, financial implications, and governmental benefits affecting the elderly and special needs population. In 2016, Nancy was named as an "Outstanding Woman in Law" by Hofstra University School of Law Center for Children Families and the Law. Later that same year, she was named by Manhattan Magazine as a Big Apple Entrepreneur winner. Nancy continues to grow her practice with offices in New York City, Setauket, and Westhampton Beach.

*Partner*

**Moriah Adamo** is a Partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

Ms. Adamo represents nursing facilities and individuals in all aspects of securing third party benefits, including Medicaid. Ms. Adamo focuses her practice on navigating clients through complicated Medicaid Managed Care regulations through the application and appeals process. She distinguishes herself as a litigator pursuing maximization of Medicaid benefits and priority of reimbursement in the context of Article 81 Guardianship, Article 78 and estate proceedings. Additionally, Ms. Adamo counsels clients with respect to all Medicaid benefits, including advocating for increased home care hours, reversing penalty periods, and eliminating findings of excess resources.

## **ADDRESSING MEDICAID ISSUES IN AN ARTICLE 81 PROCEEDING**

**Tuesday, November 13<sup>th</sup> 2018**

**Suffolk Academy of Law**

### **HYPO #1**

Priscilla Pearson, daughter of Alicia Iris Pearson (“AIP”) comes to your office seeking advice on how to address her mother’s care. Priscilla explains that AIP has been living with her sister (AIP’s other daughter), Rebecca Reese, since her father died two years ago and the family home in Huntington was sold. Priscilla is concerned about AIP’s health and care. Recently, AIP fell and broke her hip. She stayed in the hospital for a week and was transferred to a local rehabilitation center last week. Although the social worker has advised the family that AIP can be safely discharged home to the community after the course of rehabilitation is complete, Rebecca is very concerned about this plan. She explains that in the past 18 months AIP’s cognition has really declined. AIP no longer engages in social activities with her senior citizen community and has stopped going to church, which she had done religiously for their entire lives. Priscilla had noticed a decline in AIP’s hygiene and gait. AIP is now having trouble transferring and walking without assistance. AIP has lost weight and is not able to tell Rebecca how meals are prepared for her. AIP seems generally confused and disoriented to time and place. Rebecca and her husband work full time and AIP is left at home alone for 10 hours of the day.

In addition, Priscilla is concerned because Rebecca and her husband, Robert Reese, have always lived modestly, but since AIP moved in they have gone on many vacations, bought new cars and their daughter is now attending New York University. Priscilla is suspicious that Rebecca and Robert are using AIP’s funds for their own benefit.

Priscilla thinks that AIP has a Last Will and Testament but is not aware of any advance directives. Priscilla knows that the house in Huntington, which AIP owned without encumbrance was sold for \$850,000.00. She also knows that AIP had a small retirement fund of approximately \$100,000.00 and inherited her late husband’s IRA of approximately \$300,000.00. Priscilla believes that AIP had some other modest savings but is not aware of the current financial picture of AIP. Rebecca refuses to speak to Priscilla about AIP’s finances, insisting that AIP handles everything herself.

### **HYPO #2**

Willa consults with you regarding her 50-year-old husband, Hank, who recently suffered a massive stroke and is vent dependent residing at local nursing home. Up until his stroke, Hank was working as a principle in a local school district. Hank had no advance directives.

The nursing home is pressuring Willa to submit a Medicaid application.

Willa is still working as an accountant and the couple have two minor children: Sam (12) and Denise (14). Willa’s annual salary is \$100,000.00.

The couple owns a home as tenants by the entirety in Nesconset that is valued at approximately \$500,000.00 and is encumbered by mortgage of \$200,000.00.

The couple has a joint savings account with \$50,000.00.

Hank has a retirement account worth approximately \$300,000.00.

Willa has a retirement account worth approximately \$75,000.00.

### **HYPO #3**

With your assistance, Gail has been appointed Guardian of the Property and Person for her mother, Alice. Alice, age 81, resides in her own home in Centereach. Gail has arranged for a home care agency to provide 12 hours of home care assistance per week at a rate of \$1,600.00 a week. Gail has come to you because she is concerned that Alice is going to deplete her resources.

Alice has the following resources:

Centereach home \$400,000.00 (no mortgage)

Guardianship Account: \$65,000.00

Funded Irrevocable Pre-Needs Funeral: \$10,000.00

IRA: \$150,000.00

Alice has the following income:

SS: \$1,200.00

Pension: \$450.00

Alice has a will that leaves her residuary estate in equal shares to Gail and her brother, Bob.

### **HYPO #4**

George is guardian of his father, Allen. George has lived with Allen in Allen's home in Quogue for 5 years, since his divorce. Allen continues to live in the Quogue home, but is in failing health and George has sought your advice regarding planning for long term care. George has two siblings Brad and Diane. Diane has been disabled since birth. Allen has a Will that was executed when his wife was still alive. The contingent beneficiaries are the three children in equal shares outright.

Allen's assets are as follow:

Quogue home worth 1.5 million (unencumbered)

Brokerage Account worth 800,000.00

IRA worth 550,0000.00

Savings account worth \$150,000.00

Life Insurance with a face value of \$100,000.00 and a \$500,000.00 death benefit.

## HYPO #5

Tom Jones contacts your office, his mother, Jane Jones who is 80 years old recently suffered a stroke and is currently at Whispering Pines Nursing Home. She does not have capacity to execute documents and the cost of the Nursing Home is approximately \$18,000.00 per month. It is expected that she will have to stay there long term although Tom is hopeful that someday she may recover and come home. Tom has a sister Mary Jones who is 37 years old, developmentally disabled and living in a group home. Mary relies on Medicaid is dependent on government benefits. Eight years ago, Mary transferred ownership of her home to Tom retaining a life estate, the home is worth approximately \$350,000.00. Jane has approximately \$130,000.00 cash in the bank. She receives social security and a pension totaling approximately \$3,000.00 per month. She has a last will and testament which leaves everything to Mary pursuant to a Supplemental Needs Trust. She has not engaged in any other estate planning. Tom lives in California but visits regularly. He is financially secure and wants to do what is best not only for his Mom but for his sister also. How do you advise him?

### Discussion Points:

What is Mom's likely source of payment at Nursing Home?

Medicare? Medicaid? Chronic or Community?

Can you protect assets?

What if Mom can later come home?

Do you recommend a Guardianship Proceeding?

Do you recommend both Personal Needs and Property management Guardian?

What powers are appropriate?

Who is your client?

What other issues?

## **HYPO #6**

Client Lorraine Flick has a son Eric Flick who is 24 years old and disabled since an accident at age 12. He does not have capacity to handle his personal or financial affairs. She has never applied for guardianship and has been able to make all decisions for him. However, the workshop caseworker is telling her she needs to be appointed his Guardian. He lives at home and attends the workshop run by a not-for-profit organization which paid for by Medicaid. She is a single mother, Eric's father, who was a sheet metal worker died 3 years ago at age 48.

She has gotten a call from Medicaid regarding recertification. She is confused and asks for help.

She doesn't know why Medicaid is asking her to recertify, they have never asked before. She thinks he is on SSI but she is not sure. The caseworker has advised her that he is on SSI and cannot have more than \$2,000.00 in his name. Also, he has received an inheritance from his father's estate that has recently settled in the sum of \$25,000.00. He receives \$1,467.00 per month from Social Security and she is the rep payee.

She needs help with Medicaid and Guardianship.

### **Discussion Points:**

What do you advise her?

What are his likely SS benefits?

What does he have to do to remain eligible for Medicaid in the recertification?

What other issues?

## HYPO #7

Susan Gallo comes into your office to assist with her mother's estate. Her father passed away several years ago and her mother died recently at age 90. Her mother Theresa was survived by Susan and her brothers Thomas and John. Susan is named as the Executor of the pour over will and as trustee of her mother's Revocable Trust. Susan is 60 years old, Thomas is 58, and John is 50. The trust assets include:

Residence: \$800,000.00

Brokerage Account: \$500,000.00

Checking/Savings: \$40,000.00

IRA: \$300,000 naming 3 children as beneficiaries

The Revocable Trust distributes assets to her children equally, in a general needs trusts. Each beneficiary can act as their own trustees and each beneficiary can choose their own trustee. The interested trustee can distribute all net income to themselves, they can take principal for health, education, maintenance, or support (ascertainable standard), and can appoint an independent trustee to distribute for any purpose. There are no supplemental needs provisions for a disabled beneficiary receiving benefits under a means-based government program.

Susan's brother John is disabled having recently suffered a stroke and is unable to make medical decisions or handle his finances. He is currently receiving Community Medicaid benefits and has been living in his mother's home. Susan is concerned that John will be ineligible for Medicaid when he receives his share of the trust. John had no other assets before this inheritance. He has recently been approved for Social Security Disability with his mother as representative payee.

Susan wants to know if she can get the authority to make health care decisions and handle his finances.

### Discussion Points:

What type of Guardianship and what powers?

What plan should she have to protect his Medicaid?

Can he continue receiving Social Security Disability?

What other issues?



## **HYPO # 8**

Tom and Mary Archer are married 29 years and this is both a second marriage for each. Each have children from their first marriage, no children in common. Tom has suffered a catastrophic stroke. Mary's children have taken her to an attorney to file for divorce based upon a prenuptial agreement. Mary and Tom are living together at a home they own as Tenants by the entirety of New York. They also own a condominium in Naples Florida as tenants by the entirety. The divorce papers seek to enforce the prenuptial and divide up the property. Tom has 30 days to answer. He is incapacitated and has no advance directives. His children ask for help.

### **Discussion Points:**

Who do you represent?

What do you advise?

Guardianship should she apply for and what powers?

What other issues?

## RESOURCES

- NY Decanting Statute: EPTL 10-6.6  
<https://www.lexisnexis.com/LegalNewsRoom/estate-elder/b/estate-elder-blog/posts/decanting-new-york-trusts-eptl-10-6-6-significantly-revised>
- Collected Article 81 Cases through September 2018- MHL Article 81 Unified Court System  
[www.nycourts.gov/ip/gfs/Art81CollectedCases.pdf](http://www.nycourts.gov/ip/gfs/Art81CollectedCases.pdf)
- NYS Unified Court System Part 1200 Rules of Professional Conduct  
[www.dos.ny.gov/info/nycrr.html](http://www.dos.ny.gov/info/nycrr.html)

- NYS Consolidated Laws Mental Hygiene Law Article 83  
Unified Guardianship and Protective Proceedings Jurisdictional Act
- Conflict of Interests – Current Clients:

Rule: RPC 1.7(b)(1): a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client and (b)(4) each affected client gives informed confirmed, confirmed in writing.

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1.9(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) Use confidential information of the former client protected by RPC 1.6 to the disadvantage of the former client or when the information has become generally known; or (2) Reveal confidential information of the former client protected by RPC 1.6 except as these rules would permit or require with respect to a current client.

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### **Discussion Points:**

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What do you advise?

Guardianship should she apply for and what powers?

What other issues?

## RESOURCES

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<https://www.lexisnexis.com/LegalNewsRoom/estate-elder/b/estate-elder-blog/posts/decanting-new-york-trusts-eptl-10-6-6-significantly-revised>
- Collected Article 81 Cases through September 2018- MHL Article 81 Unified Court System  
[www.nycourts.gov/ip/gfs/Art81CollectedCases.pdf](http://www.nycourts.gov/ip/gfs/Art81CollectedCases.pdf)
- NYS Unified Court System Part 1200 Rules of Professional Conduct  
[www.dos.ny.gov/info/nycrr.html](http://www.dos.ny.gov/info/nycrr.html)

- NYS Consolidated Laws Mental Hygiene Law Article 83  
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By: **Moriah Adamo, Esq.**  
**Partner**  
[madamo@abramslaw.com](mailto:madamo@abramslaw.com)  
**(516) 328-2300**

**I. Gifting in an Article 81**

**A. Precedent/Authority**

1. MHL 81.21 a Guardian may: “exercise those powers necessary and sufficient to manage the property and financial affairs of the incapacitated person; to provide for the maintenance and support of the incapacitated person, and those persons depending upon the incapacitated person; to transfer a part of the incapacitated person's assets to or for the benefit of another person on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act”
2. The Matter of Shah: Court of Appeals decision that provides a complete and well-reasoned discussion of the policy allowing for gifting the context of an Article 81 Proceeding to hold that a spouse/guardian may transfer assets to herself for the purposes of Medicaid planning, over the objection of DSS.

**B. Standard**

1. Clear and Convincing Evidence MHL 81.21(e)
2. Substituted Judgment standard: MHL 81.21 directs that the Court should consider: “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”; and “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”
  - a. Matter of Modesta: Appellate Division, Second Department affirmed denial of application where, Petitioner’s failure to demonstrate that a competent and reasonable person in the position of the IP would have transferred all assets to daughter to qualify for Medicaid.
  - b. Matter of John XX: Appellate Division, Third Department found: “..., there being little question that, barring death. John will require continued nursing home care, the cost of which will exhaust his assets, it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition.”

**II. Procedure**

**A. Special Proceeding**

1. MHL Article 81 provides substance and procedure
2. CPLR Article 4 provides procedure where Article 81 is silent  
-Must move by Order to Show Cause and Verified Petition

**B. Notice**

1. Statutory 81.21(c)
  - a. IP
  - b. Attorney for IP
  - c. Court Evaluator
  - d. Presumptive Distributees
  - e. Nominated beneficiaries under existing testamentary documents
2. Interested Parties
  - a. Department of Social Services
  - b. Attorney General's Office
  - c. Administrator of Facility

**C. Pleadings**

1. MHL 81.21(b)
  - a. No prior application
  - b. IP's Current financial obligations
  - c. IP's Anticipated financial obligations
  - d. Financial obligations to and dependents (even if not legally responsible)  
-A copy of support orders must be attached as an exhibit
  - e. Statement of the IP's Property
  - f. Proposed disposition and reasoning
  - g. Any prior statement of testamentary intent (i.e Last Will and Testament or Trust)
    - i. Petitioner should try to secure the instrument and plead how it was secured and why it is believed to be the most current statement of intent
    - ii. If unable to secure any testamentary document, plead what efforts were made to try to secure the document
    - iii. Court may direct in camera review of a copy of a testamentary instrument
  - h. Description of known patterns of gifting
  - i. Name and contact information of presumptive distributees and beneficiaries under current testamentary documents

2. Practice Tips
  - a. Describe the Plan and the Cite the Corresponding Medicaid regulations
  - b. If proposed plan deviates from testamentary intent, should counsel for the AIP be appointed?
  - c. Need for Medicaid repayment?

### **III. Diversity Considerations**

#### **A. Religion**

1. Matter of Geoffrey: Discusses use of a minor IP's funds and specifically denies payment of cost of Bat Mitzvah despite the family's orthodox beliefs and observations, because the party could have been provided by the parents that had an obligation to support the IP.
2. End of Life Decisions and Purchase of a Pre-Paid Funeral in Planning

#### **B. Cultural and Language Barriers**

1. Need for Interpreter
2. Beliefs about gifting/supporting non-legally dependent family members
3. Charitable Giving

#### **C. Disability**

1. Determining Appropriate Level of Care
  - a. Dementia: RAND corporation: Improving Dementia Long-Term Care, by Regian A. Shih, Thomas W. Concannon, Jodi L. Liu, Esther M. Freidman [https://www.rand.org/pubs/research\\_reports/RR597.html](https://www.rand.org/pubs/research_reports/RR597.html)
  - b. Use of Geriatric Care Managers
2. Representing Individuals Under Disability

# ABRAMS FENSTERMAN

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP

Attorneys at Law

By: **Moriah Adamo, Esq.**

**Partner**

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## **I. Medicaid “Pending Guardianship”**

### **A. The Law:**

“If an A/R is alleged to be incapable of managing his/her own finances and there is no one with the legal authority to make decisions concerning the A/R’s income/resources, the A/R’s income and resources, as appropriate, are considered unavailable from the time a petition to appoint a guardian is filed until the court appoints a guardian. The income and resources, as appropriate, are considered unavailable to the A/R prospectively and for a retroactive period of three months.”  
-The Medicaid Reference Guide at pg. 502 (June 2010)

### **B. Practice Tip:**

Upon receipt of the guardianship index number, DSS will approve Medicaid benefits without regard to the non-assignable income and resources of the AIP/applicant. This results in an immediate payment source for the medical providers. Upon either denial of application or commission of guardian, DSS will seek to verify eligibility while the benefits continue.

### **C. Other Considerations:**

1. **Recoupment:** DSS may seek to recoup benefits paid on behalf of an otherwise ineligible IP. However, this claim is less than the “private pay” otherwise charged by the provider and negotiable. Utilizing the “pending guardianship pick-up” strategy results in a net gain for the IP with resources.
2. **Other Factors of Eligibility:** Other factors of Medicaid eligibility (i.e. disability, residency, citizenship, legally responsible relative’s information) is not disregarded upon production of the index number. As such, the approval may not be forthcoming without documentation of these items.

## **II. Exempt Transfers of Homestead**

### **A. The Law**

#### **1. Definition of Homestead:**

“A homestead is the primary residence occupied by an A/R and/or members of his/her family in which the A/R has ownership interest. Family members include the A/R's spouse, minor children, certified blind or certified disabled children and other dependent relatives. The homestead includes the home, land and integral parts such as garages and outbuildings. The homestead may be a house, condominium, cooperative apartment or mobile home. Vacation homes, summer homes or cabins are generally not considered homesteads.” 18 NYCRR 360-1.4(f)

#### **2. Exempt Transfer:**

- a. the spouse of the individual; or
- b. a child of the individual who is blind, disabled, or under the age of 21; or
- c. a sibling of the individual who has an equity interest in such homestead and who was residing in such homestead for a period of at least one year immediately before the date the individual became an institutionalized individual; or
- d. a child of such individual who was residing in such homestead for a period of at least two years immediately before the date the individual became an institutionalized individual, and who provided care, as defined in section 311.4(a)(1) of this Title, to such individual which permitted such individual to reside at home rather than in an institution or facility; or

- 18 NYCRR §360-4.4(c)(2)(iii)(b)

### **B. Practice Tip:**

1. Sibling with Equity Interest: equity includes demonstration of payments of mortgage, upkeep of property or inheritance.
2. Caretaker Child: “care” is presumed.

### **C. Other Considerations: Testamentary Intent of the IP**

## **III. Exempt Transfer of Other Assets**

### **A. The Law**

1. to the individual's spouse or to another for the sole benefit of the individual's spouse; or
2. from the individual's spouse to another for the sole benefit of the individual's spouse; or



3. to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child; or
  4. to a trust established solely for the benefit of an individual under 65 years of age who is disabled;
- 18 NYCRR §360-4.4(c)(2)(iii)(c)

B. Practice Tip:

Sole benefit of the spouse has been interpreted to mean a trust in which the spouse is the sole lifetime beneficiary and the spouse's estate is the remainder. 96 ADM-8

C. Other Considerations: Testamentary Intent of the IP

IV. **Promissory Note Planning**

A. The Law:

"In accordance with the Deficit Reduction Act, the transfer of assets provisions in Section 1917(c) of the Act are amended to require that funds used to purchase a promissory note, loan or mortgage on or after February 8, 2006, will be treated as an uncompensated transfer of assets unless the note, loan or mortgage meets the following criteria:

- has a repayment term that is actuarially sound;
- provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- prohibits the cancellation of the balance upon the death of the A/R."

06 ADM-5

B. Practice Tips:

Institutional Medicaid planning option. A portion of countable assets are transferred without consideration, triggering a calculated penalty period. A portion of assets are loaned pursuant to a compliant promissory note, the payments under which will pay the facility during the penalty period triggered by the gift.

C. Other Considerations:

1. Testamentary intent of the IP
2. Gift to Irrevocable Trust- IP cannot have a principle interest in the trust. Protects the "gifted" portion of the funds from the recipient(s) creditors and allows for mirroring of testamentary intent

## V. Single Premium Annuity Planning

### A. The Law:

Applicable to non-qualified annuities

“effective August 1, 2006, if an A/R or the A/R’s spouse purchased an annuity on or after February 8, 2006, and the A/R is seeking Medicaid coverage for nursing facility services, the State must be named as a remainder beneficiary in the first position or the purchase of the annuity will be considered an uncompensated transfer of assets. In cases where there is a community spouse or minor or disabled child, the State must be named the remainder beneficiary in the second position. ....If the A/R or the A/R’s spouse fails or refuses to name the State as the remainder beneficiary of an annuity purchased on or after February 8, 2006, the purchase will be considered a transfer of assets for less than fair market value. In addition, if an annuity is purchased by or on behalf of an A/R, the purchase will be treated as a transfer of assets for less than fair market value unless the annuity is:

- irrevocable and non-assignable;
- is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and
- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.”

06 ADM-5

### B. Practice Tips:

Option to be used in conjunction with a pooled income trust (see below) for a community Medicaid applicant that needs to convert resources to an income stream.

### C. Other Considerations:

1. Testamentary Intent of IP
2. Sufficient expenses to absorb income stream

## VI. Undue Hardship Waiver

### A. The Law:

An undue hardship waiver may be granted to overcome the imposition of a penalty period.

“Denial of eligibility will result in an undue hardship if:

- the institutionalized individual is otherwise eligible for MA;
- the institutionalized individual is unable to obtain appropriate medical care without the provision of MA; and
- despite his or her best efforts, the institutionalized individual or the individual’s spouse is unable to have the transferred asset returned or to receive fair market value for the asset. Best efforts include cooperating, as

deemed appropriate by the commissioner of the social services district, in efforts to seek the return of the asset.”

18 NYCRR §360-4.4(c)(2)(iii)(e)

**B. Practice Tip:**

The commencement of a discovery and turnover proceeding has been deemed sufficient to satisfy the “best efforts” prong to secure an undue hardship waiver.

**C. Other Considerations:**

1. Effect of actual return of resources
2. Standard of Review

**VII. First Party Supplemental Needs Trusts**

**A. The Law:**

1. Private Trust: A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

-42 USCA §1396p(d)(4)(A)

2. Pooled Trust: a trust containing the assets of such a disabled individual established and managed by a non-profit association which maintains separate accounts for the benefit of disabled individuals, but, for purposes of investment and management of trust funds, pools the accounts, provided that accounts in the trust fund are established solely for the benefit of individuals who are disabled as such term is defined in section 1614(a)(3) of the federal social security act by such disabled individual, a parent, grandparent, legal guardian, or court of competent jurisdiction, and to the extent that amounts remaining in the individual's account are not retained by the trust upon the death of the individual, the state will receive all such remaining amounts up to the total value of all medical assistance paid on behalf of such individual. Notwithstanding any law to the contrary, a not-for-profit corporation may, in furtherance of and as an adjunct to its corporate purposes, act as trustee of a trust for persons with disabilities established pursuant to this subclause. provided that a trust company, as defined in subdivision seven of section one hundred-c of the banking law, acts as co-trustee.

New York Social Services Law §366(2)(b)(2)(iii)(B)

- B. Practice Tip: Effective May 2017 a disabled individual may now create a first party supplemental needs trust for themselves.

GIS 17 MA/008

- C. Other Considerations:
1. Pay Back Provisions
  2. Available Trustees

## V. Pooled Income Trusts

- A. The Law: Income of a Medicaid recipient of any age will not be considered available for eligibility purposes when deposited in a trust that meets the following characteristics:

- The trust is established and managed by a nonprofit association.
- A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c(a)(3) of this title)
- To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

-42 USCA§1396p(d)(4)(C)

- B. Practice Tip: Although income deposited to a pooled-trust will not be considered available for eligibility purposes, it will be counted in post eligibility budgeting for an IP permanently residing in a nursing facility. Therefore the pooled income trust is a viable option only for community Medicaid recipients.

- C. Other Considerations:
1. Utilization of income
  2. Guardian's authority to create trusts

SUPREME COURT THE STATE OF NEW YORK  
COUNTY OF NASSAU

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In the Matter of the Appointment of

**{GUARDIAN}**

As Guardian of the Property Management of

**VERIFIED PETITION**

Index No.:

**{IP},**

An Incapacitated Person  
-----X

TO THE SUPREME COURT OF THE STATE OF NEW YORK:  
COUNTY OF NASSAU:

The Verified Petition of {GUARDIAN}, Guardian for the Property Management of {IP} respectfully states and alleges:

1. {GUARDIAN}, (hereafter "Petitioner") is the Guardian for the Property Management of {IP} (hereafter "{IP}") having been appointed as such by Order of this Court, dated November 3, 2017. A copy of the Order for the Appointment of a Property Management Guardian is attached hereto and made a part hereof Exhibit "A".

2. Your Petitioner has secured and filed a Commission to Guardian with the Clerk of the Court on November 16, 2017.

3. The Order of Appointment authorized your Petitioner to marshal the assets of {IP}'s Living Trust, dated May 18, 2016 (the "Revocable Trust"). *See*, Exhibit A at pg. 9. A copy of the Living Trust Agreement of 2016 is attached hereto and made a part hereof as Exhibit "B".

4. The Revocable Trust is an *inter vivos* trust that allows {IP} unfettered access to both the principal and income of Trust *res.* *See* Exhibit B at pg. 2. As such, the entire Revocable Trust

assets and income are considered available to {IP} for Medicaid eligibility purposes. 18 N.Y.C.R.R. §360-4.5(b)(1)(ii).

5. Your Petitioner has marshalled \$20,000.00 from an account titled to the Revocable Trust. There remains approximately \$191,000.00 in the Revocable Trust account.

6. The available balance of the Revocable Trust *res* exceeds the current Medicaid resource allowance of \$15,150.00. GIS 17 MA/20.

7. Nevertheless, {IP} receives Medicaid benefits through the Nassau County Department of Social Services (“NCDSS”). From August 30, 2016 through December 25, 2017, {IP} received \$48,654.29 in Medicaid benefits. A copy of the statement of claim from NCDSS is attached hereto and made a part hereof as Exhibit “C”.

8. Since the Revocable Trust property has been available to {IP} during her entire tenure as a Medicaid recipient, NCDSS may have a claim for Medicaid benefits incorrectly paid pursuant to 18 N.Y.C.R.R. §369(2)(a)(i).

9. As such, your Petitioner requests an expansion of his authority to allow for negotiation and settlement of this possible claim.

10. Once NCDSS’s claim is satisfied, there will be an opportunity to engage in appropriate Medicaid planning on behalf of {IP}. Consistent with the authority of MHL §81.21, the Court In the Matter of Shaw, 95 NY2d 148 (2000) held that a Guardian may engage in prudent Medicaid planning.

11. Here, {IP} resides in the Assisted Living facility.

12. The private monthly cost of care at the Assisted Living is approximately \$3,500.00. In addition to this monthly fee, the IP spends approximately \$500.00 a month for miscellaneous items such as a cell phone, outings, hair, nails, and cable television. It is anticipated that these cost

will remain substantially similar. However, if the IP's medical, physical, emotional, or cognitive support needs increase, the cost of her care could expeditiously increase.

13. However, with the appropriate planning, {IP} may be eligible for the Medicaid covered Assisted Living Program, in which the Assisted Living participates. As such, Medicaid planning is in the best interest of {IP} so that her care can be covered in part by the Medicaid program.

14. The Assisted Living Program is a community Medicaid benefit and, therefore, eligibility can be established without penalty for transferring assets. *See* 18 N.Y.C.R.R. §360-4.4(c)(2)<sup>1</sup>. In other words, an individual may transfer assets sufficient to deplete their assets to the applicable \$15,500.00 resource allowance and qualify for community based Medicaid services the next month.

15. Here, your Petitioner proposes that {IP} do just that. After settling any claim of the NCDSS, payment of fees associated with the instant application and establishment of an escrow account for future fees and expenses associated with this proceeding (*see infra*), your Petitioner proposes that, consistent with the authority granted in the Order for Appointment of a Property Management Guardian, he create and fund the {IP} Irrevocable Trust (the "Irrevocable Trust"). A copy of the draft of the {IP} Irrevocable Trust is attached hereto and made a part hereof as Exhibit "D". The funds transferred to the Irrevocable Trust will be considered unavailable for Medicaid eligibility purposes and {IP} will be entitled to any income that the Irrevocable trust *res* generates. 18 N.Y.C.R.R. §360-4.5.

16. Other than the Revocable Trust, Petitioner is not aware of any pattern of gifting that

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<sup>1</sup> The Court should note that an uncompensated transfer of assets could result in a period of Medicaid ineligibility, should {IP} require skilled nursing services within the next five (5) years.

the IP has undertaken. The remainder beneficiaries suggested in the Irrevocable Trust mirror {IP}'s testamentary intent as set forth in the Revocable Trust that she established just last year. *See* Exhibit B. Unfortunately, that Revocable Trust did not achieve the current objective of preserving assets in favor of Medicaid eligibility. Accordingly, it is your Petitioner's belief that {IP} would wish to establish the Irrevocable Trust for the purposes of qualifying for Medicaid and preserving assets for the benefit of her intended beneficiaries (i.e. her sons).

17. As mentioned above in paragraph 13, your Petitioner request that the Court direct the establishment of an escrow account in the amount of \$35,000.00 to allow for the continued expenses of the of this guardianship proceeding, since the Irrevocable Trust funds may not be used for this propose. The funds in this account would not be distributed absent further order of this Court.

18. Finally, once the Irrevocable Trust is established, an application for the Assisted Living Program will need to be submitted and processed with the Department of Social Services.

19. Your Petitioner requests the authority to retain the continued services of Moriah Adamo, Esq. for that aspect of this matter as well.

20. The only parties necessary to this proceeding, or over whom the Court must have jurisdiction, are the following. None are under a disability.

<u>Name/Address</u>	<u>Interest</u>
{IP} 3400 Brush Hollow Road How, New York 11590	IP
{child} 71 Forest Avenue What, New York 11758	Son



{child 2}  
3220 Steuben Avenue  
Why, New York 10467

Son

{named beneficiary in Revocable Trust}  
31 Homestead Drive  
When, New York 11798

grand-niece

Mental Hygiene Legal Service  
320 Carleton Avenue, Suite 3200  
Where, New York 11722

Counsel for MS.GREENE

{CE}  
369 Main Street, Suite 8  
Really, New York 11730

Court Examiner

{Facility}  
3400 Brush Hollow Road  
For Real, New York 11590

Assisted Living Facility

Nassau County Department of Social Services  
60 Charles Lindbergh Drive  
Yes For Real, New York 11553

Medicaid District

21. No previous application for this relief requested herein has been made to this or any other Court.

WHEREFORE, it is respectfully requested that the Court issue an Order:

1. Expanding the powers of the Property Management Guardian to authorize the negotiation and payment of any claim for Medicaid benefits incorrectly paid on behalf of {IP};
2. Authorizing the creation and funding of the {IP} Irrevocable Trust;
3. Directing the funding of an escrow account to be held by {GUARDIAN}, in the amount of \$35,000.00, to be distributed only upon further order of this Court;

4. Authorizing {GUARDIAN} as Guardian of the Property to retain Moriah Adamo, Esq. and pay her from the funds of {IP} the sum of \${ } for services in connection with the filing and processing of a community Medicaid application on behalf of {IP}; and
5. For such other relief that the Court deems just and proper.

Dated: Lake Success, New York  
February 7, 2018

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Moriah Adamo, Esq. as counsel to  
{GUARDIAN} *Guardian for Property*  
c/o ABRAMS, FENSTERMAN,  
FENSTERMAN, EISMAN, FORMATO,  
FERRARA, WOLF & CARONE LLP  
3 Dakota Drive, Suite 300  
Lake Success, New York 11042  
(516) 328-2300

**VERIFICATION**

STATE OF NEW YORK    )  
  ) ss:  
COUNTY OF NASSAU    )

{GUARDIAN} , being duly sworn, deposes and says:

I am the Petitioner in this proceeding. I have read the annexed VERIFIED PETITION, and I know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

\_\_\_\_\_  
{GUARDIAN}

Sworn to before me this  
\_\_ day of \_\_\_\_\_ 2018

\_\_\_\_\_  
Notary Public

**CERTIFICATION**

The undersigned, MORIAH ADAMO ESQ., a Partner with the law offices of ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA WOLF & CARONE LLP, an attorney duly licensed and admitted to practice law in the State of New York, with offices located at 3 Dakota Drive, Lake Success, New York 11042-1034 does hereby certify pursuant to §130-1.1-a of the Rules of the Chief Administrator (22 NYCRR), that I have prepared the annexed Order to Show Cause and Verified Petition as Attorney for the Guardian of {IP} BENDER, an Incapacitated Person, and that the contents thereof are true to the best of my knowledge, information and belief.

Dated: \_\_\_\_\_

ABRAMS, FENSTERMAN, FENSTERMAN,  
EISMAN, FORMATO, FERRARA, WOLF &  
CARONE LLP

By: \_\_\_\_\_  
MORIAH ADAMO ESQ.