Aging Wisely: Elder and Special Needs Law Basics
What is Elder Law?

A multi-faceted practice area which has as its foundation traditional estate planning
- Advance Directives
- Health Care Proxy
- Power of Attorney
- Last Will and Testament
- Guardianship
- Trusts
- Medicaid Asset Protection Trust (MAPT)
- Special Needs/Supplemental Needs Trusts
  - First Party Supplemental Needs Trust
  - Third Party Supplemental Needs Trust

The younger “sibling” to Trusts and Estates

With a focus on issues surrounding aging, capacity and long-term care

Planning for aging, potential incapacity and long-term care
Advance Directives: Health Care Proxy and Power of Attorney ("POA")

Advance Directives have the same objectives in Elder and Special Needs Law as they do in traditional estate planning---with some important twists.

The documents will “speak” for you in the event you become incapacitated—short or long-term.

The documents not only reflect your stated wishes, as the “Principal” but also the breadth of the powers conferred on your “Agent,” the person or persons chosen to carry out these responsibilities.
• Document that provides direction and instruction to health care providers regarding Principal’s medical care

• An Agent must be at least eighteen years of age. I would not recommend a younger person as an agent unless they have demonstrated maturity that defies their chronological age.

• The Principal should inform the person they want to name as Agent of their decision prior to executing the actual document. The Agent can either accept or decline to act in that capacity.

• A listed Alternate (“back up”) Agent is ALWAYS a good idea. And the same criteria I cited above for the Agent would be applicable here. Someone must be available to step in for the Agent if they become unable to serve in that capacity.

• The Health Proxy should be for an indefinite period of time. I have rarely encountered a person who wants it to expire under a certain set of circumstances or on a specific date. How can any person know the future?

• A Principal should always discuss their wishes with the Agent during capacity. The Health Care Proxy allows an Agent to follow a Principal’s wishes as he or she “knows them to be”---i.e. they do not need to be memorialized in the document.

• However, the Principal is well within their right to elaborate on, limit or expand those powers within the document. The instructions can be brief or pages long. It is a highly personal document and the decisions that follow are personal as well.
• A Health Care Proxy also addresses routine medical care, like doctors’ visits, medications, course of treatment, hospitalizations, surgical procedures and overall health. It covers all medical decisions, including “end of life.”
• “End of life” treatment can also be explicitly addressed in the document.

• “End of life” includes, but is not limited to, mechanical respiration and ventilation as well as artificial nutrition and hydration, cardiopulmonary resuscitation (CPR), surgical procedures, blood transfusions, and even antibiotics.
• You can specify medical conditions by category and state what treatments you want or want withheld (examples of conditions are coma or an unconscious state with no chance of reversal, a terminal illness, or brain damage- like John in my hypothetical).
• The Principal can either request that all life sustaining measures be taken or that they be withheld if a meaningful recovery is medically impossible and/or if the Principal’s diagnosis would not allow them to live a full or independent life. What a quality life means to the Principal differs for every person.
The Principal must sign the document.

The Principal’s signature must be attested to by two witnesses who then also sign the document, but notarization is not required.

The witnesses have no right to read the Health Care Proxy. They are there to attest to the Principal’s state of mind as well as the voluntary nature of the document execution.

The Agent is never to be a witness.

The Health Care Proxy should be kept in a place accessible to family and emergency medical personnel; it’s location should be known to anyone who is important to you—especially your Agent. Copies should be made available to family and your physicians.

It is not a secret document.

Every person, once they reach eighteen years of age, should have a fully executed Health Care Proxy among their most personal and important documents. Your life is the most precious gift. When you are no longer able to speak for yourself, others should treat your life in accordance with your beliefs— with respect.
Like a Health Care Proxy, the "POA" (the abbreviated term utilized by attorneys) is an Advance Directive. It is a document that is only valid when the person who executed it, also referred to as a Principal, is alive and incapacitated. The person who carries out the document's intent is, again, the Agent.

A POA should have two Agents that either act separately or together.

There are many authorities that can be conferred in a POA and, often, one person cannot do it all or may not have the aptitude for certain tasks. It does make sense to allow both Agents to act separately. When agents act together, this means they must agree on a course of action. This could lead to conflict but, to be fair, so can Agents who act separately.

Rule of thumb: Think responsibly and cautiously about who you select to act as your Agents. They do not need to be your spouse, child or close family member. If they happen to be and are appropriate, then so be it.

There should also be named successor Agents in the event your original Agent(s) are unable to serve for any reason.

The criteria for incapacity are the same as defined for the Health Care Proxy. The person can no longer make decisions, because they are:

- unable to verbally, or through other means, communicate and/or;
- cannot comprehend what is being told to them;
- it is usually a neurocognitive issue, and/or;
- developmental or intellectual disability, and/or;
- at times combined with a psychiatric illness.

What powers does a Power of Attorney confer on the Principal's named Agent, the person with the authority to act on their behalf?

Few to many. Narrow to broad.

It depends on the Principal's level of comfort with ceding control as well as their expressed wishes. However, an effective Power of Attorney needs to cover a lot of bases and the one you download off the internet is not going to pass muster.

The subjects addressed in your boilerplate POA:
Claims and Litigation;
• Banking transactions;
• Bond, share and commodity transactions;
• Real Estate transactions;
• Benefits from governmental programs or civil or military service;
• Health care billing and payment;
• Tax matters;
• Estate transactions;
• Business operating transactions;
• Retirement benefits;
• Insurance transactions;
• Personal and family maintenance;
• Chattel and goods transactions; and
• “All other matters”

On its face, the above subjects appear to be comprehensive. They cover every facet of your life outside of health care and medical decisions. But do they really protect you as the Principal?

From the perspective of an experienced Elder Law or Trusts and Estates attorney, the above provides insufficient to minimal protection, in that the language is too generic and open to any interpretation---usually of the narrow kind. It is also missing other subject matters that are important to an aging population and those with special needs.

It is simply not tailored to the Principal, his/her life and future needs.
• banks and financial institution are not known for their POA “friendliness.” They will often ask their customers to complete an institutional POA, even though this is not necessary—or is it?

• If you look at a standard/template POA it simply states, “banking transactions.” What exactly does that mean? Whatever the person looking at the document determines it to be—and it will often not work in the Agent’s favor.

• I can say the same thing for every single category listed. Additionally, the “all other matters” language is akin to a catch all provision in a contract—and not a good one.

• The Statutory Gifts Rider

• Another mistake people make when it pertains to a POA? The absence of a Statutory Gifts Rider, an accompanying document that permits the Agent(s) to make gifts of money in excess of $500. The sole gifting provision in the POA only allows gifting in an amount up to and including $500. The additional gifting authority found in the Rider is vital in the area of Medicaid Planning, a future series topic.

• An experienced Elder Law attorney will further flesh out the above subjects when drafting a POA and the Statutory Gifts Rider. Furthermore, they will also include and expand the following topics; this is definitely a general and non-exhaustive list:

  • Trusts (creating, funding, modifying, termination, etc.)
  • Medicaid Planning
  • HIPPA (access to confidential medical records)
  • Beneficiary Designations (modifications, etc.)
  • Powers of Appointment
  • Statutory Elections
  • Domicile and Residence (changing the Principal’s home setting as well geographic location, etc.)
  • Estate Transactions (receipt, waivers, consents and releases, etc.)
  • Real Estate transactions (sales, leasing, transfers, etc.)
  • Employment of other professionals (to assist the Agents in handling the Principal’s affairs)
- Reimbursement issues for the Health Care Agent

- Enforcement proceedings against banks or financial institutions

- And even the naming of the Agent as a Guardian, should the question of formal guardianship arise during the period of incapacity.
There is no excuse for ANY person to not have a Last Will and Testament.

It is NOT a document reserved for the wealthy.

EVERYONE has assets; their value is relative and also quite personal. Actual value isn’t really important.

A “Will” can greatly lessen or eliminate potential family discord.

It is the only opportunity for a person to declare their wishes with respect to property and to have a Court enforce it.
Article 81 Proceeding: An Overview

- Derives its name from Article 81 of the NYS Mental Hygiene Law.
- Article 81 authorizes this particular type of proceeding.
- Its legislative intent is defined under §81.01
- It addresses the Personal and/or Property Management Needs of an Alleged Incapacitated Person
- An Alleged Incapacitated Person is commonly referred to by its initials, “AIP.”
- The powers given to the Guardian are tailored to the individual’s needs, with attention to greatest degree of independence and self-determination possible.
- It is not limited to specific age groups; it is ADULT guardianship (eighteen years of age or older).
- The standard at hearing is “clear and convincing evidence.”
- Burden of Proof is on the Petitioner.
• See generally MHL §81.02
• Evidence at hearing must show individual’s inability or limitations in management of his or her personal needs or financial affairs—”clear and convincing evidence.”
• The Court may, for good cause shown, waive rules of evidence.
• For a personal needs guardian, deficiencies in attending to Activities of Daily Living (ADL)
  – For example: toileting, bathing/showering, self care, walking/ambulating, eating, feeding oneself, etc.
• For property management guardian, individuals lack of understanding of his/her assets and their value; failure to pay bills, for example.
• Must also demonstrate that AIP is likely to suffer harm because of his/her incapacity and doesn’t understand consequences of this incapacity.
• Even if all of the elements of incapacity are met, a Guardian should only be appointed as a last resort if available resources or other alternatives will adequately protect the person

• Least Restrictive Alternative/Least Restrictive form of Intervention
Jurisdiction and Venue

• Jurisdiction for Article 81 Proceedings (MHL §81.04) in NYC: Supreme Court; in NYS: County Courts or Surrogates Court

• Venue for Article 81 Proceedings (MHL §81.05): In County where AIP lives or is physically present; if AIP in a facility then Article 81 is brought in county where facility located
Who May Commence an Article 81?

- See generally MHL §81.06
- The Alleged Incapacitated Person (AIP)
- Presumptive Distributee of AIP
- Executor or Administrator of an estate in which AIP may be a beneficiary
- A Trustee of a Trust in which AIP may be a grantor or beneficiary
- Person with whom AIP resides
- A Person Otherwise concerned with welfare of the AIP- this includes public agency like Human Resources Administration (HRA)
- CEO or subordinate/designated person of facility where AIP is residing or patient; i.e. Hospital, Nursing Home, Assisted Living Facility, etc.
How do you commence an Article 81? See generally §81.06, 81.07 and 81.08

- You file an Order to Show Cause (OTSC)- as well as a Notice of Proceeding (MHL §81.07) and
- Petition with the Court
- The Petition: MHL §81.08
  - Is verified under oath
  - Contains the name, address and telephone number of AIP
  - The name and contact information for person or persons with whom AIP resides and the same information for any other person the petitioner intends to serve- as well as the nature of the relationship.
  - A description of the AIP functional level as well as their ability to manage activities of daily living (ADL), behavior and understanding and appreciation of nature and consequences of any inability to manage ADLs.
  - If petitioner is seeking powers with respect to personal needs, need specific factual allegations as to personal actions or other actual occurrences involving the AIP which supposedly demonstrate that AIP is likely to suffer harm because they cannot appreciate and understand nature and consequences of inability to provide for personal needs;
  - If petitioner is seeking powers with respect to property management, specific allegations with regard to financial transactions or other actual occurrences involving the AIP that demonstrate that AIP is likely to suffer harm because they cannot adequately understand and appreciate the nature and consequences of his/her inability to provide for property management
- The particular powers being sought and relationship to functional level and needs of AIP
- Duration of powers being sought; i.e. finite or indefinite;
- Approximate value and description of financial resources of AIP, and whether to petitioner’s knowledge, the AIP is a public benefits recipient;
- Nature and amount of any claim, debt or obligations of the AIP to be incapacitated, to best of petitioner’s knowledge;
- If applicable, the names and contact information for AIP distributees (family members);
- The name, address and telephone number for the proposed guardian, if any, and standby guardian, and the relationship to the AIP and reasons why this person is suitable to exercise powers necessary to assist the AIP;
- Any provisional remedies pursuant to §81.23
- The sufficiency of any available resources considered by petitioner and if they are sufficient and reliable;
- Any other information petitioner feels will assist the Court Evaluator in completing investigation and report.
• Upon the actual filing of the OTSC and Petition, petitioner’s counsel awaits an adjourn (court) date from the Court. Hearing date no later than 28 days from date of filing.
• Notice- MHL §81.07
  – Once received, Petitioner’s counsel must serve on all interested parties:
    – Personal Service on AIP (no later than 14 days prior to hearing date)
    – Personal/Mail Service on Interested Parties (the same 14 days)
    – Personal Service/Mail Service on Attorneys (Email Service may be permissible if done on consent of attorney)
- Appointment of a Temporary Guardian with limited powers
  - At commencement of proceedings or prior to final appointment of guardian
  - Must show: danger in the foreseeable future
  - AIP must be given notice and opportunity to be heard
- Temporary restraining order and injunction
  - At any time during the proceedings or after the guardianship appointment
  - Court enjoins a person who is attempting to transfer or dispose of property OR
  - A person who in some other way poses a danger to the AIP or IP
Who is the Court Evaluator?

-Defined under MHL § 81.09

-Oftentimes an attorney but can also be a social worker or other professional. The Court Evaluator is the “eyes and ears” of the Judge and is, often, the only individual involved in the proceeding to personally meet the AIP—unless they have an attorney assigned to represent them.

-Interviews the AIP

-Explains to the AIP the nature and consequences of the proceedings, the powers of the guardian, the AIP legal rights including the right to an attorney and inquires as to whether the AIP consents or is capable of consenting to a guardian.

-Responsible for interviewing interested parties (i.e. family members).

-Interviews Petitioner, if applicable.

-Reviews medical/psychiatric records, if applicable.

-Interviews medical and clinical professionals who provide services to the AIP.

-Recommends whether the AIP is to be present at the hearing.
The Court Evaluator Report

• A comprehensive report that includes the following:
  • In person interview with the AIP in home, hospital or facility
  • Observations of the AIP physical appearance, mental status as well as physical surroundings
  • Review and summary of the AIP medical record, if residing at a medical facility
  • Interview with the AIP treating medical professionals and/or hospital staff*
  • In person interview with and observation of the Proposed Guardian, if one named
  • Interview with interested parties (those named in the petition, could be family and/or friends)*
  • Investigation into and report/summary of AIP financial circumstances (bank accounts, investment accounts and/or real estate holdings, etc.)
  • Opinion regarding the application for Guardianship and the capacity (or incapacity) of the AIP
  • Recommended Personal Powers of the Guardian, if applicable
  • Recommended Property Powers of the Guardian, if applicable
  • Opinion as to the AIP presence at the hearing and if not recommended, the reasons why
  • Recommendation supporting or opposing Proposed Guardian, if one named, and reasons why
  • Recommendation as to duration of the Guardian powers

* Interviews can be telephonic or via video
Can be retained by the AIP or assigned by the Court

The duties of the Attorney for the AIP

- To meet with their client
- To explain to the client the purpose of the Article 81 Proceeding (who filed it, who the proposed guardian is-if known- etc.) and what the ultimate objective of the proceeding is, i.e. What does it mean to have a Guardian?
- To ascertain, to the extent possible, the AIP understanding of his or her functional limitations, if any
- To ascertain, to the extent possible, the AIP wishes with respect to the Article 81 proceeding
- To advocate for those wishes/ defend the posture of the AIP
• (a) Any person for whom relief under this article is sought shall have the right to choose and engage legal counsel of the person's choice. In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been chosen freely and independently by the alleged incapacitated person.

• (b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court in accordance with subdivision (c) of section 81.09 of this article in determining whether counsel should be appointed.

• (c) The court shall appoint counsel in any of the following circumstances unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own choosing:
  1. the person alleged to be incapacitated requests counsel;
  2. the person alleged to be incapacitated wishes to contest the petition;
  3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined in section two thousand eight hundred one of the public health law, or other similar facility;
  4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
  5. the petition requests the appointment of a temporary guardian pursuant to section 81.23 of this article;
  6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;
• 7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.

• (d) If the person refuses the assistance of counsel, the court may, nevertheless, appoint counsel if the court is not satisfied that the person is capable of making an informed decision regarding the appointment of counsel.

• (e) The court may appoint as counsel the mental hygiene legal service in the judicial department where the residence is located.

• (f) The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent. If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated. When the person alleged to be incapacitated dies before the determination is made in the proceeding, the court may award reasonable compensation to the mental hygiene legal service or any attorney appointed pursuant to this section, payable by the petitioner or the estate of the decedent or by both in such proportions as the court may deem just.

• (g) If the court appoints counsel under this section, the court may dispense with the appointment of a court evaluator or may vacate or suspend the appointment of a previously appointed court evaluator.
– Burden of Proof is on Petitioner
– Showing “clear and convincing” evidence of incapacity for Court to appoint a Guardian. This determination is made after a hearing;
– Petitioner, if Proposed Guardian, to testify
– If petition filed by hospital or nursing home, then hospital or nursing home social worker or staff to testify
– The Court Evaluator must testify and be subject to cross examination for the report to be admitted into evidence;
– Court Evaluator Report is entered into evidence;
The AIP must be present at the hearing so the Court can obtain its own impression of AIP capacity; if person cannot physically move to attend, hearing should occur where the AIP resides UNLESS

- Person is not present in the state; or
- The information presented clearly establishes 1) AIP is completely unable to participate in the hearing or 2) no meaningful participation will result from person’s presence at the hearing.

- If hearing is conducted without the AIP and a Guardian appointment is made, the order of appointment must provide factual basis for conducting hearing without AIP.

- If hearing is conducted in presence of AIP and they are without counsel, Court shall explain to person, on the record, the purpose and possible consequences of the hearing and their right to counsel and that an attorney will be appointed if the AIP requests it.
  - Even if AIP declines counsel Court may still appoint if they are unsatisfied that AIP is capable of making an informed decision regarding an attorney

- The Court must render a written decision within seven days of the hearing, although an oral decision is made at the conclusion of the hearing.

- Petitioner’s attorney must request the “decretal” or decision portion of the hearing transcript for inclusion with the Final Order of Guardianship to be submitted to the Court, which is to be signed by the Judge
Findings after Hearing (§81.15 MHL)

- When the AIP agrees/consents to the appointment of a Guardian and that it is necessary (Voluntary)
  - That AIP agrees to appointment;
  - The Court finds that the AIP is an Incapacitated Person (also known as “IP.”)
  - IP has functional limitations which impair ability to provide for personal needs or property management;
  - Necessary to appoint guardian as means of providing for personal needs and/or property management of person;
  - Specific powers of guardian which are least restrictive form of intervention consistent with person’s functional limitations;
  - Duration/length of appointment
Findings after Hearing MHL §81.15 (cont.)

– Where the Court determines that the AIP is incapacitated and that a Guardian of Person is necessary

• IP has functional limitations which impairs their ability to provide for personal needs
• IP lack of understanding and appreciation of nature and consequences of his/her functional limitations
• Likelihood IP will suffer harm because of their functional limitations and inability to adequately understand and appreciate nature and consequences of such functional limitations;
• Necessity of appointment of guardian to prevent such harm;
• Specific powers of the Guardian which equal least restrictive form of intervention consistent with findings;
• Duration of appointment;
• Whether IP will receive a copy of the initial and annual report.
Where the Court determines that the AIP is incapacitated and that a Guardian of the Property is necessary

- Type and amount of property and financial resources of person/the IP;
- IP functional limitations which impair AIP ability with respect to property management;
- IP lack of understanding and appreciation of nature and consequences of his/her functional limitations;
- Likelihood IP will suffer harm because of their functional limitations and inability adequately understand appreciate nature and consequences of such functional limitations;
- Any other findings as listed under §81.21 for property management
- Necessity of appointment of guardian to prevent such harm
– Order of Appointment identifies all persons entitled to notice of further proceedings.
  • Judgment will be entered determining rights of parties
  • Order and Judgment must be served within ten (10) days of the order signing.
  • A copy will be personally served and explained to the IP.
Incapacitated Person (IP): is incapable of managing their personal needs and/or property management; Advanced Alzheimer’s, severe brain injury; comatose; vegetative state; deep unconsciousness; no response to stimuli; severe or untreated mental illness (disconnected)

A Person in Need of a Guardian (PING): is not incapacitated but suffers from an impairment which either makes the managing of their personal needs and/or property management challenging/hardship or if they were to manage or attempt to manage, they would be at risk of harm.
• Petition Dismissal
  – If person is not found to be incapacitated the petition is dismissed

• Protective Arrangements and Single Transactions
  – If person is found to be incapacitated, Court can authorize—without appointing a Guardian—a transaction or series of transactions necessary to achieve any security, service or care arrangement meeting the foreseeable needs of the IP
  – The Court can also authorize, direct or ratify any contract, trust, or other transaction relating to the IP property or financial affairs if Court determines transaction is necessary as a means of personal needs and/or property management of the IP.
    • Before approving, the Court must first consider interests of dependents and creditors of the IP, and in light of person’s functional level, whether person needs continuing services of a guardian.

• Special Guardian
  – Court may assign a Special Guardian to assist in the accomplishment of the above. The Guardian will report to the Court and remain Guardian until discharged by the Court.
  – Court may award compensation to Special Guardian unless Court finds that Guardian failed to discharge duties satisfactorily—then Court can reduce/deny compensation or remove the Guardian.
Appointing a Guardian

- If AIP agrees to appointment of a Guardian and the Court finds that a Guardian is necessary, the Court’s order shall be designed to be the least restrictive form of intervention with Guardian having powers limited to those which Court finds necessary to assist person providing for personal needs and/or property management.

- If Court finds the person to be an IP and Court determines a Guardian appointment is necessary, the Court’s order shall be designed to be the least restrictive form of intervention with Guardian having powers limited to those which Court finds necessary to assist person providing for personal needs and/or property management.
Counsel Fees

– IP pays fees for petitioner’s counsel, Court Evaluator, and Counsel for the AIP

– If IP is found to be low income or indigent, payment will be pursuant to Article 18b of the County Law, which assigns to counsel to indigent litigants in Criminal, Family or Surrogate’s Court

– Article 18b of the County Law also pays counsel for their legal representation at a capped and reduced rate
- MHL §81.19
- Anyone over the age of 18
  – Including but not limited to spouse, adult child, sibling or parent of the IP
  – Court may appoint a guardian from a non profit corp., social services office, public agency or a community guardian program
Duties and Powers of a Guardian

• Generally, they are set forth in §81.20
  – Exercise powers authorized in Court order only
  – Must exercise utmost care and diligence when acting on IP behalf
  – Must exhibit utmost degree of trust, loyalty, and fidelity to the IP
  – File initial and final reports
  – Must visit IP a minimum of four times per year, or more if directed by Court order

• Specifically related to Property Management
  – Preserve and protect the IP property and financial resources faithfully
  – Determine if IP has executed a Will, its location, and the people to be notified at IP death
  – Use IP property and financial resources for the IP support and maintenance and for any dependent of the IP
  – Deliver property to the proper person at death of IP
  – File the appropriate documentation in the county where the IP has property, including documentation reflecting effective date
    IP declared incapacitated
  – Perform all duties as required by Law

• Specifically related to Personal Needs
  – Guardian must afford IP greatest degree of independence and self-determination consistent with person’s functional level and
    his/her understanding of their limitations; the IP wishes, preferences and desires must also be considered.

• Specific/Enumerated Property Management Needs and Personal Needs POWERS are set forth in MHL §§81. 21 and 81.22.

• Court may assign a Temporary Guardian at any time prior to appointment of regular guardian—specifically if
danger to health and well-being of AIP or waste of their assets is demonstrated.
• Bond for Guardians- MHL §81.23
  – Generally bond is ordered when the AIP is a person of means and/or owns property
  – The purpose of the bond is to hold harmless third parties who may rely on bad acts of a Guardian
  – Amount is fixed by the Court
  – Guardian is responsible for seeking and completing process for the bond; see MHL §81.25

• Guardian’s Commission
  – Proceeding title, index number, address and telephone number of IP
  – Contact information for the Guardian
  – Date of Appointment
  – If termination date, must also include

• Guardian’s Compensation
  – Court establishes
  – Can increase or decrease the commission based on performance
  – Can also award for extraordinary services
• **Initial and Annual Reports**
  – Within ninety (90) days of the commission being issued, the guardian must file an initial report stating the steps taken to fulfill their responsibilities- as well as proof of completion of the guardianship course.
    - Property Management: complete inventory of property and financial resources; plan for property; location of a WILL; recommendation for changes to powers
    - Personal Needs: report of personal visits with IP: steps taken to provide for IP personal needs; plan for providing for IP personal needs; copy of any advance directives; any necessary changes to powers- court authorized
  – **Annual Report**
    - Any major changes to physical/mental condition or medications
    - A physician or mental health professional, nurse – visit at least 2 months prior – with report
      - Property Management: income received; money earned; expenses paid; money received from previous year
      - Personal Needs: statement of appropriateness of current residential setting; professional medical treatment; medical/dental plans for coming year; information about the IP social condition; social needs and skills and services used; number and calendar date of visits paid to IP by guardian
(a) A guardian may move in the court of his or her appointment for an order permitting him or her to render an intermediate report to the date of the filing thereof in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of section 81.31 of this article. The court may order the report to be filed with the clerk of the court on or before a fixed date.

(b) When a guardian dies or is removed, suspended, discharged pursuant to the provisions of this article, or allowed to resign, the court shall order a final report in a form prescribed by the court which shall include the same information as is required under section 81.31 of this article provided, however, that if the incapacitated person has died the report need not include information otherwise required in paragraphs five and six of subdivision (b) of section 81.31 of this article. When such a report has been made in the course of a proceeding to remove a guardian, the court may dispense with a further report.

(c) Notice of the filing of a report under this section shall be served upon the persons entitled to notice pursuant to paragraph three of subdivision (c) of section 81.16 of this article. If the incapacitated person is deceased, notice shall also be served upon his or her executor or administrator, if any.

(d) The court may appoint counsel for the incapacitated person, if living, for the protection of such person's rights and interests with regard to such report. The court may appoint a referee to hear the matter and report to the court.

(e) Upon the motion for a confirmation of the report of the referee, or if the report is made before the court, upon the court's determination, the report shall be judicially approved and filed. The compensation of the referee and of counsel shall be fixed by the court and shall be payable out of the estate of the incapacitated person unless it is determined that the incapacitated person is indigent.

(f) If the incapacitated person resides in a facility, a copy of a report under this section shall be served upon the chief executive officer in charge of that facility and upon the mental hygiene legal service of the judicial department in which the residence is located.
• **Removal of a Guardian**
  – Under MHL §81.35, a Guardian may be removed under the following conditions
    • Failure to comply with an order
    • Misconduct
    • Or for any other reason the Court deems just

• **Discharge of Modification of a Guardian’s Powers**
  – Under MHL §81.36
    • The IP has become capable of exercising some or all of the personal or property management needs powers granted to the Guardian
    • The IP has become incapable of exercising some or all of the personal or property management needs that the Guardian has NOT been granted to exercise
    • The IP has died
    • For some other reason the Guardianship is no longer required or the order requires modification due to a change in circumstances of the IP
    • Who can make the motion? The IP, Guardian, or any person who is entitled to commence a proceeding under Article 81
    • Notice and hearing requirements are listed at MHL §81.36 (c)- (e)
Things You Should Know About the Guardian (but we may run out of time, cont.)

- **Resignation or suspension of a Guardian’s Powers**
  - Under MHL §81.37
    - Court May Allow Guardian to resign or may suspend Guardian’s powers
    - For a guardian who seeks to suspend their appointment
      - If there is no named successor, the same motion shall seek the appointment of one
      - If a suspended Guardian is able to serve again, upon motion the Court may reinstate
      - If there is a reinstatement, the successor is discharged and may have to provide an accounting to the Court

- **Vacancy in Office**
  - Under MHL §81.38
    - Created by death, resignation, discharge, suspension or removal of a Guardian
    - Interim Guardian: Application made by person entitled to commence a proceeding under this Article, Court appoints interim guardian for ninety (90) day period or until final accounting and successor guardian appointed.
    - Standby Guardian: At the time of the guardianship appointment and at the Court’s discretion, it may also appoint a standby guardian
    - The Standby Guardian may act in the event the guardian dies, resigns, is removed, discharged, suspended or becomes incapacitated
    - The Court may also appoint alternative/successor alternatives to the standby guardian to act if the standby guardian dies, resigns, is removed, suspended, discharged or becomes incapacitated
    - The standby or alternate shall be empowered to act immediately, without further proceedings- until confirmation of the duties by the Court no later than 60 days after assuming these duties.
    - Before confirming the appointment, the Court may hold a hearing pursuant to §81.11 prior to confirming the standby guardian

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January 16, 2022
Article 81- noteworthy sections

- **§81.18- Foreign Guardian for Person not in State**
  - AIP not in the state and Guardian appointed pursuant to the laws of any other country where the AIP resides to assist such person in property management, the court in its discretion, may make an order appointing the foreign guardian as a guardian.

- **§81.27- Commission of Guardian- timeline for Commission and requirements of said order**

- **§81.28- Compensation of Guardian**
  - (a) Court establishes and may modify a plan for the reasonable compensation of the guardian or guardians accounting for specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian.
  - (b) If the court finds that the guardian has failed to discharge his or her duties satisfactorily in any respect, the court may deny or reduce the compensation which would otherwise be allowed.

- **§81.29- Effect of Appointment on the IP**
  - (a) IP retains all powers and rights except those powers and rights which the guardian is granted.
  - (b) Subject to subdivision (a) of this section, the appointment of a guardian shall not be conclusive evidence that the person lacks capacity for any other purpose, including the capacity to dispose of property by will.
  - (c) The title to all property of the incapacitated person shall be in such person and not in the guardian. The property shall be subject to the possession of the guardian and to the control of the court for the purposes of administration, sale or other disposition only to the extent directed by the court order appointing the guardian.
  - (d) Court may modify, amend, or revoke any previously executed appointment, power, or delegation or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.
81.43 – Proceedings to discovery property withheld

(a) To the extent that it is consistent with the authority otherwise granted by the court a guardian may commence a proceeding in the court which appointed the guardian to discover property withheld. The petition shall contain knowledge, or information and belief of any facts tending to show that any interest in real property or money or other personal property, or the proceeds or value thereof, which should be delivered and paid to the guardian, is in the possession, under the control, or within the knowledge or information of respondent who withholds the same from the guardian, whether such possession or control was obtained before or after the appointment of the guardian, or that the respondent refuses to disclose knowledge or information which such person may have concerning the same or which will aid the guardian in making discovery of such property...
Uniform Guardian and Protective Proceedings Jurisdiction Act

Became effective in New York on April 21, 2014 as Article 83 of the Mental Hygiene Law

Enacted to address jurisdiction and other issues involved in guardianship matters where multiple states are involved

Multi-state guardianship issues are becoming increasingly common
  – i.e. New York/Florida
  – Out of State medical providers
  – Going in and out of NYS
  – “Granny snatching”

There is no “full faith and credit” for guardianship and protective proceedings under our Constitution

Therefore, one state’s orders under a guardianship proceedings need not be recognized in another state

The Act does not change an individual state’s laws.
Article 83: The Three Objectives of the UGPPJA

– To identify one state to adjudicate all guardianship matters;

– To establish a system of transferring a guardianship matter from one state to another; and

– To establish a system to recognize and enforce one state’s guardianship order in another.
Home State and Significant Connection State

• Home State MHL
  – Where the AIP is physically present, even with a temporary absence, for at least the past consecutive six months immediately prior to the commencement of the guardianship proceeding;

• Significant Connection State MHL §83.13
  – A State, other than the AIP home state, where the AIP has a significant presence, other than a mere physical presence, and where there is substantial evidence regarding the AIP
    • 83.13 lists the factors the Court should consider to determine “significant connection”
      – Location of the AIP family and others entitled to notice
      – Length of time AIP was in the State and the length of time of any absences
      – Location of the AIP property
      – Extent to which the AIP has ties to the State, for example: voting registration, filing of local or state tax returns, vehicle registration, driver license, social relationships, and receipt of services.
Article 83: Jurisdiction

- Jurisdiction §83.17
  - Person is a resident of NY or is “present” in the state.
- The criteria to determine jurisdiction
  - Home State
  - Significant connection State and
    - Person does not have a home state or Home state declines to exercise jurisdiction because New York is more appropriate; or
    - There is no petition for appointment or order pending in the person’s home state and before the Court makes the appointment or issues the order
      - A petition for appointment or order is not filed the AIP home state
      - An objection is not filed by a person in AIP home state who is entitled to notice AND
      - The Court concludes that it is the appropriate forum under 83.23
    - New York does not have jurisdiction under home state or a significant connection but the home state or another significant connection State decline jurisdiction because New York is the more appropriate forum;
    - Requirements for special jurisdiction are met under §83.19
- Special Jurisdiction- see generally Article §83.19
• Transfer of Guardianship
  – Article §83.31- transferring to another state from New York
  – Article §83.33- transferring from another state to New York

• Registration and Recognition of Orders from Another State
  – Article §83.35
  – Article §83.37
**Surrogate’s Court Procedure Act 17-A**

<table>
<thead>
<tr>
<th>Proceeding</th>
<th>SCPA 17-A</th>
<th>Article 81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>Surrogate’s Court</td>
<td>County Supreme Court</td>
</tr>
<tr>
<td>Year Enacted</td>
<td>1969</td>
<td>1992</td>
</tr>
<tr>
<td>For Whom Enacted</td>
<td>Intellectual/developmental disabilities. Extended to TBI in 1989</td>
<td>Not limited to people with ID/DD; TBI, EX:DEMENTIA; STROKE, PSYCH DX INCAPACITY/Functional limitations</td>
</tr>
<tr>
<td>Onset of the disability</td>
<td>Before the age of 22</td>
<td>N/A; person needs to be a minimum of 18 years old at time of petition filing</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Proceeding</th>
<th>SCPA 17-A</th>
<th>Article 81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who Can Petition</td>
<td>Parent, “an interested party,” The ID/DD if they are at least eighteen years old;</td>
<td>Parent, Relative, Friend, “an interested party;” or an Institution/Gov Agency; the Alleged Incapacitated Person (AIP)</td>
</tr>
</tbody>
</table>
| Petition Requirement | • ID/DD must be permanent or of indefinite nature  
• Medical Certifications: 2 MDs or 1 MD and 1 Psychologist  
• Person has an ID/DD  
• Incapable of managing affairs due to ID/DD | • A description of the AIP fx level; ability to manage activities of daily living (ADL), behavior/understanding/appreciation of nature/appreciation of nature and consequences of inability to manage ADLs./appreciate nature and consequences of inability to provide for property management |

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<table>
<thead>
<tr>
<th>Petition Requirement</th>
<th>SCPA 17-A</th>
<th>Article 81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing?</td>
<td>Full hearing can be waived both parents consent to guardianship; otherwise hearing shall be held; MUST be held if neither parent or sole surviving parent does not consent. ATTENDANCE OF ID/DD: MD can certify whether person physically unable to be present OR not in best interest.</td>
<td>If AIP consents, then no full hearing. If AIP does not consent or if unable to consent, full hearing held. ATTENDANCE OF AIP Can person meaningfully participate in the hearing?</td>
</tr>
<tr>
<td>Counsel</td>
<td>Guardian Ad Litem OR Guardian Ad Litem/MHLS AND counsel/attorney</td>
<td>Counsel for the AIP</td>
</tr>
<tr>
<td>Standard at Hearing</td>
<td>No specific standard: <strong>that guardianship be in the “best interests”</strong> of the ID/DD; no finding made based on ID/DD Least Restrictive Alternative - Supported Decision Making - Family/Comm/Residential Community support - Health Proxy/POA</td>
<td>“Clear and Convincing” that guardianship is least restrict alternative to meet IP needs AIP inability or incapacity to manage personal needs and property management; Personal: Deficiencies in ADLs Property: lack of understanding of their assets and their value; AIP likely to suffer harm Least Restrictive Alternative</td>
</tr>
<tr>
<td>Powers of Guardian</td>
<td>Person and Property</td>
<td>Person and Property</td>
</tr>
</tbody>
</table>

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Long Term Care Medicaid: Let’s Talk About Medicare

- **MEDICARE**
  - Medicaid is NOT Medicare but to understand the former we must discuss the latter.
  - Medicare is a federal (government) health insurance program for Americans aged 65 and older.
    - As we work during our adult lives, we pay money to the government (in the form of taxes) into Medicare so that when the time comes it is (hopefully) available to us.
- **The FOUR parts to Medicare**
  - Part “A” is HOSPITAL COVERAGE: inpatient hospital care, rehabilitative inpatient at a nursing home, and hospice care and home health services.
  - Part “B” is MEDICAL COVERAGE: doctor visits, diagnostic exams, lab services, physical and occupational therapy, outpatient and preventive care, home health care.
  - Part “C” is a hybrid of Part “A” and “B” called MEDICARE ADVANTAGE. There are different types of Medicare Advantage plans.
  - Part “D” is PRESCRIPTION DRUG COVERAGE
Long Term Care Medicaid: Medicare continued

- An older person can have Medicare as their sole insurance; however, Medicare works with other insurance types. Each insurance is called a “payor.”

- Sometimes, Medicare is considered the primary payor or insurance, but it is also possible for the other insurance to be primary instead.

- How does that work?

- Primary insurance pays up to the limit of its coverage.
- Secondary insurance pays what primary insurance did not cover (if anything).
- The secondary payor may not pay all the uninsured costs.
- If your employer insurance is the secondary insurance, a person may need to enroll in Medicare Part B.
- If your primary insurance does not pay the medical bill within a certain number of days (about 120), the secondary insurance will pay and seeking reimbursement from primary payor.
Long Term Care Medicaid (con’t): Medicare continued

- Medicare does not pay for long term care, except under these very limited circumstances:

- It will pay for a short term stay at a skilled nursing facility following a hospitalization if:

  - Admitted inpatient to a hospital for at least three days
  - Admitted to a Medicare-certified nursing facility within 30 days of that inpatient hospital stay
  - Require skilled care, such as skilled nursing services, physical therapy, or other types of therapy.
  - If meet this criteria Medicare will pay once hundred percent of cost up to the first twenty days
  - From day twenty-one to one hundred the patient is responsible for a daily co-pay of approximately $170.50 and Medicare pays the balance
  - After day 100, Medicare will not pay any portion of the care.
Long Term Care Medicaid: Medicare continued

• To treat a medical condition:
• Medicare pays for the following services when a physician prescribes them as “medically necessary” to treat an illness or injury:
• Part-time or intermittent skilled nursing care
• Physical therapy, occupational therapy, and speech-language pathology provided by a Medicare-certified home health agency
• Medical social services to help cope with the social, psychological, cultural, and medical issues that result from an illness.
• Medical supplies and durable medical equipment such as wheelchairs, hospital beds, oxygen, and walkers. For durable medical equipment, Medicare pays 80 percent of approved amount and patient pays 20 percent.
• There is no limit on how long a person can receive any of these services
• Services must remain medically necessary and
• A doctor reorders them every 60 days.
• There also is no requirement for condition to improve, or for improvement to be expected.
• To prevent further decline due to medical conditions
Long Term Care Medicaid: Medicare (con’t)

- In some cases, Medicare also covers ongoing long-term care services to prevent further decline for people with medical conditions that may not improve. This can include conditions like stroke, Parkinson’s disease, ALS (Amyotrophic Lateral Sclerosis), Multiple Sclerosis, or Alzheimer’s/dementia.
- Hospice care
- Medicare covers hospice care if:
  - a person has a terminal illness,
  - are no longer seeking a cure,
  - are not expected to live more than six months.

- With hospice care Medicare covers:
  - drugs to control symptoms of the illness and pain relief,
  - medical and support services from a Medicare-approved hospice provider,
  - limited respite care, and
  - other services that Medicare does not otherwise cover, such as grief counseling.

- Hospice care is available:
  - In the home
  - In a nursing home
  - In a hospice care facility.

- Medicare also pays for some short-term hospital stays and inpatient care for caregiver respite
Long Term Medicaid: The Basics

- **MEDICAID**

- Joint federal and state program that assists people with low income and assets in paying for their medical care.
- Babies, children, children with complex medical needs, and older people are the most vulnerable in our population and are beneficiaries of the Medicaid program.
- There are negative connotations associated with Medicaid, especially because it is considered a “poor person’s” health insurance.
- And many believe that the health care provided under Medicaid is subpar, compared to those who are either provided group health insurance or who self-pay for their private coverage.

We did not create our health care system and yes, it could be infinitely better. And, again, while we cannot change our health care system (yet) we need to work with what we have and be grateful that this option exists.

- Medicaid, in addition to providing health insurance to expectant and new mothers, babies and children, is the largest payor of long-term care services in our country.
Long Term Care Medicaid: The Basics (con’t)

- LONG-TERM CARE MEDICAID
  - Medicaid also covers long term care services like:
    - Nursing Home
    - Community or Home Care
    - Personal Care Services
    - Case Management
    - Assistance with laundry and cleaning
  - Managed Long Term Care (MLTC) in New York
    - Provides long term care services to chronically ill or disabled persons who wish to remain in their homes or in the community
    - If you are a “dual eligible,” eligible for Medicare and Medicaid, over the age of 65 and requiring long term care in excess of 120 days
    - Are a resident of the five boroughs of New York City, Long Island (Nassau and Suffolk counties) and Westchester County
    - Enrollment in an MLTC is mandatory
    - Enrollment is voluntarily if:
      - You are dual eligible, between the ages of 18-21, require community-based care for more than 120 days and are eligible for nursing home care
      - Are not dual eligible, over the age of 18 and are nursing home care eligible.
Community Medicaid: Lookback Period

• Prior to April 2020, there was no “lookback” period for MLTC Medicaid Home Care.
• This meant an applicant could transfers assets without incurring a penalty period— if their immediate need was home care only.
• The effective date for this change has been pushed back multiple times due, in part, to the Covid-19 pandemic. But, for now, the effective date is possibly April 1, 2022 but even as far as July 1, 2022.
• If there is a non-exempt transfer of an asset, the applicant can be disqualified from receiving services from months to years, depending the dollar amount of the transfer.
Community Medicaid (2022)

- Income and Resources
  - The maximum income level for a single person applying for long term care Community Medicaid is $934, with a $20 disregard, equaling $954 per month.
  - If a couple is applying for long term care Community Medicaid, the income limit is $1367. There is only ONE $20 disregard, so the maximum is $1387.
  - In terms of resources, a single applicant cannot have more than $16,800, while a married couple both applying is capped at $24,600.
  - I know many older people who would be ineligible based on income for long term care Medicaid based upon the above. However, there are possible ways to ameliorate this. I will look at two options:
# Community Medicaid (2022)

- **Home Care Medicaid Income and Asset Requirements**

<table>
<thead>
<tr>
<th>Home Care</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant Resource Allowance</td>
<td>$16,800.00</td>
</tr>
<tr>
<td>Community Spouse Resource Allowance</td>
<td>$24,600 minimum</td>
</tr>
<tr>
<td>Applicant Income Allowance</td>
<td>$934.00</td>
</tr>
<tr>
<td>Community Spouse Income Allowance</td>
<td>$1367.00</td>
</tr>
<tr>
<td>HOME EQUITY LIMIT</td>
<td>Under $995,000</td>
</tr>
</tbody>
</table>
The “Spend Down”

This is a way to qualify for Medicaid when you have a slight excess in income. The person will “spend down” excess income to pay medical bills. Once they’ve paid up to the amount of excess income, Medicaid will provide coverage.

They need to meet or exceed this income overage every month.

For example:

Applicant A has $1500 in monthly income. For Medicaid purposes the max is $934. Applicant will need to incur $566 in medical expenses every month

Pooled Income Trust

This is one of the most popular ways to spend down excess income. And it is only available for those living in the community, not a nursing home.

The applicant places their excess income in a Pooled Trust, where each beneficiary has their own account. The administrators of the Trust use this income to pay the beneficiary’s bills- medical, housing and support, etc. The beneficiary relinquishes control of this excess income thereby becoming Medicaid eligible.

At death, any balance remains with the Trust; Medicaid cannot recover from these funds.

If you own a home

It is a Medicaid exempt asset under Community Medicaid…you are living there.
• Home Care Services

• New York City offers a few long-term care options. All applicants must be Medicaid eligible; other requirements differ:

1. Personal Care (Medicaid-Funded Home Care): Offering a home attendant and housekeeping services for individuals having difficulty with at least one or more activities of daily life (ADLs). Individuals must be Medicaid eligible and otherwise exempt from Managed Long-Term Care (MLTC) or Managed Care.

2. Managed Long-Term Care Program: is a program that (attempts to) streamline the delivery of long-term care services, like case management, nursing, home health aides, home attendant services, physical therapists for dual eligible (Medicare and Medicaid) and Medicaid eligible people--- and who are medically eligible for long term care services.
• Enrollment in a MLTC plan is mandatory for those who:

• Are dual eligible (eligible for both Medicaid and Medicare) and over 21 years of age and need community based long–term care services for more than 120 days.

• NYC, Nassau/Suffolk (Long Island) or Westchester county residents

• Enrollment in MLTC plan is voluntary for those who:

• For dual eligible young people between the ages of 18 and 21
• Non-dual eligible people over 18 years of age and assessed as nursing home eligible
• A brief pause to distinguish a home attendant from a home health aide- the level of care they provide and their training:
Community Medicaid (con’t)

- Home Attendant: mostly personal care — such as bathing, grooming, and dressing. The medical care that personal aides provide is usually limited to such things as medication reminders, dental care, and assistance with toileting and incontinence.

- Home Health Aide: Home health aides have more specialized training than a Home Attendant. Usually a home health aide is a certified nursing assistant (CNA). They often work for certified nursing or hospice agencies that receive government funding and therefore must comply with regulations regarding documentation, medical supervision, and paperwork.

- Usually a doctor orders home health aide and it is covered by insurance.

- New York now has “Advanced Home Health Aides” (AHHA) as of May 28, 2018. This is brand new.

- Advanced tasks that an AHHA may perform, under the new amendments include:
  - the administration of routine and prefilled medication
  - injection of low molecular weight heparin or medication prescribed to treat diabetes
  - prefilled autoinjector of naloxone or epinephrine in an emergency.

- AHHAs cannot
Community Medicaid (con’t)

• convert or calculate the dose of any medication or determine a client’s need for medication
• medication administration through enteral feeding (gastrointestinal) tube
• medication administration parenterally (other than mouth or anus) except as provided in the regulations; and certain other tasks

3. Assisted Living Program: Long term residential care (difficult to access); to be distinguished from an Assisted Living Facility. These are very competitive and there is sparse availability.

4. Long Term Home Health Care Program: Plan of medical, nursing and rehabilitative care provided at home to persons medically eligible for placement in a nursing home. These individuals must have care costs which are less than the nursing home cost in the local county.

• The Actual Home Care Assessment

• In New York, the home care assessment is conducted by one company named Maximus. They have no connection to any providers.

• The assessment looks at multiple factors
Community Medicaid (con’t)

- Generally, the assessment is weighing three factors:

1. Is the home environment appropriate for person’s needs?
   - a. Current living arrangement
   - b. Home composition
   - c. Connections to the community
   - d. Community Support
   - e. Safety and Accessibility

2. What is person’s functional ability?
   - a. Patient traits
   - b. Self-directed/independent
Community Medicaid (con’t)

• c. Can make appropriate decisions
• d. Memory intact
• e. Can participate in decision-making
• f. Understands diagnosis
• g. Patient wants to remain home

3. What services are necessary to maintain the person at home?

• a. Nursing
• b. Home Health Aide
• c. Occupational Therapy
• d. Physical Therapy
• e. Speech Pathology
• f. Personal Care
  i. As well as hours and days for each (a) - (f)
• g. Any necessary equipment
### Nursing Home Medicaid Income and Asset Requirements

<table>
<thead>
<tr>
<th>Institutional/Nursing Home Care</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant Resource Allowance</td>
<td>$16,800.00</td>
</tr>
<tr>
<td>Community Spouse Resource Allowance</td>
<td>$137,400.00 maximum</td>
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</table>

<table>
<thead>
<tr>
<th>Income Allowance</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant Income Allowance</td>
<td>$50</td>
</tr>
<tr>
<td>Community Spouse Income Allowance</td>
<td>$3435.00</td>
</tr>
</tbody>
</table>

| HOME EQUITY LIMIT | Under $995,000 |
Nursing Home Medicaid (con’t)

• Applicant/family cannot utilize a Pooled Income Trust. If a pooled Trust was previously established, it is to be terminated

• But the most significant and important difference for nursing home Medicaid purposes is the “Five Year Lookback” period and the assessment of a Penalty Period

• The Lookback period is an examination of five years worth of banking, financial and real estate transactions for the applicant

• Part of this examination is self-reported by the applicant by providing FIVE years worth of paper financial records.

• The local Medicaid office also investigates an applicant’s assets independently
Nursing Home Medicaid (con’t)

- What is Medicaid looking for in these five years of transactions?
- **Non exempt** transfers of assets to other people
- First, what is an EXEMPT transfer?
  - Transfer of a primary residence to a spouse is ALWAYS exempt
  - Outright transfers or establishment of a Special Needs Trust to a disabled minor child
  - Transfer of primary residence to an adult caretaker child who resides in the home with the applicant at least two years prior to nursing home admission/application
  - Transfers to a sibling who has ownership or equity in a home AND has resided there for at least one year
- A primary residence is exempt if transferred to any of the above four classes of people – BUT should be placed in a Medicaid Asset Protection Trust whenever possible.
- One personal automobile is exempt
- Home furnishings
- Home improvements to primary residence is exempt
- Burial/funeral planning is exempt
- Paying off debts is exempt
- **Additional** properties are not Medicaid exempt
Nursing Home Medicaid (con’t)

- Nursing home rates in NYC:
- Anywhere from $10,000 to $16,000 per month
- Options to pay:
  - Self pay or family
  - Long Term Care Insurance (either covers all or is a buffer)
  - Long Term Care Medicaid
<table>
<thead>
<tr>
<th>Region Description</th>
<th>Penalty Period</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Long Island (Nassau/Suffolk)</td>
<td></td>
<td>$14,102</td>
</tr>
<tr>
<td>New York City (5 Boroughs)</td>
<td></td>
<td>$13,415</td>
</tr>
<tr>
<td>Central (Syracuse, Broome, Cayuga, Oswego, etc.)</td>
<td></td>
<td>$11,328</td>
</tr>
<tr>
<td>Northeastern (Albany, Rensselaer, Saratoga, Schenectady, etc)</td>
<td></td>
<td>$12,560</td>
</tr>
<tr>
<td>Northern Metropolitan (Westchester, Dutchess, Orange, Rockland, etc.)</td>
<td></td>
<td>$13,399</td>
</tr>
<tr>
<td>Rochester (Monroe, Ontario, Seneca, etc.)</td>
<td></td>
<td>$13,376</td>
</tr>
<tr>
<td>Western (Buffalo, Erie, Niagra, Genesee, etc.)</td>
<td></td>
<td>$11,884</td>
</tr>
</tbody>
</table>
Nursing Home Medicaid (con’t)

- If a non-exempt transfer is discovered, then a penalty period will be imposed
- Example 1:
  - On Jan. 1, 2014 you transferred the deed/title of your primary residence to your adult daughter (who lived separate and apart with her family)
    - On January 1, 2018, you suffered a massive stroke and can no longer be cared for at home.
    - The transfer of primary residence was a non exempt transfer within the five year lookback period.
- Penalty Period is assessed as follows:
  Amount of the non exempt transfer divided by the nursing home rate in your NYS county. The total is the number of months/years you will be ineligible for Nursing Home Medicaid.
Nursing Home Medicaid (con’t)

• In the hypothetical, the applicant lives in Westchester County. The average cost of nursing home care is $13,399.00 (for transfer penalty purposes)
  – At the time of the transfer the home was worth $400,000
  – $400,000/$13,399.00=29.85 (30) months or 2.5 years of penalty period
  – Applicant is ineligible for nursing home care for 2.5 years from the date they became Medicaid eligible

• Example 2:
In the year 2015 and 2016, you gifted your granddaughter a total of $100,000
In 2017, you had a stroke and need to be admitted to a nursing home
The $100,000 is a non-exempt transfer
The penalty period will be calculated to equal 7.5 months

• Example 3: Same as Example 1 except the second date is January 1, 2021. The transfer, even though done for no consideration is NOT subject to the penalty period— it has exceeded the five year look back
Nursing Home Medicaid: Medicaid Asset Protection Trust (MAPT)

- It is an Irrevocable Trust
- It is established by the Grantor(s)
- Typically an adult child or children are named Trustees
- Trustees manage the assets for the Beneficiaries
- Grantor has exclusive use and enjoyment of primary residence, if placed in Trust
- Grantor has right to income from any Trust assets
- Once Trust established, some do’s and don’ts

- Do
  - Do make all transfers to your trust in a timely manner
  - Do use trust assets for repairs or improvements to the home or other property in the trust
  - Do use trust assets for payment of real estate taxes and homeowners insurance
  - Do take dividends and income on trust assets on at least a quarterly basis

- Don’t
  - Don’t use trust assets to pay telephone or utility bills
  - Don’t use trust assets to pay personal expenses
  - Don’t use trust assets to purchase an automobile
  - Don’t take principal or capital gains from trust assets
  - Don’t transfer IRA’s or 401(k)’s to the trust
  - Don’t allow beneficiaries to return to the trust or the Grantor any gifts made from trust assets
  - Don’t make additional transfers to the trust without advising an attorney

THE TRUST ALONE DOES NOT PROTECT THE ASSET(S). IT MUST STILL SURVIVE THE FIVE YEAR LOOKBACK
Special Needs Planning

- **TRUSTS**
  - WHAT IS IT? A legal arrangement wherein one party has the legal ownership of money or property, but must hold it or spend it for benefit of some other party.
    - estate planning
    - to avoid probate
    - creditor protection
    - supplementing public benefits

WHO CONTROLS IT? Trustee: parent, grandparent, sibling, a trust company.
  - Looks at best interests of the Beneficiary (the SN individual)
  - Trustee spends money on beneficiary behalf
  - Trustee cannot give beneficiary cash
  - Expenditures must be for primary benefit of beneficiary
  - No gifts to others
  - Can’t pay expenses for others
  - CAN reimburse someone else for paying beneficiary’s expenses.
  - Trustee must make “third party” payments
  - Transfer into trust is “irrevocable” – spent or remain or withdrawal
Special Needs Planning (con’t)

- Special Needs Trusts
  - Self-settled trust/(d)(4)(a) – 42 U.S.C.A. 1396p (d)(4)(a) if the SN individual has funds of their own - they can be used for their benefit and to preserve SSI and Medicaid and other benefits.
  - One beneficiary
  - Trustee can be almost anyone
  - Beneficiary must be under 65 years of age when funded
  - Can be established by SN person or family
  - Malpractice and Personal Injury Settlement
    - Medicaid Lien—this occurs prior to the funding of the trust- Medicaid is seeking to recoup expenses made on behalf of individual.
  - Payback provision at end of person’s life for Medicaid purposes- any balance is to be paid to state Medicaid office in amount not in excess of what Medicaid expended.

- Some Details
  - Supplemental Needs Trust (Third Party SNT)
    - Will not affect beneficiary’s Medicaid eligibility because their money is not being utilized to fund the trust.
    - However the trust language used can/should be similar to that used for a Special Needs Trust.
  - There is no Medicaid payback provision
  - The settlor/grantor determines the disposition of the balance of the trust at the beneficiary’s death - there are no restrictions.
  - An alternative is a “Pooled Trust” established through a charity (more on this below).
  - Sole Benefit Trust- grantor establishes for benefit of SN child; remainder of trust at death of grantor to estate of beneficiary.
Special Needs Planning

- In terms of Medicaid recovery; likely for any benefits over age of 55 (Medicaid liens go back a max of 10 years).
  - Inter Vivos Irrevocable SNT – giving up control of assets in the trust; fund it with a nominal amount and fund it again at a later date- perhaps under a will.
  - Testametary SNT – if married couple, funded at death of second spouse
  - Inter Vivos Revocable with SNT provision

- **Special Needs Trust**
  - Purpose of the SNT is to supplement NOT duplicate or replace Medicaid benefits
  - Trustee is person who administers the trust
  - Specific prohibition to not pay for what Medicaid or another means tested program would pay for otherwise. e.g. a television set.
  - Trust language or “qualifying language” is found in “statutory law” and should be used-otherwise it is not a Special Needs Trust and Trust will need to be pay medical expenses-be exhausted- before Medicaid will cover.
  - Distributions: are to never be made directly to the SN individual; payments to individual are considered income and could affect Medicaid eligibility.
Special Needs Planning (con’t)

- **Pooled Trust/ (d)(4)(c)**
  - **SECOND type of self settled trust**
  - Assets of a disabled individual are held in one trust and each person has their own account
  - Trust is administered by a non profit
  - Disabled
  - Beneficiary can be of any age
  - Funded by disabled individual, or parents, grandparents, legal guardian
  - Can be funded by Agent under a POA also
  - Language in Pooled Trust must be similar to that of a Special Needs Trust
  - Payback provision, like other mentioned trusts, balance left up and until amount Medicaid expended on behalf of individual - is to be paid back to the state; HOWEVER, if the individual elects to leave the balance of the trust in the trust (for the benefit of others) after death, there is no payback provision.
  - Family has no control over trust administration, etc.
  - People may prefer if concern about family availability to administer an SNT or concern about administering an SNT in general.

- **Disabled Person can now establish their own First Party Trust**
  - **Special Needs Trust Fairness Act- 2016**
  The Special Needs Trust Fairness Act inserts language into the Social Security Act to give individuals with special needs the same right to create a trust as a parent, grandparent, guardian, or court. If competent to do so, they can now create a trust on their own behalf using their own assets. (This change in the law does not affect people with disabilities who do not have capacity to set up a trust.)
Special Needs Planning (con’t)

- **Post Script on ABLE (Achieving a Better Life Experience) ACT**
- Expenses including medical and dental care, education, community based supports, employment training, assistive technology, housing, and transportation.
- The ABLE Act provides individuals with disabilities the same types of flexible savings tools that all other Americans have through college savings accounts, health savings accounts, and individual retirement accounts.
- The legislation also contains Medicaid fraud protection against abuse and a Medicaid pay-back provision when the beneficiary passes away. It will eliminate barriers to work and saving by preventing dollars saved through ABLE accounts from counting against an individual’s eligibility for any federal benefits program.
- Onset of disability before age of 26; can establish account after age of 26
- If receive SSI, automatically eligible for ABLE ACT.
- If not SSI/DI recipient may still qualify if meet certain functional limitations
- Max contribution is $15,000.
- Account can hold max of $100,000 without jeopardizing SSI (normal resource limit is $2000).
- If account exceeds $100,000 ineligible/suspended for SSI but not Medicaid.
- What are some types of permissible expenses:
  - Education, housing, transportation, employment, training and support, assistive technology, personal support services, health care expenses, financial management and administrative services.
THANK YOU FOR LISTENING!