The New York–Florida Connection: Key Developments and Differences in the States' Long-Term Care Planning Environment

By Howard S. Krooks

INTRODUCTION

The New York–Florida connection has always been strong, and in the last 18 months it has grown even stronger as many people have considered, and reconsidered, their living arrangements in the face of a global pandemic. It is estimated that approximately 900 people every day are making Florida their new home, according to the state's chief financial officer, Jimmy Patronis.[1] According to the state's Office of Economic and Demographic Research, an estimated 329,717 new residents relocated to Florida between April 2020 and April 2021. The website move.org reported that Florida was the No. 1 destination for Americans who relocated during 2020. The migration is comprised not only of people, but entire businesses as well. Several reasons for this include a strong desire to leave high-income-tax states, such as New York (and other states), no personal income tax in Florida, the warmer climate, and the proliferation of remote working capabilities due to a global pandemic.

This influx into the Sunshine State means that we will see even more interaction in the lives and professions of people who have connections between these two great states. For us elder law attorneys, and for me, personally and professionally, having practiced the last 16 years as an elder law attorney in both states, we will be asked in ever-increasing numbers about the differences in accessing care, planning to receive that care, eligibility for benefits to pay for that care, quality of care, and a wide range of other issues that our clients face in determining whether to reside in New York or Florida. In this article, I examine some recent developments and core differences between the two states from an elder law perspective.

THE PENALTY PERIOD—DO THE "TRANSFER OF ASSETS" RULES APPLY TO HOME CARE BENEFITS?

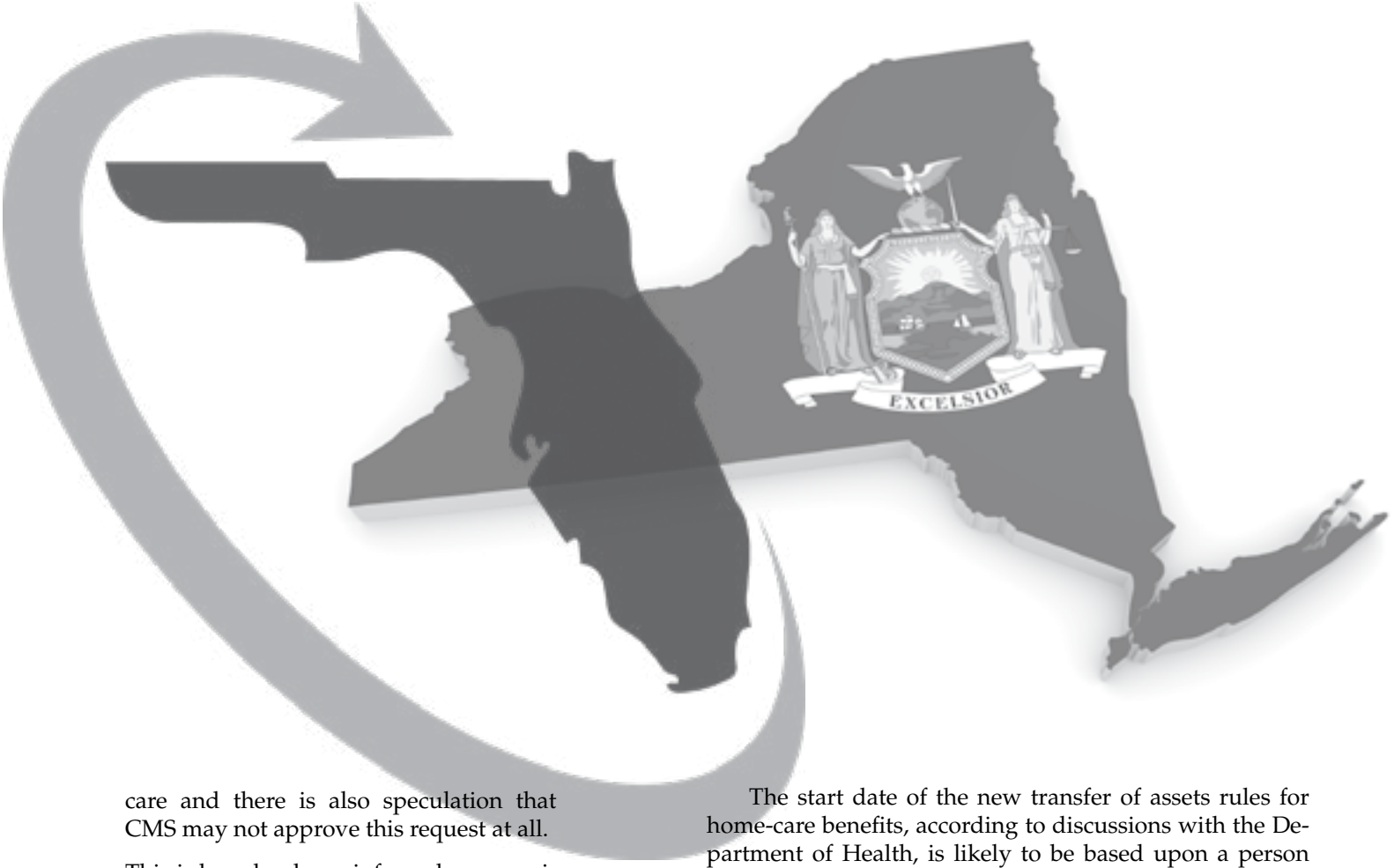
New York

While New York historically did not penalize transfers of assets to qualify for the coveted home-care benefit under its Medicaid program, community-based long-term care transfer rules were proposed and scheduled to become effective for transfers of assets made on or after October 1, 2020.[2] The New York State Department of Health then determined that it would only begin implementing the new law for transfers of assets made on or after October 1, 2020, for applications filed on or after April 1, 2021. That was followed by a determination that the Federal Public Health Emergency banning a reduction or termination of Medicaid benefits would be extended through July 1, 2021, thus extending the new implementation date for the transfer of assets rules through July 1, 2021, as well. This also did not occur, leaving us all to wonder when, or if, this new law will be implemented in New York. As of early September 2021, it is anticipated that the transfer of assets rules will apply to applications submitted on or after January 1, 2022 (still for transfers made on or after October 1, 2020). That being said, there is speculation that this implementation date may be postponed until July 1, 2022. In a message to Section members on September 20, 2021, Chair Deepankar Mukerji noted as follows:

Howard S. Krooks

> New York State Department of Health (NYSDOH) has now indicated that the implementation date of the new lookback for community based long term care is likely to be postponed until July 1, 2022. This estimate is based on the assumption that current Maintenance of Effort (MOE) restrictions based on enhanced COVID-19 federal funding will end on March 1, 2022, (though this could be later if additional COVID-19 funds are received which carry the same MOE restrictions). They have indicated that it will then take additional time for NYSDOH to develop procedures and protocols for the local Medicaid agencies to train staff on how to implement the new rules.
>
> Keep in mind also that the Centers for Medicare and Medicaid Services (CMS) has not yet approved NYSDOH's state plan amendment proposal to allow for the lookback for community based long term

Howard S. Krooks, JD, CELA, CAP, a member of Cozen O'Connor, is a past president of the National Academy of Elder Law Attorneys, a past Chair of the New York State Bar Association's Elder Law and Special Needs Section, and chair-elect of the Florida Bar Elder Law Section. Krooks actively practices elder law, special needs planning and estate planning in New York and Florida.



care and there is also speculation that CMS may not approve this request at all.

> This is based only on informal communications with the knowledgeable employees from NYSDOH who have agreed that we can share this data; however, nothing is certain until written policy is issued to the public. That being said, based upon the information received from NYSDOH, July 2022 will be the earliest that the lookback and penalty provisions are implemented. Note, however, that while the implementation of the lookback will cover only new applications received after implementation start date, the retrospective review of financial information will go back to October 1, 2020, or 30 months [as discussed below], whichever is later.

Stay tuned for more developments in this regard.

The lookback period for community-based long-term care benefits is 30 months (two-and-a-half years) under the new law (as compared to the five-year lookback period for institutional care). This lookback period, however, will be phased in over time. Assuming that the new law is implemented effective January 1, 2022, the lookback period will only be 14 months at that point, retroactive to transfers made on or after October 1, 2022. As each month passes by, another month will be added to the lookback period, until May 2023, when the full 30-month lookback will apply for applications submitted on May 1, 2023, and thereafter.

The start date of the new transfer of assets rules for home-care benefits, according to discussions with the Department of Health, is likely to be based upon a person meeting the financial eligibility requirements for Medicaid along with a functional assessment indicating the need for home-care services. This leaves the door open for the possibility that the Department of Health will implement rules allowing for the commencement of the penalty period in the month of application, rather than the month in which a determination of eligibility is issued or when benefits actually commence, either of which would occur at a later point in time.

Florida

New York elder law attorneys, while preparing for the implementation of a penalty period *for the first time* in the case of community-based long-term care services, may or may not be aware that Florida's home-care program always had and continues to impose its transfer of asset rules on gifts made to qualify for this all-important benefit. Thus, while many New Yorkers continue to be able to qualify for home-care services for applications now being filed, New York elder law attorneys should be mindful that any transfers of assets made while a client is residing in New York and considering a relocation to Florida will be subject to a penalty period disqualifying the client from receiving home-care benefits in Florida. Only if, and when, the New York Department of Health issues an Administrative Directive regarding the implementation of the community-based long-term care transfer of assets rules will the two states be in parity on this issue.

POOLED TRUSTS

Nationally

States have long differed on their approach to imposing penalty periods for transfers of assets made by individuals aged 65 and over into pooled supplemental needs trusts, with some states allowing such transfers to be made without a disqualifying penalty period being imposed, with other states prohibiting such transfers by imposing a penalty period. The National Academy of Elder Law Attorneys has consistently advocated for the permissible placement of funds into a pooled trust without the imposition of a penalty period. Recently, a case decided in Minnesota concluded that a state regulation similar to that of New York's (see below) on exceptions to the transfer penalty rules where valuable consideration was provided did not cause a transfer penalty for a transfer of assets by an individual age 65 years or more into a pooled trust. See *Pfoser v. Harpstead*, 2021 Minn. Sup. Ct., Lexis 4 (January 20, 2021).

New York

While the transfer of income *or* assets into a pooled trust has been allowed in New York without a resulting penalty period in the case of community-based long-term care services, transfers of assets by individuals age 65 and over are and always have been penalized for purposes of determining eligibility for institutional care program benefits.[3] With the impending imposition of a penalty period for community-based long-term care, the ability to place income into a pooled trust is going to be subject to higher scrutiny by Medicaid in New York. The New York State Bar Association's Elder Law and Special Needs Section has been in discussions with the Department of Health on this issue, which has stated that a penalty period may now be imposed on income placed into a pooled trust, if the income is not used for the benefit of the individual in the same month in which the contribution is made.[4]

In response, the NYSBA Elder Law and Special Needs Section argued that one of the exceptions to the penalty period provisions is "if a satisfactory showing is made to the State that (i) the individual intended to dispose of the assets either at a fair market value or for other consideration . . . ," which is identical to that of federal law at 1396p(c)(2)(c)(i).[5] The Section also has argued that 1) Social Services Law Section 366 (5)(e)(4)(iii)(A) provides that the contribution is a transfer for value received, 2) the law already requires the contribution be spent for the benefit of the beneficiary (with nothing in the law requiring the contribution be spent in the month it is deposited), 3) without clear guidance from the Department of Health, local Medicaid agencies may vary in their efforts to monitor pooled trust subaccounts inconsistently, disrupting crucial benefits needed to keep people in their homes, and may even violate the *Olmstead* mandate, 4) not every expense is incurred monthly, thus causing temporary accumulations within the pooled trust subaccounts, and 5) the burdens placed on elderly and persons with disabilities, pooled trust administrators and Medicaid agencies in order to comply with the new law need to be taken into account.[6]

The Section argued for the following policies to be implemented by the Department of Health, if and when the new law is implemented:

1. Presume that all contributions to pooled trusts are to be used for the benefit of the beneficiary, based on federal and statutory rules that require expenditures from pooled trusts be made for the sole benefit of the beneficiary;

2. Limit local Medicaid agencies to reviewing pooled trust contributions and expenditures to one time per year (and not more frequently) at the time of the annual recertification for benefits; and/or

3. Instead of applying a transfer penalty, treat the excess amount in the pooled trust as a resource up to the allowable $15,900 resource allowance (if the excess amount in the pooled trust subaccount causes the person to go over the $15,900 resource allowance, provide the individual with a certain amount of time (i.e., six months) within which to spend down the excess resources. This policy would prevent disruption of an individual's enrollment and receipt of services.[7]

The pooled trusts in New York have also pointed out that the administrative costs to New York State to monitor the pooled trusts and the negative impact on the pooled trusts to comply with the new law will outweigh any benefits from treating the transfers to a pooled trust as a disqualifying transfer.[8]

New York practitioners and the elderly and disabled who rely on community-based long-term care benefits await a resolution of these issues as of the writing of this article in September 2021.

Another pooled trust issue concerns the use of powers of attorney to establish pooled trust subaccounts in New York. In February 2019, the Department of Health began requiring New York Powers of Attorney to contain gifting authority in the Statutory Gift Rider component of the Power of Attorney (more on that topic below, as the SGR has since been eliminated in New York). This change came about as a result of the issuance of a General Information System Memorandum containing the following: "Note: If a trust is established by an agent acting under a Power of Attorney (POA), the powers granted under the POA must include permission to gift assets."[9] As of March 2020, however, the Department of Health has rescinded this requirement, issuing a General Information System Memorandum clarifying its position on the issue.[10] This was a direct result of the NYSBA Elder Law and Special Needs Section's advocacy, which is detailed in a compelling letter to the Department of Health dated August 7, 2019, ar-

guing that under New York's General Obligations Law regarding powers of attorney, a transfer to a pooled trust does not constitute the creation, amendment, revocation or termination of a trust under GOL Section 5-1514(3)(c)(8). The Section further argued that even if the funding of a pooled trust is a trust transaction, it is not a gift, because the trustee is obligated to use the funds in the pooled trust subaccount for the sole benefit of the disabled beneficiary during the beneficiary's lifetime.

The lack of the pooled trust option for asset transfers made by the 65 and over demographic applying for institutional care in New York has been a tremendous disadvantage for those New Yorkers looking to provide a means to enhance their quality of lives in nursing homes. We as elder law attorneys know that the staffing ratio in the nursing home setting is inadequate to properly meet the needs of a nursing home resident, and the ability to supplement a person's care needs with an aide, even on a part-time or intermittent basis, can be essential to the well-being of a person in need of such care. Florida has taken a different approach to the treatment of asset transfers to pooled trusts in the institutional setting (see below). To lose this planning opportunity in New York in the community-based long-term care setting as well as not being able to utilize this planning tool in the institutional setting would be a devastating blow to New Yorkers. Stay tuned for further developments in this area.

Florida—Transfers to Pooled Trusts

For about 28 years, ever since the pooled trust option was codified in OBRA '93, Florida has been one of the states that allowed transfers of assets into pooled trusts without imposing a penalty period. This included home care and assisted living levels of care in addition to nursing home level of care, thus providing Florida elder law attorneys with the ability to counsel clients on the pooled trust option to enhance their clients' quality of life while in need of long-term care services, whether at home, in an assisted living facility or in a skilled nursing facility. It was, and remains for now, a viable and often utilized approach to addressing the long-term care needs of Floridians.

On April 12, 2021, the Florida Department of Children and Families changed its Program Access Policy Manual (similar to the Medicaid Reference Guide in New York used by Medicaid caseworkers to process Medicaid applications) and began denying cases where transfers to pooled trusts were made by individuals 65 or over immediately preceding the submission of the Medicaid application. Without any prior notice, or publication of a notice of rulemaking, the Department of Children and Families (DCF) seemingly embarked on a plan to overturn 28 years of policy in this area. The response from the Florida elder law bar was immediate and strong, noting the lack of administrative protocol in the Department of Children and Families implementing this new policy, with severe repercussions to their clients.

The advocacy included attorneys within the Academy of Florida Elder Law Attorneys (AFELA) and the Florida Bar Elder Law Section. On May 20, 2021, a Zoom town hall was conducted by DCF with members of the elder law bar and other stakeholders on the call. As result of this call, AFELA retained administrative law counsel and submitted its opposition to adoption of the proposed rule,[11] noting that it represented "a dramatic departure from the historic Florida interpretation and application of federal and state law in the treatment of asset transfers made by disabled elderly individuals to pooled trusts when determining eligibility for benefits under the Medicaid institutional Care Program." The letter goes on to warn DCF that if adopted in its current form, litigation would ensue and expressed the hope that DCF would be issuing a revised rule after consideration of comments received in response to the published rule. AFELA further requested support for the proposed rule change and appurtenant policy shift by DCF, in the form of communications with the Centers for Medicare and Medicaid Services or documented abuses of pooled trusts. In the letter, AFELA included proposed language for a rule change that could be used by DCF going forward, and which would address many of the concerns the elder law bar raised with implementation of the restriction on all transfers to pooled trusts for 65 and over individuals.

AFELA proposed an amendment to the Florida Administrative Code Rule 65A-1.702(13) by adding a subsection (d) that states as follows:

> The funding of Pooled Trusts described under the authority of section 1917 (d)(4)(c) of the Social Security Act for disabled individuals aged 65 and older will be subject to the transfer of asset provisions under section 1917(c)(2), unless any one of the following criteria is met:
>
> 1. The amount transferred to the Pooled Trust is less than the product of the Transfer of Asset penalty divisor in effect at the time of the transfer and the life expectancy of the beneficiary, as set forth in Appendix A-14 of the Program Policy Manual,
> 2. A court order approves the transfer to the Pooled Trust,
> 3. To the extent the transfer to the Pooled Trust exceeds the amount determined under subsection 1, above, the applicant or his or her legal representative submits a spending plan that demonstrates the assets transferred to the Pooled Trust will be spent on goods or services for the benefit

of the applicant within the applicant's life expectancy, as set forth in Appendix A-14 of the Program Policy Manual, or

4. The applicant otherwise proves fair market value or other valuable consideration will be received for the assets transferred to the trust.

Under the above proposal, a transfer penalty would not apply to an individual who transferred less than the transfer penalty divisor of $9,703 (the current divisor in 2021) multiplied by the life expectancy of the pooled trust beneficiary. The example used in the AFELA letter is a 90-year-old who has a life expectancy of 3.63 years being able to transfer $35,221 into a pooled trust without a resulting penalty period and thus would be able to use those funds over his remaining lifetime.

The letter goes on to state the many benefits typically received by elderly individuals in exchange for a transfer into a pooled trust: medical and long-term care services not covered by Medicaid; dental, hearing and vision expenses; professional guardian fees and attorney fees; basic living expenses such as food, clothing and shelter expenses, including costs to maintain the primary residence even when the beneficiary does not live there; a private room in a long-term care facility; care management services; prepaid burial arrangements; pet care; adapted transportation; phone, cable and internet services; vehicle insurance, maintenance and gas; entertainment; household furnishings and furniture; television, computers, and electronics; medical expenses not covered by Medicare/Medicaid (experimental treatments, durable medical equipment, therapy, medications, alternative medical treatments, dental, hearing, vision, etc.); taxes; attorney's fees; trustee fees; and guardianship expenses.

The letter concludes with a reference to the federal prohibition on making changes to eligibility criteria or methodologies under the Families First Coronavirus Act and a request for negotiated rulemaking between DCF and AFELA in order to come up with reasonable language acceptable to AFELA, its members, affected clients, and interested parties and stakeholders who would be affected by the DCF shift in policy.

Establishing Pooled Trust Accounts Using a Power of Attorney

Another recent problem with respect to pooled trusts in Florida arose in 2018-2019 and resulted in two fair hearing decisions being issued.[12] In each case, the question presented was whether the agent under a power of attorney could create a pooled trust subaccount on behalf of the principal without specific authority in the power of attorney authorizing the creation and funding of pooled trusts by the agent. DCF objected to the signing of a joinder agreement to establish a pooled trust subaccount, claiming the power of attorney violated Florida Statutes Section 709.2201(1)(a) to "create an inter vivos trust" because the document failed to include that specific language authorizing the agent to create trusts.

In one case, the power of attorney had language authorizing the opening of financial accounts, making medical decisions, and authorizing a transfer to a trust for the benefit of the principal. In the other case, the agent was given the authority to contract, and it was argued that this was sufficient to sign a joinder agreement as a type of contract the agent had authority to sign.

In both cases, the fair hearing administrative law judge upheld the power of the agent to create a pooled trust subaccount on behalf of the principal, and this issue appears to have been laid to rest. Notwithstanding, I encourage New York and Florida practitioners alike to include language in their power of attorney documents that specifically authorizes the agent to create and fund a d(4)(C) pooled trust—there is simply no reason to leave this issue to the whimsical proclivity of Medicaid caseworkers and legal departments.

POWER OF ATTORNEY LEGISLATION

New York

After many years of dealing with statutory gift riders, New Yorkers and their elder law attorneys were freed from the shackles of the onerous requirement that a statutory gifts rider was required in order to authorize an agent under a New York Power of Attorney to engage in certain essential transactions, including gifting above the default amount of $500 per year. In legislation signed by the governor in December 2020, the New York Statutory Power of Attorney form was modified and, among many other changes, eliminated the statutory gifts rider in order to confer certain powers on the agent. Under the new law, all gifting authority exceeding $5,000 per year, including allowing the agent to make gifts to himself/herself, is now to be included in a new Modifications Section of the new statutory form.

General Obligations Law Section 5-1513

This change became effective on June 13, 2021, and was cheered by advocates and consumers alike due to the onerous nature of signing this additional form. It eliminated issues, such as the proper placement of certain powers (should the power go in the power of attorney or the statutory gifts rider? Should it be placed in both documents? Suppose a client can only locate the power of attorney but not the statutory gifts rider? Or the other way around? And what about the additional physical act of signing and initialing an additional document in order to sign a power of attorney?). A hardship at the very least for many of our elderly and disabled clients whom we serve.

Impact on Florida

Another weakness of the prior version of the New York Power of Attorney was lack of symmetry between the main form and the statutory gifts rider regarding the witness requirement. Only the statutory gifts rider was required to be witnessed by two individuals. The principal's signature on the Power of Attorney was required to be notarized, but was not required to be witnessed. This dichotomy created a quagmire for attorneys and clients in New York, who then tried to use the New York Power of Attorney in Florida. Florida requires two witnesses on its power of attorney document. And, while Florida has a provision in its statute declaring that an out-of-state power of attorney executed in accordance with the laws of the foreign jurisdiction is valid in Florida, a conflict in Florida's real estate law prevented its use in real estate transactions unless two witnesses signed the document (this is required for an effective conveyance of real estate under Florida law). Thus, title companies rejected New York Powers of Attorney otherwise considered valid under Florida law. The title company would refuse to issue title insurance for purchases and sales of real estate at a time when the individual may have already lost capacity to sign a new power of attorney that included two witnesses. This problem was resolved by the March 2021 Amendment to New York's new Power Of Attorney statute which streamlined the power into one document instead of two, and which now requires two witnesses to be valid under New York law.

IRREVOCABLE TRUSTS

Nationally

Many state Medicaid agencies have, over the years, challenged irrevocable trusts, taking a variety of legal positions that would render the assets inside the trust countable for Medicaid eligibility purposes. New York had a couple of cases dealing with the inclusion of a limited power of appointment in the trust. In those cases,[13] Medicaid took the position that the mere possibility of collusion among the grantors, trustees and beneficiaries could result in the grantor using the existence of the limited power of appointment to threaten any beneficiary who refused to use distributed assets from the trust to pay for the grantor's long-term care. The courts in these cases held correctly that the mere possibility of collusion, without evidence that there was collusion, was not a sufficient basis upon which Medicaid could deem trust assets available.

Massachusetts has its own lineage of case law dealing with Medicaid Asset Protection trusts, which ultimately resulted in the Supreme Judicial Court issuing two decisions simultaneously: *Daley v. Executive Office of Health* and *Human Services and Nadeau v. Director of the Office of Medicaid*.[14] Both cases reversed the Medicaid denials, holding that the ability of the grantors to continue residing in homes that had been transferred into their irrevocable trusts did not render the principal of such trusts available resources.

More recently, a case out of Montana has confirmed that assets contained in an irrevocable trust are not countable for Medicaid purposes.[15] The lower court held that trust assets were available due to a violation of the "any circumstances" test of 42 U.S.C. § 1396p(d)(3) on the basis that *if* the trust was terminated, "the beneficiaries *could*

thereafter, individually, jointly, directly, or indirectly, give [the grantor] this trust property for her benefit." The Supreme Court of Montana reversed, focusing instead on language in the trust prohibiting distributions of principal from the trust to the grantor, and concluding that it was improper for the lower court to consider "imaginary or improbable circumstances."

New York

A recent development has occurred with some local districts taking the position that a power in a Medicaid Asset Protection Trust providing the trustee with authority to invade principal to alter, modify or improve the grantor's primary residence where the grantor has reserved the right to use and occupy the home may render the entire trust principal a countable resource for Medicaid eligibility purposes. The NYSBA Elder Law and Special Needs Section has embarked on an effort to discuss this issue with the New York State Department of Health. During a Section call with the Department of Health in early September, the Department of Health noted verbally that irrevocable trusts containing language allowing trustees to alter or modify a homestead property would not, by itself, result in the principal of the trust being a countable resource. Nonetheless, practitioners are encouraged to exercise caution when drafting irrevocable trusts as the existence of this language coupled with other factors could cause trust principal to be deemed countable.

Florida

The use of Medicaid Asset Protection trusts in Florida continues and there have not been any recent issues regarding the use of such trusts in the planning for long-term care. Some New York practitioners with whom I have spoken are already familiar with Florida Medicaid's treatment of the use of the power to substitute assets of equivalent value as a grantor trust power in the Medicaid Asset Protection Trust—declaring the assets in such a trust to be countable resources. Although not correct on the law, there are two well-known fair hearing decisions that have held this to be the case. As a result, it is best to use other grantor trust powers under the Internal Revenue Code to achieve grantor trust status or render your client subject to a battle with Medicaid through the fair hearing process and possibly the courts as well.

UNIFORM ADULT GUARDIANSHIP PROTECTIVE PROCEEDINGS JURISDICTION ACT

New York

The Uniform Adult Guardianship Protective Proceedings Act (codified in Mental Hygiene Law Article 83) (aka UAGPPJA) was signed into law in New York on October 23, 2013, and became effective on April 21, 2014. The act addresses jurisdictional and related issues in adult guardianship proceedings where multiple states are involved. The need for adoption of the act by New York emanates from the lack of full faith and credit afforded New York guardianship orders by courts in other jurisdictions, and vice versa. The purpose of the act is to identify one singular state court wherein a proceeding for the appointment may be brought (accomplished by defining a "home state" and a "significant connection state"), establish a system for the transfer of existing guardianship appointments from one state to another, and establish a system for the recognition and enforcement of guardianship orders from one state to another.

The act benefits the courts and the parties involved in a guardianship where multiple states are involved by creating an efficient set of rules that all parties are bound to follow in such circumstances, thereby avoiding delay caused by the lack of such guidelines. The act has been adopted in all states with the exception of Florida, Kansas, and Michigan.

Florida

Considering the New York–Florida snowbird connection, the mobility of people today, the influx of people into the state of Florida every day, the fact that Florida has historically been referred to as a retirement state, and for all the reasons set forth above, it is astonishing that Florida remains one of only three states that has not adopted the UAGPPJA. Florida has always had "protective" rules in place jurisdictionally (take, for example, the limitation on who can serve as personal representative of an estate in Florida). Rest assured that your colleagues in the elder law/guardianship bar in Florida are working toward achieving adoption of the UAGPPJA. The Legislative Committee of the Florida Bar Elder Law Section is currently outlining its agenda for the upcoming legislative session, and of high priority is providing support for a bill that would adopt some form of UAGPPJA. One of the issues legislators, the Elder Law Section and other Sections of the bar are discussing, and which has caused significant delay in Florida's adoption of UAGPPJA, is how to reconcile the goals of UAGPPJA in light of the perception among lawmakers and others that Florida's guardianship statute contains more restrictive provisions for the appointment of guardians and the administration of guardianships generally. This is perceived by some in Florida as forcing Florida courts to accept appointments made elsewhere and to honor court orders from other states, which may have lesser protections for incapacitated or alleged incapacitated persons than they would have under Florida's guardianship statute. Let's see what happens in the 2022 legislative session. Hopefully, Florida will finally join the other 47 states that have already adopted UAGPPJA.

UNLICENSED PRACTICE OF LAW

New York

On February 4, 2021, legislation (Assembly bill A. 4576) was introduced in the New York Legislature that, if enacted, would amend the Public Health Law by adding a new Section 2803-z to require education of nursing home residents about the role of legal counsel in applying for Medicaid benefits. It also would require operators of residential health care facilities to display and provide residents with a notice upon admission regarding such residents' right to hire an attorney to assist with a Medicaid application.

The notice would have to be acknowledged by the resident and the resident's designated representative at the same time as an admission agreement. The notice must provide the following language:

> YOU HAVE THE OPTION TO HIRE AN ATTORNEY TO ASSIST WITH APPLYING FOR MEDICAID: New York State does not mandate that a Medicaid applicant obtain the assistance of an attorney when completing the Medicaid application. There are non-legal agencies and companies, including arms and affiliates of hospitals and nursing homes, which may offer to prepare and submit the Medicaid application for free or for a reduced fee. These entities are not permitted to give legal advice or implement legal strategies that may best protect your interests, and they are not obligated to advise you of your rights. Moreover, these entities may have conflicts of interest. Relying on non-legal service might expose you and your family to unnecessary financial risk. You may, however, seek the assistance of an attorney who is knowledgeable about elder law and Medicaid eligibility rules. If you wish to identify such an attorney, you may contact the State or local Bar Association attorney referral service.

It should be obvious from reading the above that the elder law bar, and in particular the New York chapter of NAELA, is very much in favor of this legislation, and advocating for its enactment into law.

The Memorandum in Support of this legislation contains additional language discussing some of the issues giving rise to it being proposed. For example, the Memorandum in Support states:

> There has been a proliferation of non-legal agencies and persons, many of which may have interests other than that of the resident as the motivating factor, offering to file Medicaid applications for residents. Non-legal providers often are unaware, or do not properly advise residents, of the existence of Medicaid eligibility, avoid liens being placed on residents' assets, and avoid claims being made against applicants' spouses and the estate of applicants and their spouses. Some of these entities have a conflict of interest between their obligations to the nursing home and the resident. Moreover, the federal and the state rules regarding Medicaid eligibility change regularly, and without benefiting from the legal expertise of a professional focused in this area of law, it could result in inappropriate denials, delays accessing care, or other financial consequences for the applicant. Providing notice to residents and their representatives would ensure that they understand that legal assistance may be beneficial when preparing a Medicaid application.

Couldn't have said it better myself. Hopefully, the New York Legislature will act on this bill in the upcoming legislative session (January 2022-June 2022). The Florida elder law bar is watching closely what happens with the New York proposal and, if enacted, it will most certainly lead to a similar effort to seek passage of the same type of legislation in Florida.

Florida

The Florida elder law bar has made its own effort[16] to reduce the negative impact on consumers and elder law clients alike of non-attorney companies becoming involved in the Medicaid planning space, often crossing the line into providing legal advice or, in some cases, failing to provide essential legal counsel to the detriment of the Medicaid applicant and/or his/her family.

In 2015, nonlawyer Medicaid planning was deemed to be the unlicensed practice of law by the Florida Supreme Court, determining nonlawyer Medicaid planners who advise Medicaid applicants how to structure income and assets to become eligible for Medicaid constitutes the practice of law without a license.[17]

The opinion outlines the following activities that constitute the practice of law within the Medicaid planning area: drafting personal service contracts (with the court noting that there are both legal and tax implications if a personal service contract is not done properly), preparation, execution, funding of, and determination of the need for Qualified Income Trusts (with the court noting testimony where improperly prepared Qualified Income Trusts resulted in delayed eligibility, costing several months of nursing home charges, or being declined eligibility altogether), or the rendering of legal advice regarding the im-

plementation of Florida law to obtain Medicaid benefits (the court noting that Medicaid planning involves:

1. The assessment of all facts relevant to a client's situation, including personal, financial, familial, and historical,
2. Application of those particular facts to the laws governing Medicaid,
3. Developing a plan to structure or spend those assets in compliance with those laws or planning to reverse actions already taken to correct potentially unauthorized activity to minimize negative legal consequences,
4. Drafting legal documents to execute the plan, and
5. Assisting the client in correctly executing a particular plan).

Although the Florida Supreme Court Advisory Opinion was a welcome addition and represents a major step forward in addressing the unlicensed practice of law issue as it relates to Medicaid planning, enforcement of this opinion and its conclusions has proved difficult. Nonlawyers continue to offer and market their Medicaid advisory services, and often cross the line into the unlicensed practice of law arena. Each case must be dealt with individually and requires a ready and willing complainant to pursue.

CONCLUSION

The differences between New York and Florida relating to elder law and special needs planning are dramatic. Notwithstanding the numbers of New Yorkers and Floridians that have ties in both states, eligibility rules and planning to access needed long-term care services are vastly different between the two states. Practitioners in each state would be well advised to become familiar with these differences in order to provide clear and useful direction and guidance to their clients who face these challenges. Ultimately, it may be necessary and in the client's best interest to consult with a practitioner in the other state to provide the best counsel to the New York/Florida client.

Endnotes

1. *See* Business Development Board of Palm Beach County website, www.bdb.org, "900 People a Day are Moving to Florida, Many Fleeing 'Tax Hell' in New York and New Jersey, the State's CFO Said," May 25, 2021.
2. This change was part of the New York State Fiscal Year 2020-2021 Budget that was adopted in April 2020.
3. Administrative Directive 96 ADM-8, "OBRA '93 Provisions on Transfers and Trusts," dated March 29, 1996.
4. For more information about this issue, *see Message From the Section Chair* by Matthew Nolfo, NYSBA Elder and Special Needs Law Journal, 2021, Volume 31, No. 1. According to this article, the Elder Law and Special Needs Section is in discussions with the Department of Health to achieve a workable arrangement that would allow such transfers to be made, outlining ways in which the pooled trust funds could be spent within a reasonable time after placement and without affecting a person's eligibility for continued benefits.
5. *See* Memorandum from the NYSBA Elder Law and Special Needs Section Dated April 15, 2021.
6. *See* Memorandum from the NYSBA Elder Law and Special Needs Section Dated January 11, 2021.
7. *Id.*
8. *Id.*
9. GIS 19 MA/04, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts," issued by the Department of Health on February 4, 2019.
10. *See* GIS 20 MA/03—Clarification of GIS 19 MA/04, "Clarification of Policy for Treatment of Income Placed in Medicaid Exception Trusts."
11. *See* letter dated May 27, 2021, from Geoffrey D. Smith of Smith & Associates.
12. *See Marshack v. DCF*, Appeal No. 18F-0278 and *Lerlie v. DCF,* Appeal No. 19F-08555.
13. *In re Spetz v. Department of Health*, Chautauqua County Supreme Court, January 15, 2002, and *Verdow v. Sutkowy*, 5:01-CV-1468 (HGM/GJD) (N.D.N.Y. September 9, 2002).
14. 477 Mass. 188 (May 31, 2017).
15. *Estate of Marilyn Scheidecker v. Montana Department of Public Health and Human Services*, Supreme Court of the State of Montana, June 29, 2021.
16. The effort to obtain the Supreme Opinion described in this section of the article was led by then-chair of the Elder Law Section Twyla Sketchley, John R. Frazier, Esq., chair of the UPL Subcommittee of the Elder Law Section, Jack Rosenkranz, Emma Hemness, Gerald Hemness, and Jeff Brown, among others, which in turn petitioned the Florida Bar's Standing Committee on UPL arguing for the need for this Opinion.
17. *See* Florida Supreme Court Advisory Opinion No. SC14-211: The Florida Bar Re: Advisory opinion—Medicaid Planning Activities by NonLawyers, January 15, 2015.