



LEGAL NOTES

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ESTATE RECOVERY UNDER THE NEW MEDICAID REGULATIONS

By Richard J. Shapiro, J.D.

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New York law has long provided that only a Medicaid recipient's *probate* assets (i.e., those titled solely in the name of the Medicaid recipient) were subject to "estate recovery" after a Medicaid recipient's death. Other types of dispositions, including popular planning tools such as joint tenancy, "life estate" deeds, and assets held in revocable and irrevocable trusts were excluded from the reach of estate recovery.

Last March, however, the New York State Legislature's 2011 budget included "expanded" estate recovery rules that will allow the county Departments of Social Services to recover more assets from the estates of deceased Medicaid recipients. These new rules were made subject to regulations to be promulgated by the New York State Department of Health. On September 8, 2011 the Department of Health finally promulgated the regulations required by the statute.

Traditionally, the use of a life estate deed for a primary residence has been one of the most

popular planning tools used to protect assets from a Medicaid "spend down." So long as the deed in which the grantor retained a life interest was executed at least five years prior to a Medicaid application being filed, the entire interest in the residence would be deemed "exempt" from a Medicaid spend down. This planning tool has long been popular largely because it is easy to quickly implement, and is considered inexpensive compared to other planning strategies such as irrevocable trusts.

The new regulations, however, specifically include as assets subject to estate recovery those owned by the decedent "through joint tenancy, tenancy in common, survivorship, *life estate*, living trust or other arrangement, to the extent of the decedent's interest in the property immediately prior to death" (emphasis added). The value of the life estate subject to recovery is deemed to be the "actuarial life expectancy of the life tenant" as of the date of death. For an 80-year-old, for example, that value is deemed under the life estate tables used by Medicaid to be worth 43.6%. Assume Mrs. Jones, an 80-year-old long-term nursing home resident on Medicaid, executed a life estate deed in 2003 leaving her residence to her children upon her death. Mrs. Jones dies in September 2011, with the fair market value in her home valued at

\$300,000. Under the new regulations, 43.6% of the home value – or \$130,800 – would have to be repaid to the Department of Social Services, with the children to receive the remainder.

Some may argue that it is good public policy to permit the government to recoup as many assets as possible from the estates of Medicaid recipients. But what may trouble many people is that the regulations do not provide any “grandfathering” for pre-existing life estate deeds – even those drafted decades ago. This provision of the new regulations is sure to spark legal challenges, so it is too soon to tell if this particular rule will “stick.”

Fortunately, the irrevocable “Medicaid Trust” remains an important planning tool that can be used to help protect assets if created and funded well before the time long-term care may be needed. Under the regulations, estate recovery from any irrevocable trust is limited “to the extent that the person was entitled to the distribution of ...principal and interest pursuant to the terms of the trust.” Since a Medicaid Trust will always restrict the grantor from receiving any of the trust principal, the trust assets may pass at the grantor’s death to the trust beneficiaries without risk of estate recovery, even if the grantor received Medicaid benefits during his or her lifetime. Also, while the issue is not fully resolved, it appears that these trusts will still permit the grantor retain the STAR, veteran’s and other property tax exemptions without exposing the value of the residence to any form of estate recovery.

While long-term care insurance remains the best way to protect your assets in the event you ever need long-term care, the policies can be expensive and not everyone can qualify medically for the insurance. With the ever-shrinking state and federal budgets putting the squeeze on Medicaid benefits, it is more important than ever that people looking to help protect assets against the high cost of long-term care seek the advice of an experienced elder law attorney to investigate the alternatives.

WHAT IS THE LEGAL RATE OF INTEREST?

By Burt J. Blustein, J.D., Senior Partner

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In a recent case where I was working on a computation of interest in a legal action, it brought to mind the oft-asked question, what is the legal rate of interest? It’s a simple question that surprisingly has a complex answer. Frankly, I find that not many attorneys have a clear understanding of this issue. The answer is further complicated because every state has different usury laws (a term for the laws governing interest rates), and their applicability depends upon the controlling state law.

You may be aware that on some credit card contracts, the interest rates are as high as 35%. If you look closely at the credit card statement or contract, you will observe that the issuing bank likely has its address in South Dakota. Why South Dakota? Quite simply, South Dakota law permits banks and credit card companies that incorporate their operations in that state to charge high rates of interest. Credit cards aside, this article will focus specifically on interest rates applicable under New York law.

As a starting point, Section 5-501 of the General Obligations Law fixes the rate of interest and forbids usury. Subdivision (1) of this law proclaims that the maximum rate of interest shall be 6% per annum unless a different rate is prescribed in Section 14-(a) of the Banking Law. Section 14-(a) of the Banking Law fixes the legal rate of interest at 14% per annum, which seems simple enough. However, there are many exceptions to the rule that limits its applicability. For example, under Section 5-501 (6)(a) of the General Obligations Law, any loan or forbearance in the amount of \$250,000.00 or

more is exempt from the usury ceiling and is only limited by the Criminal Usury Law, which fixes the maximum rate of interest at 25%. The only exception to the rule exempting loans of more than \$250,000 is a loan in excess of \$250,000.00 for a one or two family residence dwelling.

Further, General Obligations Law Section 5-501(6)(b) exempts from all usury constraints -- even criminal usury -- loans in excess of \$2,500,000.00. Effectively, any loan above that amount has no restraint on the interest rate.

To further complicate the usury rules, corporations and limited liability companies, not being considered individuals for the purposes of the usury laws, are exempt from the 14% maximum interest rate pursuant to Section 14-(a) of the Banking Law, but *are* included in the criminal usury maximum rate of 25% for loans below \$2,500,000.00.

Why is it important to understand applicable interest rates and usury laws? Because if a lender charges a usurious rate of interest on a loan and the borrower subsequently defaults, if the lender sues for the amount due on the note, a defense of usury could result not only in the lender forfeiting the entire amount of interest, but also forfeiting the entire principal indebtedness owed to the lender as a penalty for charging a usurious rate.

How does the lender protect itself from running afoul of the maze of usury laws? The courts have come up with a ready solution. Lenders will be protected against forfeiture of the interest and principal under a loan if they include in their loan documents a simple provision stating that notwithstanding the rate of interest charged under the agreement, if it shall be determined that the interest rate exceeds the maximum rate permissible by law, the interest rate is deemed to be adjusted to an amount that does not exceed the maximum rate of interest permissible by law.

IT'S ILLEGAL TO DO WHAT?

By Jamie T. Ferrara J.D.

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For its entire 226 year history, a cornerstone of the United States it that it has been a country of laws. There are plenty of laws that cover all realms of activities, but this article will discuss some of the more unusual criminal laws.

One law that could have wide applicability, but is practically irrelevant, is the prohibition against adultery. That's right, in most states you can be convicted of a crime for cheating on your spouse. Why might a person be concerned about this law? Because if you are convicted, you can be sentenced to jail -- and this is no slap on the wrist, either. If a judge were so inclined, he could require you to serve 90 days in the county lockup. So any person considering an extra-marital liaison must consider the criminal consequences that are in addition to the wrath of the scorned spouse.

Why are adultery laws practically *irrelevant*? Because only a handful of people have been charged with such a crime over the past few decades, and only a small percentage of those resulted in a criminal conviction. And, most of those cases were high profile cases where the betrayed spouse made a point of pushing a criminal prosecution, and even then the conviction only resulting in a fine.

Of particular interest is the language of the New York statute. It reads:

A person is guilty of adultery when he engages in sexual intercourse with another person at a time he has a living spouse, or the other person has a living spouse.

For those asking what it means to be a “living spouse,” it means exactly what you think it means. For those wondering about situations involving a non-living spouse, there’s a law for that too. But to keep pace with this article’s “G” rating, I’ll leave that law for discussion in a future article.

So what if you decide adultery is not worth the trouble and seek a divorce? I advise that you go through the proper channels and don’t try to fabricate your dissolution decree, because it too is illegal to declare a marriage dissolved or annulled unless you have the proper authority to do so. *See* Penal Law § 255.05. In other words, do not step on the Judge’s toes. Let them do the dirty work and declare your marriage is at an end.

If, however, you happen to be convicted of the crime of “unlawfully issuing a dissolution decree,” it can’t be a big deal, right? After all, you are only trying is to get away from your “insignificant” other, correct? Wrong. Your conviction can bring with it one year in the County Jail. Bottom line: don’t fabricate that paperwork!

So for those keeping track, committing adultery, which may ultimately end your marriage, can get you 90 days behind bars. Trying to end the marriage without committing adultery? Up to one year in jail. Makes sense, right?

Say you are that unfortunate soul who is now a two-time convicted criminal for (1) cheating on your spouse and (2) trying to dissolve your marriage. To add insult to injury, as a result of the economic crisis, you are unemployed and penniless.

My advice to you: *do not carry around “slugs”.*

Your response: *“Obviously --who wants to carry around slugs?”*

My reply: *while slugs are those slimy little creatures that resemble snails, it is also a legal term for a “fake coin”.*

As defined by Penal Law §170.50(2), “[s]lug means an object or article which, by virtue of its size shape or any other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill or token.” So think twice about trying to rip off that soda machine. It’s no joking matter, because if you have \$100 worth of “slugs” in your pocket, you can get up to four years in prison. And by prison I mean the “big house,” not the comfy confines of Orange County Jail with the basketball courts and flat screen televisions. This is the “hard time, up near Canada” prison ... all for trying to get a soda from a soda machine. And by the way, did I mention the Secret Service is looking for you too for violating Federal law?

As it has often been said, “ignorance of the law is no excuse.” It doesn’t matter if you knew conduct was or was not illegal; if you’ve committed a crime as it is defined, you can be punished for it. To avoid such a drastic consequence, pick up a copy of New York’s Penal law for further amusing reading. Among other tidbits, you will learn what “jostling” means, and why it’s illegal to carry a “chuka stick”.

On a more serious note, if you or a loved one is ever charged with a crime, give me a call. As a former Assistant District Attorney in Orange County, I can help you navigate the complexities of the criminal justice system to help you obtain the best outcome.

BSRB Adds Family Law and Bankruptcy Practice With Addition of Attorney Raymond P. Raiche

Blustein, Shapiro, Rich & Barone, LLP is pleased to introduce Raymond P. Raiche, who joins the firm as a Senior Associate in our litigation department. Ray's practice is concentrated in the areas of Family and Matrimonial law, Bankruptcy, Estate Litigation and General Litigation. A graduate of Seton Hall Law School, Ray previously practiced with Larkin, Axelrod, Ingrassia & Tetenbaum, and clerked for a New Jersey State Judge. Ray is admitted to the Bar in both New York and New Jersey.



Welcome, Ray!

EDUCATIONAL WORKSHOPS

Estate Plans That Work™

October 20, 2011 (3:00 p.m. to 6:00 p.m.)
November 15, 2011 (6:30 p.m. to 9:30 p.m.)

Trustee Training Workshop

November 12, 2011 (9:30 a.m. to 12:00 p.m.)

All workshops are held at the BSRB Education Center, 10 Matthews St. Goshen, New York, 1st Floor

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

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