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# Legal Update – Changes to Medicaid and the New Power of Attorney Form

# Medicaid Legislation

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- ▶ In 2020, Gov. Cuomo empaneled a group, dubbed the “Medicaid Redesign Team II” (MRT II) to make proposals which would result in savings of \$2.5 billion to the Medicaid program.
- ▶ On March 19, 2020, the MRT II delivered a report recommending 50 changes to the Medicaid program. A number of items from the report were included in the final budget as approved by the New York legislature on April 3, 2020 (Chapter 56 of the Laws of 2020).
- ▶ Other items are being implemented through regulations amending 18 NYCRR § 505.14 and 18 NYCRR § 505.28 which have yet to be finalized.

## Significant changes in the law

1. There are now transfer penalties and a 30 month “lookback” period for home care Medicaid.
2. Assistance with more than two activities of daily living (ADLs) is required to receive Managed Long Term Care (MLTC) which covers most home care services. If there is a diagnosis of dementia, then assistance with more than one is required.
3. The law calls for the development of a new home care assessment and evaluation system to determine how much care will be provided.
4. There will be a review of high utilization cases by a medical panel to determine whether they are appropriate for home care.

# Home Care Lookback

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- ▶ There is a new “Lookback” period of 30 months for home care Medicaid. Prior to this there was only a lookback period for nursing home Medicaid.
- ▶ This is effective October 2020, although the way the law is currently written, it will affect transfers occurring up to two and a half years before 2020. The Department of Health has indicated that it would only apply to transfers after October 1, 2020.
- ▶ New home care applications will have to submit financial documentation back to October 1, 2020 until the full lookback of 30 months (2.5 years) is reached.
- ▶ The Department of Health has indicated that the effective date for requiring the lookback on applications will be pushed to **January 1, 2022 or later** in response to the continued threat of Covid-19. The penalty is to apply to increases in coverage, from regular MA to long term care.

# Penalty Period

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The penalty period starts on the date that a person is applying for Medicaid and is

“Receiving services” that would otherwise be covered by Medicaid. This is an impossibility under the current laws, since programs like MLTC and CDPAP are only available to people on Medicaid.

Less than \$15,900 in assets

Medicare and other insurance policies must be exhausted or insufficient to pay for care

# Exempt transfers

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How will exempt transfers be treated?

- Caretaker child living in the homestead for two years prior to institutionalization.
- Sibling with equity interest living in homestead for one year before institutionalization.
- The State is so far unreceptive to making any changes to these provisions and indicated that transfers would not be exempt for home care.

## Unclear how pooled trusts will be treated

- To a Supplemental Needs Trust or trust for the sole benefit of *any disabled individual* under age 65 remain exempt.
- To a pooled trust operated by a not-for profit entity, if under 65. It is not clear what will happen with transfers of excess income for people over age 65, as they are not exempt from transfer penalties; however the consensus is that to the extent that the distributions for the “sole benefit” of the trust beneficiary, they will be a return of the transfer. The question is what will be the accounting period.

# New Home Care Regulations proposed

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- ▶ The new law imposes ADL requirements in order to qualify for MLTC.
- ▶ The new proposal would require assistance with more than 2 ADLs or, if there is a diagnosis of dementia, more than one ADL to receive MLTC. (Effective October 2020, but likely to be pushed back to January 2022).
- ▶ New regulations amending 18 NYCRR § § 505.14 and 505.28 have been proposed but are not final yet. These regs define the ADLs.



# What are Activities of Daily Living (ADLs)?

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- ▶ Under the new regs, ADL's are defined to be the following:
  - Bathing
  - Personal hygiene
  - Dressing
  - Walking
  - Locomotion
  - Transferring on to and off the toilet
  - Toilet use
  - Bed mobility
  - Eating

# New Home Care assessments

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- There will also be a new “task-based assessment” tool to determine how many hours of home care is to be received.
- All assessments by Medicaid to determine how many hours of home care are to be received will be handled by a third party contractor (RFP process). This will replace private physician recommendations, local public health nurses and home care agency nursing assessments. The new agency is to be in place by October 2022.
- Currently nursing assessments are performed twice a year; under the new law the assessments will be performed by the contract agency once a year.

# Utilization Review

- ▶ Cases will be reviewed by a separate medical review panel if they exceed a “specified level” to determine whether they can be appropriately maintained at home. (Effective October 2020 and likely to be pushed back to January 2022).
- ▶ The proposed regulations require that the panel review all cases exceeding 12 hours per day; however this is not finalized.
- ▶ It is not clear exactly how these high utilization cases will be handled, but the end result is that people receiving 24 hour care could be sent to nursing homes.



## Durable Power of attorney

- ✓ New York General Obligations Law Section 5-1501 *et seq.*, provides the statutory forms for powers of attorney, and allows for an “agent” to perform a wide range of transactions for a “principal”, generally financial. It does not confer health care decision-making powers.
- ✓ Powers of Attorney must be executed by a person while competent and will survive incapacity. This is why they are called “durable.”



## Durable Power of attorney

- ✓ In 2009, a new Statutory Short Form was introduced to provide a more secure instrument and less likely to be fraudulently executed. That form made a number of major changes. This was in reaction to several court cases where Powers of Attorney were improperly used.
- ✓ Powers of Attorney executed prior to 2009 were still valid.
- ✓ In 2010, a few technical changes were made, and the sections regarding revocation and successor agents were changed as well.



## Durable power of attorney (2009-2010 Changes)

- ✓ There is a “Caution to the Principal” at the beginning of the form to inform people of the serious nature of the document.
- ✓ There is a statement by the agent will act in the best interest of the principal.



## Durable power of attorney (2009-2010 changes)


- The Power of Attorney must be signed and accepted by the Agent(s). It only becomes valid after the Agent signs and accepts the responsibility of acting as agent.
- If you name more than one agent, then each one would have to sign in order to use it.
- A Successor agent or agents can be named. They do not have to sign until they are needed.
- Additions, alterations and modifications must be appended in a Modifications section. No changes are allowed to the form except for this section.



## Durable power of attorney (2009-2010 changes)


- Prior Powers of Attorney are not automatically revoked unless there is a statement specifically revoking them.
- There is a box for Agent compensation. If no provision is made, the Agent can not be compensated. Also, reasonable compensation can be specified in the Modifications section;
- There is a provision for appointment of a Monitor, who has the power to review the accounts of the Agent;
- For gifts in excess of \$500 in the aggregate, a Statutory Gift Rider must be appended. This form requires two witnesses. This is changed in the new law.





## Durable power of attorney (2020 changes)

- Chapter 343 of the Laws of 2020 provides for a new Statutory Power of Attorney, signed in December 15, 2020. This law comes after a multi-year effort by the NYS Bar Association to make the form simpler to use.
- Substantial conformance with the statutory form, rather than “exact wording.”
- Optional sections can be omitted and replaced with “intentionally omitted.”
- Two witnesses are required; one may be the notary.
- For gifts in excess of \$5,000 in the aggregate, a gift-giving power must be in the Modifications.



## Durable power of attorney (2020 changes)

- Any person or institution asked to accept a Power of Attorney can request an agent's certification as to any factual matter, e.g., is principal still alive, has the POA been revoked, etc. Also, the law permits the person or institution to make a request in writing for an attorney's opinion letter regarding any matter of law. The request must state the reason that the opinion is being requested.
- The person or institution must accept or reject the form within 10 days. A response can be made and a final decision is required 7 days after the response.
- These deadlines **do not apply** to a number of government agencies or a public retirement system.
- If there is unreasonable failure to honor the statutory form, there can be a lawsuit for damages, including attorneys fees and costs. This is to deter banks and financial institutions from rejecting the form for no legal reason. This also applies to older Powers of Attorney.



## Durable power of attorney (2020 changes)

- Ability for individual to sign at direction of principal who is unable to physically sign.
- Effective 180 days after signing, so June 13, 2021. The new form should not be used until then. Prior forms will still be valid.
- Questions?