Berwitz & DiTata LLP

A STEP AHEAD

Third Quarter 2015 • Volume 12 • Issue 3

Lawrence N. Berwitz, Esq. and
Maureen Rothschild DiTata, Esq.

Estate Planning in the Age of Step-Families

Many of us have at least one step-relative in the family – a step-parent, a step- or half-sibling or a step-child. Because the relationships among step-family members are frequently as strong or stronger than the relationships we have with our direct family members, it is important to take current and potential step-relationships into account when planning your estate.

So, for example, recently, a client's step-siblings had refused to acknowledge that, despite the fact that their father had been married to his second wife for only a few years, a strong and meaningful relationship had existed between their father and his step-daughter for the rest of his lifetime.

Sometimes, however, if we don't have step-relationships in the immediate family, we don't recognize the importance of considering the issue. Here is another example of how things can go wrong:

Bill and Betty had one child, Carol, who had, at the time that Bill and Betty did their estate planning, one

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Medicaid's Protections Are Afforded To Same-Sex Couples Nationwide

In a landmark decision, the U.S. Supreme Court has ruled that state bans on same-sex marriage are unconstitutional and that states must recognize same-sex marriages performed in other states. Among other implications, the ruling means that same-sex couples living in states that previously did not recognize their marriage will now be covered by Medicaid's "spousal impoverishment" protections and asset transfer rules. Of course, marriage is for better or for worse, and the Medicaid implications of marrying, or securing recognition for the marriage, can be either helpful or detrimental depending on the couple's financial circumstances.

Certain Medicaid regulations are aimed at keeping the spouses of Medicaid recipients from becoming impoverished. These rules now apply to same-sex married couples. For instance, in New York, nursing home residents are not eligible for Medicaid if their countable resources

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Guardianship — Different Strokes for Different Folks Article 81 Guardianships

In our last issue of *"A Step Ahead,"* we provided information regarding Article 17 and 17-A guardianships. In this issue, we will address the "other" New York guardianship proceeding, the Article 81 guardianship.

First, it is important to remember that estate planning is not just about what happens after you die. A good estate plan will also protect you if there comes a time in your life when you become incapacitated. Some people incorrectly assume that a spouse or "next of kin" has legal authority to manage our affairs if we become incapacitated. This is not true. Without proper planning, if you

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become ill or incapacitated, an Article 81 guardianship proceeding is in your future.

Article 81 of New York's Mental Hygiene Law authorizes a Court to appoint a representative to make personal and property management decisions for an individual who is ill or incapacitated. The proceeding is generally commenced through the filing of a Petition by the person seeking to be appointed as the guardian. The Petition must be supported by evidence that the individual is no longer capable of managing his or her personal and/or financial affairs. The Court will then conduct a hearing at which evidence will be produced and witnesses questioned so that it can determine whether a guardian is needed and, if so, who that guardian should be. The Court will also determine what level of personal care and property management powers should be granted to the guardian.

Article 81 guardianships can be costly, time-consuming and intrusive on affairs that most of us would prefer to keep private. Imagine parading your loved one before a Court to prove that he or she can no longer make appropriate personal and financial decisions. Imagine having to testify about your loved one's bathing, grooming and bathroom habits, or having to admit that your loved one no longer knows how to write a check or pay a bill. Imagine that, apart from these indignities, Court fees, attorneys fees, fees for the service of process and the

fees of a Court Evaluator, someone whom the Court appoints to investigate the matter before the hearing, must all be paid. Now consider that the process takes weeks and even months for the Petition to be prepared, served, filed, considered by the Court and investigated by the Court Evaluator, and more time passes before the matter appears on the Court's calendar for the hearing, after which additional time is required to prepare, serve and file the papers which will ultimately constitute the authority of the guardian to act! Add to this that there is no guarantee that the person who wishes to be appointed will prevail. Finally, once appointed, a guardian must account to the Court on an annual basis, apprise the Court of the incapacitated person's affairs, explain expenditures made on behalf of the incapacitated person and obtain Court approval before performing certain tasks or taking certain steps on behalf of the incapacitated person. It is no wonder that people in the know wish to avoid guardianship.

How can I avoid an Article 81 Guardianship?

Proper planning in advance and the implementation of "Advance Directives" can eliminate the need for a guardianship proceeding. A Power of Attorney (POA) permits you, the "principal," to name another, the "agent," to make financial and property management decisions for you. A Health Care Proxy (HCP) appoints an agent to make health and medical decisions for you if you are unable to communicate your wishes. A Living Will (LW) contains information for your agent as to your end-of-life wishes. Having these documents in your estate plan will allow you to avoid Court involvement and ensure that your health and financial matters remain private. By utilizing these effective tools, we can maintain control for as long as possible and then ensure that our wishes will be carried out by those we trust.

Medicaid's Protections Are Afforded To Same-Sex Couples Nationwide

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exceed $14,850. The healthy (or "community") spouse is permitted to keep up to $119,220 in assets and, if he or she has less than this amount, the nursing home spouse may transfer assets to the community spouse to make up the difference. So, too, if the community spouse's monthly income is less than $2,980.50 (the "community spouse income allowance"), he or she is permitted to retain so much of the nursing home spouse's income as will bring his or her own income to that level. Medicaid's rules also help married couples protect their homes. The state cannot seize or impose a lien on the home of a deceased Medicaid beneficiary if the spouse still resides there, and Medicaid applicants may transfer title of the home to their spouse, thus allowing the spouse to remain in the home.

Same-sex spouses of Medicaid recipients will now be shielded from Medicaid "estate recovery." Under Medicaid law, following the death of the Medicaid recipient, Medicaid must attempt to recover the cost of the benefits provided from his or her estate. However, no recovery can take place until the death of the recipient's spouse.

Another advantage to being a married couple is that one spouse may transfer assets to the other without triggering Medicaid's penalties for asset transfers. Even after entering a nursing home, the institutionalized spouse may transfer any asset to his spouse, although this may not help him become eligible for Medicaid since the same limit on both spouses' assets will apply.

None of the above protections are available to non-spouse partners of Medicaid recipients. In 2011, when only six states allowed gay and lesbian couples to wed, the federal government gave states the option of extending spousal protections to same-sex *domestic partners*. With same-sex couples now having the right to marry nationwide, it is unclear whether individual states will continue to offer spousal benefits to same-sex domestic partners.

The newly available protections cut both ways. The asset and income protections primarily help lower-income individuals. Although under Medicaid's rules, the transfer of assets to individuals other than a spouse is not exempt, domestic partners are also not subject to the asset limits. Thus, if the healthy domestic partner is also the "monied" partner the assets are not counted in determining the applicant's eligibility for Medicaid.

If you would like to discuss the implications of Medicaid planning before undertaking your marriage vows, call Berwitz & DiTata LLP and ask for a consultation.

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son, David. Bill and Betty implemented a trust for David's benefit. In the trust, in the event that David was not alive, the contingent beneficiaries were listed as "the brothers and sisters" of David. After the trust was created, Carol divorced David's father, Curt, and Curt remarried and had two children with his second wife. Years later, David died suddenly and unexpectedly. Curt's two children with his second wife were technically the "brothers and sisters" of David and, thus, eligible beneficiaries under the trust established by Bill and Betty. Bill and Betty, who were still alive, reviewed their estate plan and were advised by their new counsel that David's half-siblings were the beneficiaries of the trust despite the fact that they had never even considered this possibility. Imagine if the problem had arisen only after they had died?

This case demonstrates the importance of the care and consideration that must be given to the language used in describing family members in estate planning documents. When Bill and Betty did their estate planning, neither they nor their counsel anticipated the consequences of the simple phrase, "brothers and sisters" of David.

Anticipating the changes to family structure that come about in our fluid society, and utilizing language, when referring to family members, that is tried and tested is something that we, at Berwitz & DiTata LLP, strive to do. Call us to review your family-related concerns.

310 Old Country Road, Suite 101
Garden City, New York 11530

TELEPHONE: (516) 747-3200
FACSIMILE: (516) 747-3727
WEBSITE: www.berwitz-ditata.com

Berwitz & DiTata LLP Welcomes Alyssa

Berwitz & DiTata LLP welcomes associate attorney Alyssa H. Solarsh to the firm. After earning a bachelors degree summa cum laude in Political Science from the C.W. Post campus of Long Island University, Alyssa obtained her law degree from Touro College Jacob D. Fuchsberg Law Center. During law school, Alyssa participated in Touro Law Center's Elder Law Clinic where she assisted senior citizens in various legal matters. She also received the David Berg Public Interest Fellowship for her dedication to assisting those in the community, pro-bono. She also had the opportunity to intern at the Suffolk County regional office of the New York Attorney General. Alyssa practices in the areas of estate planning, estate administration, and elder law. Alyssa is admitted to practice law in the State of New York and is member of the Bar Associations of New York State, Nassau County, and Suffolk County. In her spare time, Alyssa enjoys photography and competing in races.

Alyssa H. Solarsh, Esq.

Have You Relocated?

Do You Want to Keep Receiving This Newsletter?

If you have moved to a new home, either permanently or temporarily, please contact our office with your up-to-date address, telephone numbers, and e-mail addresses. We want to be sure that you will continue to receive communication from us.