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IN THIS ISSUE:

CONNECTICUT COURT FINDS ATTORNEY IN
FACT LIABLE UNDER PROMISSORY ESTOPPEL
THEORY

AGREEMENT TO SPLIT PROCEEDS FROM SALE
OF GIFTED HOUSE ENFORCEABLE

TRANSFER PENALTY IMPOSED ON LUMP-SUM
CARE AGREEMENT

NURSING HOME ADMISSION AGREEMENT
AND PRIOR KNOWLEDGE OF ASSET TRANSFER
PRECLUDES HOLDING FAMILY LIABLE

NURSING HOME NEGLIGENCE VERDICT
BASED ON LACK OF STAFFING AFFIRMED

IRS CLARIFICATION REQUESTED ON CAPITAL
GAIN EXCLUSION ON PRINCIPAL RESIDENCE

COURT TO DECIDE WHETHER DIFFERENCE IN
MEDICAID SPEND-DOWN FOR HOME HEALTH
VERSUS NURSING HOME BENEFITS VIOLATES
FEDERAL DISABILITY LAW

Connecticut Court Finds Attorney in Fact Liable under Promissory Estoppel Theory

On December 13, 2007, Anna Parawich's attorney-in-fact, transferred money from Parawich's account to himself. The next day, Parawich was admitted to Abbott Terrace Health Center, a nursing home. The transfer made Parawich unable to meet her obligation to Abbott Terrace, although it was known there would be financial obligations to the facility. The attorney-in-fact signed an admissions agreement providing that he would use Parawich's assets to pay her expenses and that he would promptly apply for Medicaid when her assets were exhausted, but he did neither. Abbott Terrace demanded payment after the amount due for services rendered reached \$75,151.77. In October, 2008, Abbott Terrace sued Parawich and her attorney-in-fact; the complaint went unanswered and a motion for default was granted. At a hearing on damages, the court rendered a judgment finding that Parawich alone was liable for damages, but not her agent. After re-argument, the trial court again entered judgment only against Parawich and Abbott Terrace appealed. The Court of Appeals reversed, finding that by virtue of the default, the attorney-in-fact had admitted Abbott Terrace's allegations relating to promissory estoppel and fraudulent conveyance. Accordingly, Connecticut law demanded a judgment against the attorney-in-fact. The case was remanded for a determination of damages. See *Abbott Terrace Health Center, Inc. v. Anna Parawich*, 120 Conn. App. 78 (March 23, 2010)

Agreement to Split Proceeds from Sale of Gifted House Enforceable

Guiseppe and Donata wanted to protect their home from a Medicaid lien should they ever need nursing home care so they conveyed their home to their daughter, Bianca. On the same date, Bianca, her siblings and her parents entered into an agreement providing that after Guiseppe and Donata died, Bianca would sell the house and split the proceeds equally with her three siblings; the agreement provided that it could only be modified in writing by all of the parties. The parents then executed Wills leaving their remaining estate in equal shares to their four children. After Donata died, Guiseppe, Bianca and one of the daughters executed an amendment to the agreement purporting to change the agreement so that Bianca received 60% of the sale proceeds and one daughter received 40% of the proceeds. Following Guiseppe's death, the other daughters sought to enforce the original agreement. Bianca argued the original agreement was unenforceable because there was no consideration. The trial court and the court of appeals disagreed. Bianca's promise to take title and distribute the proceeds after her parents death benefitted her parents sufficiently to constitute adequate consideration. See *Cascio v. D'Arcangelo*, 2010 Mass App. Unpub. LEXIS 346 (March 30, 2010)

Transfer Penalty Imposed on Lump-Sum Care Agreement

Guiseppe and Donata wanted to protect their home from a Medicaid lien should they ever need nursing home care so they conveyed their home to their daughter, Bianca. On the same date, Bianca, her siblings and her parents entered into an agreement providing that after Guiseppe and Donata died, Bianca would sell the house and split the proceeds equally with her three siblings; the agreement provided that it could only be modified in writing by all of the parties. The parents then executed Wills leaving their remaining estate in equal shares to their four children. After Donata died, Guiseppe, Bianca and one of the daughters executed an amendment to the agreement purporting to change the agreement so that Bianca received 60% of the sale proceeds and one daughter received 40% of the proceeds. Following Guiseppe's death, the other daughters sought to enforce the original agreement. Bianca argued the original agreement was unenforceable because there was no consideration. The trial court and the court of appeals disagreed. Bianca's promise to take title and distribute the proceeds after her parents death benefitted her parents sufficiently to constitute adequate consideration. See *Cascio v. D'Arcangelo*, 2010 Mass App. Unpub. LEXIS 346 (March 30, 2010)

Nursing Home Admission Agreement and Prior Knowledge of Asset Transfer Precludes Holding Family Liable

In 2006, Heriberto conveyed his home to his son, Herbert. In 2008, Heriberto was admitted to a nursing home which was aware of the prior transfer. Heriberto's daughter-in-law, Kathryn, signed an admission agreement requiring her to use Heriberto's assets to pay for his care until Medicaid began paying. The agreement did not make her personally liable for the bills and did not require the return of any previously conveyed assets. Herbert entered into a similar oral agreement. When a Medicaid penalty was imposed, the nursing home demanded payment. The

family took Heriberto home, where he received care until he died. The nursing home billed Herbert and Kathryn directly in the amount of \$23,000. When they failed to pay, suit was filed against the estate (which was insolvent), Herbert and Kathryn. Herbert and Kathryn moved for summary judgment, which was granted; judgment was entered against the estate. On appeal, the court refused to reform the nursing home's contract, noting that it was consistent with federal law which prohibits third-party guaranties. The court also found it significant that the nursing home was aware of the 2006 conveyance, which distinguished this case from other precedent. *Arnold Walter Nursing Home v. Pumarejo*, 2010 N.J. Super. Unpub. LEXIS 610 (March 23, 2010)

Nursing Home Negligence Verdict Based on Lack of Staffing Affirmed

Tucker Nursing Center appealed a \$1.25 million verdict relating to its negligence in caring for a resident who was at risk of developing pressure ulcers. In addition to other matters, the nursing home appealed the trial court's ruling that former employees could testify regarding inadequate staffing, lack of supplies and complaints regarding care. The trial court allowed testimony from former employees concerning what they experienced and observed while the resident was at the nursing home, reserving ruling concerning other time periods. In affirming the verdict, the Court found that the testimony objected to: "pertained to the conditions at Tucker Nursing while Mr. Raybon was a patient there, and that the testimony specifically related to the care he and other patients received, including the fact they observed Mr. Raybon or other residents soiled with urine and waste, that they lacked the supplies necessary to do their jobs, which included bathing and cleaning the patients, and that the facility lacked enough staff to turn or reposition Mr. Raybon every two hours as his condition required." The trial court's rulings on other evidentiary objections were similarly affirmed. The judgment was affirmed. *Tucker Nursing Center, Inc. v. Mosby*, 2010 Ga. App. LEXIS 277 (March 24, 2010)

IRS Clarification Requested on Capital Gain Exclusion on Principal Residence

On March 31 the National Academy of Elder Law Attorneys submitted a letter to the IRS requesting clarification with respect to the wording of IRC Section 1022, which is unclear as to whether any basis increase is allocable to the home upon the death of a life tenant or an income beneficiary of an irrevocable trust, or whether a grantor trust would be treated differently as having been owned by the decedent. NAELA is suggesting that the IRS clarify with a notice stating that the remaindermen of a deed where the decedent retained a life estate, and the remaindermen of an irrevocable trust where the decedent retained the income interest for life, would be entitled to have the basis increased under Section 1022.

Court to Decide Whether Difference in Medicaid Spend-Down for Home Health Versus Nursing Home Benefits Violates Federal Disability Law

A federal district court sets a hearing to determine whether the fact that a Medicaid recipient in a nursing home can keep more income than if he receives home health benefits creates an incentive for institutionalization that violates federal disability law. *St. Marie v. Ludeman* (U.S. Dist. Ct., D. Minn., No. 09-3141 (JNE/AJB), March 11, 2010).

John St. Marie is a quadriplegic who works as an attorney. When his condition degenerated, he began receiving home health Medicaid benefits through a Minnesota program for disabled individuals who are employed. The state informed Mr. St. Marie that when he turned 65 he would no longer be eligible for those benefits and that he would have to spend down \$4,586 of his monthly income in order to receive Medicaid benefits.

Mr. St. Marie brought a suit in federal court to enjoin the state from enforcing the monthly spend-down, arguing it violated the integration requirements of the Americans with Disabilities Act (ADA) and ; Section 504 of the Rehabilitation Act (Section 504) by requiring him to move into a nursing home. If Mr. St. Marie remains at home and spends down his income, his and his wife's combined income would be \$911, but if he enters a nursing home, his wife would be entitled to a monthly income allowance of \$2,739. Mr. St. Marie asked for a temporary restraining order.

The U.S. District for the District of Minnesota denies the restraining order, finding that a waiver of the

spend-down requirement would fundamentally alter the nature of the program. However, the court notes that Mr. St. Marie has a strong incentive to move into a nursing home because his wife could keep a greater portion of his income than if he remains at home. Because this issue was not briefed by the parties, the court sets a hearing to determine whether this incentive constitutes a violation of federal disability law.

Editor's Note: This anomaly in the rules brings to a head two competing interests. On the one hand, there is a national movement to allow our elderly and disabled citizens to "age in place" and remain in the least restrictive setting possible. This movement is reflected in our laws and in the allocation of State and federal health care dollars. Nonetheless, this laudable goal is to be balanced against fiscal constraints—there is only so much taxpayer money available to fund our health care needs.