

# *LKRB Alert*

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## **Littman Krooks Roth & Ball P.C.**

**Elder Law and Estate Planning**

### **THE ZERO NAMI BUDGET**

#### **Use of the Zero NAMI Budget in Guardianships**

There are a number of fees that must be paid from the guardianship estate in any guardianship proceeding: the petitioner's legal fee, the Court Evaluator's fee and, in certain cases, the legal fee of the AIP's Court-Appointed Counsel. In addition, there also may be the fee of an examining physician. The Court approves any and all such fees in the Order and Judgment Appointing Guardian. Furthermore, guardian commissions must be paid during the course of the appointment. When the AIP is indigent, however, from where will the money come to cover these fees?

When a case involves an indigent AIP receiving Medicaid benefits, the following strategy may be employed: the Court may be requested to direct (In the Order and Judgment Appointing Guardian) that the local Medicaid agency issue a budget that reflects a zero NAMI, whereby the AIP's net income (i.e., after Medicare Part B and other appropriate deductions) is placed into an escrow account that is deemed exempt (Medicaid is served with all papers so it is on notice of the proposed budgeting methodology) by the guardianship court for purposes of the AIP's Medicaid eligibility. Thereafter, the funds which accrue in the escrow account are used to pay for the costs of the guardianship proceeding (as approved by the Court), as well as guardian commissions.

Certain guardianship judges may not feel comfortable directing Medicaid to issue a zero NAMI budget without specifically setting forth a legal basis for the relief in the Order and Judgment Appointing Guardian. Thus, the Court may include in the Order and Judgment a written determination that the costs and expenses of the guardianship proceeding are "necessary medical expenses" based upon the theory that the appointment of a guardian is necessary to make medical decisions for the AIP or to submit a Medicaid application on behalf of the AIP. The Medicaid regulations at 18 NYCRR section 360-4.9(a)(4) provide that necessary medical expenses are a permissible deduction from the A/R's income. This provides a legal basis for directing that a zero NAMI budget be issued to cover guardianship costs.

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Courts have upheld this strategy and have held that legal fees “necessarily” incurred on behalf of an incompetent, including 1) the cost of filing a guardianship petition, 2) the cost of preparing the Medicaid application, and 3) monthly fees to the guardian, are “necessary medical expenses” not otherwise reimbursable by a third party, and therefore, deductible from a Medicaid recipient’s NAMI.

It is important that the attorney draft the appropriate language which allows the Court to make this determination.

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