

# *LK Alert*

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## **Littman Krooks LLP**

### **FAIR HEARING DECISION - PERSONAL SERVICES CONTRACT CONSIDERED AN UNCOMPENSATED TRANSFER WHEN SIGNED AFTER APPLICANT ENTERS NURSING HOME**

On March 2, 2007, the New York State Department of Health (“DOH”) issued a fair hearing decision which upheld a determination of the Oneida County Department of Social Services (“DSS”) that a transfer of assets pursuant to a Personal Services Contract is an uncompensated transfer resulting in a Medicaid penalty period where the contract was signed after the applicant entered the nursing home.

Following the Deficit Reduction Act of 2005 (the “DRA”), many attorneys are using more sophisticated alternatives to assist families with planning and asset protection. One such alternative is a Personal Services Contract (a/k/a Caregiver Agreement), whereby assets are transferred by the applicant to one or more individuals in exchange for a promise to provide certain personal care services to the applicant. While it is still unclear exactly how the local Medicaid agencies will treat such transfers, it is generally believed that such transfers will be considered by Medicaid to be compensated transfers (i.e., not gifts) to the extent that and the amount transferred is commensurate with the fair market value of the specific services provided under the contract, and the contract is entered into under appropriate circumstances.

In the recent case which resulted in the above-mentioned March 2, 2007 fair hearing decision, DSS argued that since the applicant was already in a nursing home at the time of the contract, the services provided for under the contract (which included monitoring the oxygen administered to the applicant) were duplicative with services to be provided by the nursing home and, as such, not medically necessary. DSS introduced an opinion memo from its legal division, which stated that upon review of the contract and discussion with DOH Bureau of Law, no Personal Services Contract will be accepted when the recipient is in a nursing home as the caregivers are “considered to be providing services that are not medically necessary.”

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DOH agreed with DSS and upheld the agency's denial. DOH distinguished the February 20, 2002 fair hearing decision in Matter of Carolla (which upheld the fair market value of the Personal Services Contract) by noting that Mr. Carolla was not in a nursing home at the time the personal services were provided to him.

In view of the complexity of issues involved in the more sophisticated post-DRA planning techniques, such as Personal Services Contracts, it is critical that such cases be identified early on. If you have any questions about Personal Services Contract or any other post-DRA planning techniques, please feel free to contact us.

Littman Krooks LLP encourages you to share this LK Alert with anyone interested in the issues discussed herein. Please contact Nicole Garcia at (212) 490-2020 or (914) 684-2100 if you are interested in having an attorney from Littman Krooks LLP speak at your facility. Littman Krooks LLP offers legal services in several areas of law, including Accounts Receivable Management, Medicaid, Health Care, Guardianship, Elder law, Estate and Tax planning, Public Benefits, Estate Administration/Probate, and Trusts and Estates. Our offices are located in Midtown Manhattan at 655 Third Avenue, and in White Plains, New York at 399 Knollwood Road.

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