DONALD D. VANARELLI▲●■◆
WHITNEY W. BREMER
CHEN LI●
SHELBY E. NEISS●
Of Counsel
ERIC A. STRULOWITZ
▲ *Certified Elder Law Attorney*
By The National Elder Law Foundation
Accredited by The American Bar Association
● *Also Admitted in New York*
■ *Accredited Professional Mediator*
◆ *Trained Collaborative Professional*

LAW OFFICE *of* DONALD D. VANARELLI
242 ST. PAUL STREET, WESTFIELD, NJ 07090
TELEPHONE: 908-232-7400
FACSIMILE: 908-232-7214
E-MAIL: dvanarelli@dvanarelli.com
WEB SITE: www.dvanarelli.com

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FINANCIAL EXPLOITATION OF THE ELDERLY: IMPACT ON MEDICAID ELIGIBILITY

I. INTRODUCTION

a. The Issue

It is not uncommon for an elderly or disabled person to entrust his or her finances to a third party. For example, an elder may execute a power of attorney as a simple estate planning tool in order to ensure that his or her affairs are properly handled in the event that the elder is unable to act due to illness, injury, incapacity or other cause. In other cases, an elder who is becoming overwhelmed by day-to-day financial tasks may simply "hand over the checkbook" to a relative or a trusted friend.

But what happens when the person to whom the elder's affairs are entrusted misuses that authority? As the elder population in the United States continues to increase dramatically, the financial exploitation of the elderly continues to be an increasingly serious problem.

The exploitation may arise in various contexts. The elder's assets may be misappropriated by a family member or agent under a power of attorney, see, e.g., In re Garson, *infra,* 793 N.Y.S.2d 397, 17 A.D. 3d 243 (N.Y. App. Div. 1st

Dept. 2005); or by the guardian or conservator appointed to handle the elder's affairs, see Probate of Marcus, *infra,* 199 Conn. 524, 509 A.2d 1 (Conn. 1986). The elder may even retain an attorney to file a Medicaid application on her behalf, only to have that attorney misappropriate her assets in the guise of a Medicaid "spend down." See In re Disciplinary Action Against Peterson, *infra,* 718 N.W. 2d 849 (Minn. 2006).

But whether elder financial exploitation involves common theft by an outsider or the improper use of a power of attorney by a family member, that financial abuse presents a myriad of issues.

Liability may be clouded by issues of family relationships and trust between the victim and the abuser; ambiguities in powers of attorney or other instruments controlling the fiduciary's authority; and varying levels of competency of the victim.

Adding to the dilemma of financial exploitation is the issue of Medicaid eligibility, and the impact of the exploitation on the victim's eligibility for necessary public benefits. In particular, when a third party makes improper transfers of the elder's property without the elder's knowledge or consent, will those improper transfers negatively affect the elder's eligibility for Medicaid?

b. The Medicaid Program

Medicaid is a joint federal and state program created under Title XIX of the Social Security Act of 1965. It provides a source of funding for long-term

care to those aged, blind and disabled individuals who qualify financially. 42 U.S.C. §1396 et seq. Eligibility for Medicaid is based upon financial need.

With the enactment of the Deficit Reduction Act of 2005, Medicaid legislation now imposes a 60-month "look-back period," in which Medicaid officials "look back" from the application date to analyze asset transfers by the applicant. Id. If a Medicaid applicant disposed of assets for less than fair market value within the "look-back" period, the applicant may be subject to a period of Medicaid ineligibility (a "penalty period"), based upon the value of the uncompensated transfer. 42 U.S.C. §1396(p).

In the context of this public benefits program that penalizes transfers of the applicant's resources for less than fair market value, what is the result when the applicant's resources are transferred by a wrongdoer without the applicant's knowledge or consent?

i. Resource Transfer Rules

The Medicaid resource transfer rules provide a logical starting point for the analysis of a financial exploitation case. 42 C.F.R. §410.1201 defines a "resource" as follows:

> (a) Resources; defined. For purposes of this subpart L, resources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) **owns and could convert to cash to be used for his or her support and maintenance**.
>
> > (1) If the individual has the **right, authority or power to liquidate** the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

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> (b) Liquid resources. Liquid resources are cash or other property which can be converted to cash within 20 days....
>
> (c) Nonliquid resources. (1) Nonliquid resources are property which is not cash and which cannot be converted to cash within 20 days.... Examples of resources that are ordinarily nonliquid are ... buildings and land.

20 C.F.R. §416.1201(a)-(c) (1993) (emphasis supplied).

In addition, 20 C.F.R. §416.1246(e) provides that,

> Transfer of a resource for less than fair market value is presumed to have been made for the purpose of establishing ... Medicaid eligibility **unless the individual ... provides convincing evidence that the resource was transferred exclusively for some other reason.**

(Emphasis supplied).

Pursuant to 42 U.S.C. §1396a(a)(17)(B), a state's Medicaid plan must include "reasonable standards ... for determining eligibility ... which provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant..."

State Medicaid regulations, in turn, provide further guidance for the analysis of unauthorized transfers. Although Medicaid regulations vary by state, below is an analysis of New Jersey regulations, by way of example.

New Jersey regulations provide that, "in order to be considered in the determination of eligibility, a resource must be 'available.'" N.J.A.C. 10:71-4.1. Mirroring 20 C.F.R. §416.1201, the New Jersey regulations provide that a

resource is considered "available" if the applicant has "the right, authority, or power to liquidate" the resource. Id.

According to New Jersey regulations, certain categories of resources are "excludable" and are not considered in the Medicaid eligibility determination. The following are among the categories of "excludable resources":

> The value of resources which are **not accessible to an individual through no fault of his or her own.**

N.J.A.C. 10:71-4.4(b)(6) (emphasis supplied). The New Jersey regulation provides examples of such inaccessible resources, including real property that cannot be sold "because of the refusal of a co-owner to liquidate." Id.

Practitioners are well-advised to pay particular attention to their state's Medicaid regulations. In states with Medicaid regulations similar to the aforecited New Jersey regulations, a strong argument can be made that funds or assets that have been improperly transferred by a third party would be a classic example of a resource that is "not accessible ... through no fault of [the applicant's] own." In fact, such a scenario is arguably more compelling than the example provided in the aforecited New Jersey regulation itself, in which a co-owner refuses to liquidate a property. Id.

An alternate argument could be that, as to the stolen resources, the applicant can rebut the presumption that the resources were transferred to establish Medicaid eligibility. See 20 C.F.R. §416.1246(e); N.J.A.C. 10:71-4.7.

Medicaid Communication No. 88-15 states that, when determining whether an "individual" has transferred resources, the "individual" shall be

defined to include the eligible individual, his/her spouse, or "any person acting for and **legally authorized** to execute a contract for the eligible individual." (Emphasis supplied). Of course, an agent's theft of an individual's resources falls well outside the scope of a power of attorney's "legal authority."

ii. <u>The Hardship Exception</u>

In the event of a Medicaid denial as a result of an unauthorized transfer, another avenue of redress may be available to the applicant. The U.S. Code provides for states to make determinations that the denial of Medicaid eligibility "would work an undue hardship...." 42 U.S.C. §1396p(c)(2)(D). <u>See</u> 20 C.F.R. §416.1246; <u>see also</u> HCFA Transmittal No. 64, §3258.10(C)(4), 5. ("When application of the transfer of assets provisions ... would work an undue hardship, those provisions do not apply.... Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life.")

Again, by way of example, under the New Jersey hardship exception regulation:

> Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer,…an applicant may apply for an exception to the transfer of asset penalty if he or she can show that the penalty will cause an undue hardship to him or herself.

N.J.A.C. 10:71-4.10(q). Undue hardship will be found to exist if the Medicaid penalty "would deprive the applicant/beneficiary of medical care such that his or

her health or his or her life would be endangered," or "would deprive the individual of food, clothing, shelter, or other necessities of life." Id.

In order to prevail in a hardship exception request, the applicant must demonstrate that,

> the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she has made good faith efforts, **including exhaustion of remedies available at law or in equity, to recover the assets transferred.**

Id. (emphasis supplied).

The hardship exception thus places the burden on the applicant, similar to the burden placed on the applicant in Probate of Marcus, 199 Conn. 524, 509 A.2d 1 (Ct. 1986) and Linser v. Office of Attorney General, 2003 N.D. 195, 672 N.W. 2d 643 (N.D. 2003), discussed in Section III(b)(i), *infra,* to pursue litigation if necessary to recover the transferred assets.

The limited reported New Jersey law on the hardship waiver demonstrates that the requirements for entitlement to the hardship exception are stringently applied. See K.C. v. DMAHS, 2002 WL 31954976 (OAK Dkt. No. HMA 1291-02), *rev'd*, 2002 WL 32593033 (N.J. Admin. 2002) (reversing the Administrative Law initial decision that the petitioner qualified for a hardship waiver); E.P. v. DMAHS, 2002 WL 31098144 (OAL Dkt. No. HMA 063-02), *rev'd*, 2002 WL 32552608 (2002) (reversing the Administrative Law initial decision that the petitioner qualified for a hardship waiver); C.P. v. DMAHS, 2003 WL 22700943 (OAK Dkt. No. HMA 6728-03), adopted, 2003 WL 23643608 (2003) (adopting the

Administrative Law initial decision that the petitioner did not qualify for a hardship waiver).

It is, however, an alternative strategy that should not be overlooked.

b. Obstacles To Enforcing Elder's Rights

As mentioned above, cases involving the financial exploitation of the elderly present various unique issues. Liability may be clouded by issues such as family relationships and trust between the victim and the abuser (see Anecdotal Material, Case #2, *infra*); whether the abuser was "authorized" to transfer the elder's assets; and varying levels of competency of the victim. See, e.g., Bernau v. State, 891 So. 2d 1229 (Fla. App. 2d Dist. 2005), discussed *infra*.

i. Competency Issues

If the competency of the victim is compromised, it is vital that this issue be fully addressed by the advocate, in order to ease Medicaid's (or the court's) reluctance to give proper weight to the issue.

The competency of the victim may affect the evaluation of issues such as the promptness of the discovery of wrongdoing, or the victim's "right, authority or power" over the assets in question. See 20 C.F.R. §416.1201.

For example, in Davis v. Monahan, 832 So. 2d 708 (Fla. 2002), the Florida Supreme Court refused to apply the doctrine of delayed discovery in order to permit the suit of an elderly woman suffering from dementia to file suit against family members based upon their alleged misappropriation of assets, despite the elder's claimed recent discovery of the misappropriations.

In Chalmers v. Shalala, 23 F.3d 752 (3d Cir. 1994), a lower court had affirmed the termination of SSI benefits. The SSI recipient was schizophrenic and "unable to care for herself." 23 F.3d at 753. After the recipient and her siblings inherited real properties, they formed a partnership to manage the properties and signed an agreement conveying their respective equitable interests in the properties to the partnership. Id. The siblings' agreement also provided that the partnership "may be dissolved at any time by any of the partners." Id. at 754.

When the recipient appealed the SSI determination that her benefits were being terminated because of her ownership interest in the properties, the administrative law judge held that her interest was a resource, because she "had the power to dispose of her interest in the partnership." Id. at 754.

On appeal to the district court, the court held that her interest was a resource under 20 C.F.R. §416.1201 because she "had the legal right to liquidate it." Id. On appeal to the Third Circuit, the court rejected the SSI recipient's claim that, despite her "right" to liquidate that interest, her disability rendered her without the "power" to do so. Notably, in so doing, the court stated,

> although we are sympathetic to [the recipient's] disability, **the record does not establish unequivocally that she cannot effectuate her legal rights**. An affidavit filed by her psychiatrist states that it would be "impossible for [the recipient] to retain one attorney and participate in and discuss legal matters," ... but **it is also a matter of record that [she] had been represented by an attorney at each stage of these proceedings and that she signed the partnership agreement [in issue].**

Id. at 756 (emphasis supplied).

Following the Chalmers v. Shalala decision, a state court in the same circuit relied upon New Jersey Medicaid regulations to find that, when an individual is incapacitated and does not have a guardian in place, the individual's assets may be "unavailable" because they are not accessible to the individual "through no fault of his or her own." See I.L. v. Division of Medical Assistance and Health Services ("DMAHS"), *infra,* 2004 WL 47444411 (N.J. Admin. 2004), *rev'd*, 2005 WL 4684709 (Jan. 27, 2005), *rev'd*, 389 N.J. Super. 354 (App. Div. 2006) (*citing* N.J.A.C. 10:71-4.4(b)(6)).

I.L. involved an 87-year old nursing home resident with Alzheimer's disease, who had been twice denied Medicaid eligibility. The first and second Medicaid applications had been denied because the verification documentation required by Medicaid was not submitted. After the nursing home became involved and submitted the verification documents required, the third application was denied because the applicant owned insurance policies with cash surrender values. Id. at *1.

At the administrative level, the judge had found that the applicant lacked the mental capacity to surrender those insurance policies and, relying on New Jersey Medicaid regulation N.J.A.C. 10:71-4.4(b)(6), discussed *supra,* concluded that the resources were inaccessible through no fault of the applicant, that they were not countable assets for Medicaid purposes, and that, upon the appointment of a guardian, those policies would be surrendered and paid over to DMAHS as reimbursement. Id. at *4.

However, the DMAHS Director had reversed the administrative law decision, concluding that the applicant's dementia had no effect on her eligibility, and that nothing prevented the nursing facility or someone on the applicant's behalf from liquidating the insurance policies. It had held that,

> the test is whether the individual has the "right, authority or power" to the resource pursuant to N.J.A.C. 10:71-4.1(c). See also 20 C.F.R. §416.1201. While N.J.A.C. 10:71-4.4(b)(6) provides that certain resources are excludable from determining eligibility including "the value of resources which are not accessible to an individual through no fault of his or her own," there is no indication that there was a legal impediment preventing I.L. from accessing the resources.... Moreover, an individual's mental or physical condition does not extinguish the individual's right, authority or power to a resource. In Chalmers v. Shalala, 23 F.3d 752 (1994), the Third Circuit found that the phrase "right, authority or power" is disjunctive and refused to interpret the phrase as conjunctive. The court went on to find that the work "power" means not only a "mental or physical ability or aptitude," but also "the legal authority" to liquidate resources. Id. at 755. Therefore, if the individual has the legal right to receive the money, any mental or physical disability is immaterial to the eligibility determination. Indeed, as the court noted, since many disabled individuals receive benefits, "such an interpretation would render the provision meaningless. Id.

I.L. at *3.

On further appeal, however, that decision was reversed. The Appellate Division in I.L. cited the New Jersey Medicaid regulation that includes, among the categories of "excludable resources," "the value of resources which are not accessible to an individual through no fault of his or her own." 389 N.J. Super. at 362 (*citing* N.J.A.C. 10:71-4.4(b)(6)). Noting that the applicant was incapable of managing her affairs, but that a guardian had not been appointed for her at the time, the court concluded that,

> the cash values of her life insurance, while theoretically accessible to I.L. through an appointed guardian, were not in fact accessible until the guardian's appointment, a circumstance that existed "through no fault of her own."

389 N.J. Super. at 366.

In a Florida case discussed *infra*, the state was ultimately unsuccessful in prosecuting a son for financially exploiting his elderly parents by endorsing a $847,000 check to himself. Bernau v. State, 891 So. 2d 1229 (Fla. App. 2d Dist. 2005). In "reluctantly revers[ing]" the conviction, the court noted that the State's case had been complicated by the parents' mental status, finding that, although their mental status had apparently diminished rapidly during the course of events, the State had offered no evidence that they were incompetent. Id. at 1230.

ii. Issues As To Whether Actions Were "Authorized"

Although not involving the issue of Medicaid, the case of State v. Kennedy, 61 N.J. 509 (1972), explores the issue of "legally authorized" transfers, and assists practitioners in interpreting Medicaid Communication No. 88-15.

In Kennedy, the defendant had obtained a power of attorney that was assumed to have been executed by the elderly victim, authorizing the defendant to draw upon the victim's bank accounts. The defendant withdrew the bulk of the money in the victim's accounts and then misappropriated the money in those accounts. The New Jersey Supreme Court affirmed a conviction of embezzlement. In so doing, it made the following comments regarding the abuse of a power of attorney:

> A power of attorney of course is not an instrument of gift. In itself, it is no more than the term, power of attorney, imports--an authorization to the attorney **to act for the principal**. Although as between the bank and the principal, the bank was relieved [by the terms of the power of attorney] to inquire as to whether any withdrawal was in the agent's interest rather than the principal's, the instrument did not authorize the agent to make off with the principal's money. In short, **the instrument was the means whereby the agent was able to get his hands on the moneys, but when the moneys were thus obtained, the agent received them as agent for the principal, and the fraudulent appropriation of the moneys thus obtained to his own use constituted embezzlement**. In other words, **it is no defense to embezzlement that the moneys reached the agent with the consent of the principal. On the contrary, such entrusting is the necessary setting for the crime**…. it is no defense to embezzlement that the victim trusted the culprit.

61 N.J. at 512-513.

iii. Litigation Costs

In addition to the above issues, the practical issue of the cost of litigation may be magnified in this area of practice. Litigation of an elder abuse case may be time-consuming and costly. For example, if the victim of elder abuse had limited assets prior to the exploitation, or has been pauperized by the exploitation, that victim may be left without funds necessary to pursue his or her rights to relief against the perpetrator, or his or her entitlement to Medicaid benefits.

The issue of litigation costs was highlighted in the California Court of Appeals case of Levitt v. Hankin, 93 Cal. App. 4th 544 (Cal. App. 2d Dist. 2001). Levitt involved the appeal of an attorney fee award by attorney Marc B. Hankin, Esq., whom the court identified as "a recognized leader in the field of elder law," who had represented a professional conservator in two actions involving the

financial exploitation of elders. In both cases, the attorney's requested fee award was reduced based upon the modest size of each of the estates. The attorney had argued that his fees should be paid in full, regardless of the size of the estates, "to encourage attorneys such as himself to take cases of financial elder abuse." Id. at 546.

As the attorney noted, his intervention in the two cases protected not only the finances but also the health and safety of the elders. During one of the hearings, the court noted that the elder would be able to remain in the nursing facility in which he currently resided even if his estate was depleted, because "payments would be taken over by Medi-Cal." Despite findings that the hours billed and the rate charged by the attorney were not objectionable, the court in both cases held that, based upon the size of the estate involved, those fees would be reduced. Id. at 547, 548.

On appeal, the court took judicial notice of a September 12, 2000 Los Angeles County Board of Supervisors' Order No. 14, stating that,

> elderly persons with modest estates do not have ready access to legal advice and assistance, which would enable them to effectively redress the exploitation of their assets or obtain properly documented estate planning for their protection... County Counsel ... work with the State and County Bar Associations on specific legislative proposals that would help improve access to the justice system for elderly persons with modest incomes who have been victims of financial exploitation or need assistance in estate planning matters.

Id. at 549 n.2. Nevertheless, the Levitt appellate court affirmed the attorney fee awards, finding that the trial court's consideration of the modest size of the

estates was proper, and that the attorney's dispute was an argument properly addressed to the Legislature. It concluded that,

> We expect that Hankin and other members of the elder abuse bar have coordinated efforts with offices of county counsel, public guardian, and adult protective services to work on specific legislative proposals to improve access to the justice system for victims of elder abuse, as suggested in the order of the Los Angeles County Board of Supervisors.... We commend their efforts.

Id. at 550-551.

II. ANECDOTAL MATERIALS

The author was informed of an unreported Minnesota case in which an elderly victim of financial exploitation was spared his Medicaid benefits thanks to the efforts of the University of St. Thomas law students' Elder Law Practice Group. According to a Minneapolis-St. Paul Star Tribune article[1], in that case, the elder, Donald Mayne, appointed his daughter as agent under a power of attorney. She reportedly then stole approximately $60,000 from his bank accounts. Moreover, despite the fact that the daughter faced criminal charges of "theft by swindle," Medicaid authorities attempted to strip the father of his Medicaid benefits, with an administrative law judge having found "no convincing evidence" that the transfer was not simply an attempt to hide Mr. Mayne's assets and reportedly concluding that "[i]t does not matter that his daughter, who was his attorney-in-fact, made the transfers against his will and outside his control."

[1] See http://www.startribune.com/templates/Print_This_Story?sid=18751924

However, after that decision was appealed and the Minnesota attorney general's office became involved in the case, Mr. Mayne's benefits were restored.

This author recently litigated two different cases in the Superior Court of New Jersey, Union County, each involving the financial exploitation of the elderly. Neither of these two cases, which are discussed below, resulted in a reported decision.

a. Case #1: Exploitation By, And Criminal Judgment Against, The Elder's "Friend"

In one case, a non-relative "friend" took a frail, elderly widow into her home as a tenant. The elderly widow had no family in New Jersey. The friend acted as caregiver for the elder, and the elder eventually appointed the caregiver as the elder's agent under a power of attorney.

The caregiver provided the elder with personal care needs and handled all of the elder's financial affairs. Unfortunately, the caregiver also financially exploited the elder: over the course of about eleven months, the caregiver stole about $166,000 from the elder. Ultimately, the elder was removed from the caregiver's home by Union County Adult Protective Services and placed in a local nursing home.

The caregiver was indicted, convicted and eventually sentenced to serve 7 years in prison.[2] I represented the elder in a civil action against the caregiver, which civil action had been stayed pending resolution of the criminal case. We

[2] See http://www.nj.com/news/index/ssf/2007/11/thieving_caretaker_sentenced_t.html

ultimately obtained a civil judgment of $166,000 against the caregiver, based upon the criminal conviction. The elder, who is still residing in a nursing home, has been unable to recover any of the amount awarded against the caregiver.

b. <u>Case #2: Exploitation By, And Civil Judgment Against, The Elder's Daughter</u>

In another case, I was appointed by the court as counsel, and later as guardian *ad litem*, for an elderly woman who had been sued by the nursing home in which she was residing. The woman had lived with her adult daughter in the mother's home in Elizabeth, New Jersey before the daughter admitted her mother into the local nursing home. The nursing home sued the mother and the daughter after providing care for the mother for several years without receiving payment.

This case presented interesting issues with respect to family relationships and trust between the victim and the abuser. The mother was elderly, blind and hard of hearing, and her understanding of English was limited. When I first became involved, she did not cooperate in the defense of her case, instead remaining silent and deferring to her domineering daughter. She said that she did not want me to represent her because her daughter was representing her interests. Upon advising the court of the mother's stance, the court removed me as court-appointed counsel, but appointed me as guardian *ad litem* in the case. Interestingly, at some point in the litigation, the mother began to acknowledge that her daughter had exploited her, and thereafter she participated in the case against her daughter.

As we alleged in our counterclaim against the daughter, after admitting her mother to the nursing home, the daughter improperly used a power of attorney to mortgage her mother's home and withdraw most of the equity value of the home. She then gave the proceeds to herself and/or family members. We also alleged in the counterclaim that the daughter used her mother's monthly Social Security and pension checks to pay her own personal bills.

After a trial, the court entered judgment in favor of the nursing home against the mother and the daughter on the main claim for $218,000, but in the cross-claim, the court found that the daughter was liable to her mother in the full amount of the debt owed by the mother to the nursing home.

c. The Impact Of The Exploitation On The Elder's Medicaid Eligibility

In both cases, I was involved in filing Medicaid applications for the victims of the financial exploitation, with two quite different results.

In the first case involving the non-relative caregiver, Medicaid approved the application. In the second case, Medicaid denied the application based upon the failure to provide information about the stolen funds. However, in neither case was I able to provide Medicaid with concrete information about the disposition of the stolen assets. In my opinion, the criminal conviction in the first case was a motivating factor behind Medicaid's approval.

These differing results spurred my interest in exploring the effect of financial exploitation on Medicaid eligibility.

III. CASE LAW AND ADMINISTRATIVE DECISIONS

a. Theories of Recovery In Financial Abuse Cases Generally

Unfortunately, there is a dearth of reported case law directly addressing the impact of financial abuse on an elder victim's Medicaid eligibility. This problem is compounded by limited access to unreported decisions nationwide.

However, the case law that follows, involving general issues relating to financial abuse of the elderly, provides insight into potential theories of recovery in cases of abuse. These cases involve both civil and criminal actions; recoveries on behalf of the elder and on behalf of Medicaid; and restitution awards ordered to be made directly from the perpetrator or from, for example, the bond company holding the surety bond for a wrongdoing guardian.

State v. Lehman, 2001 WL 1673729 (Oh. App. 5 Dist. Dec. 12, 2001), involved an in-home caregiver employed by an agency who, while acting as the caretaker for an elder with dementia, took the elder to her bank on numerous occasions and withdrew $95,752 from the elder's account over time. The defendant was prosecuted under the Ohio criminal code for violation of R.C. 2913.02, "theft from an elderly person or disabled adult." She pleaded guilty to a lesser charge and was sentenced to 15 months in prison and ordered to make restitution to the elder in the amount of $94,752. On appeal, the sentence was affirmed, with the court commenting that the elder's family was attempting to keep her at home rather than in an institution, and that because of the theft she would no longer receive the quality of care that she had received before the

theft. Id. at *6. The appellate court approved the trial court's conclusion that, "if [the defendant] is not punished with a prison term, her actions are likely to be copied by others in her profession who are exposed to gullible, mentally incompetent people." Id.

In the Florida case of Bernau v. State, 891 So. 2d 1229 (Fla. App. 2d Dist. 2005), discussed *supra*, although son ultimately was acquitted of charges of financially exploiting his elderly parents by endorsing a $847,000 check to himself, the decision notes that a professional guardian previously had been appointed and had recovered approximately $380,000 of assets in a civil action against the son.

In the Arizona case of Capitol Indemnity Corp. v. Fleming, 203 Ariz. 589, 58 P.3d 965 (Ariz. App. Div. 2, 2003) following the misappropriation of an elder's assets by her conservator, the conservator was removed by the court and ordered to reimburse the elder's estate for the amount misappropriated. However, after the conservator was able to only pay a fraction of the misappropriated funds, the court ordered the surety bond company to reimburse the elder's estate for the remaining amount. The bond company attempted to sue the conservator's attorney and spouse for those damages based upon theories of negligence, but that suit was unsuccessful. Id.

In Persinger v. Holst, 248 Mich. App. 499, 639 N.W. 2d 594 (Mich. App. 2001), *appeal denied,* 466 Mich. 893, 649 N.W. 2d 74 (Mich. 2002), the conservator attempted to bring a legal malpractice action against the attorney

who prepared a power of attorney on behalf of an elderly widow after the agent under that power of attorney misappropriated funds, claiming that the attorney should have dissuaded the elder from appointing the wrongdoer as her agent, and that the attorney should not have permitted the client to execute the power of attorney because she lacked capacity. The court rejected these theories, however, finding that the attorney owed no duty to insure that a client appoint an appropriate agent, and that the attorney had executed reasonable judgment with regard to the elder's capacity to execute the document. Id.

In the unpublished decision of State v. Goulet, 2008 WL 2574480 (Wis. App. III Dist. 2008), a son was criminally convicted of theft and abuse of a vulnerable adult, in violation of Wisconsin Statute §§943.20(1)(b), 904.285(2)(a)2, based upon his financial exploitation and failure to care for his elderly mother. During a period in which the mother was actually ineligible for Medicaid benefits because of her son's improper transfers of the mother's assets from a trust through a power of attorney, the mother had received Medicaid benefits. At a restitution hearing, the son was ordered to pay the State, which was considered a victim of the son's theft, for the benefits incorrectly paid to his mother. In affirming the restitution order, the appellate court noted that,

> Regardless of where her trust money went, [the mother] would have exhausted the trust and would have received essentially the same care. It is the State--which has paid expenses that rightfully should have been paid by the trust--that has been placed in a worse position as a result of [the son's] thefts.

Id. at ¶9. See also State v. Huffman, 154 N.H. 678, 918 A.2d 1279 (N.H. 2007) (concerning son's conviction of "theft by misapplication of property," where father was found eligible for Medicaid but son diverted $37,345.62 of his father's income, which was properly payable to the nursing home, for his own use); In re Floyd, 359 B.R. 431 (D. Conn. 2007), *reconsideration denied*, 2007 WL 1114024 (D. Conn. Apr. 12, 2007) (bankruptcy adversary proceeding by nursing home to except embezzlement debt from bankruptcy discharge, based on debtor/grandson's alleged embezzlement of Medicaid resident's funds properly payable to the nursing home).

b. Financial Exploitation In The Context Of Medicaid Eligibility

i. Cases Involving But Not Deciding Medicaid Issues

In a number of cases involving the exploitation of an elder, the issue of Medicaid eligibility is raised but not decided.

In In re Duvall, 178 S.W. 3d 617 (Mo. App. W.D. 2005), the Missouri Court of Appeals affirmed the appointment of the public administrator as guardian of the elderly ward, over the objection of her nephew. Evidence in the record indicated that the nephew, who was the agent under Mrs. Duvall's power of attorney, had made various transfers of her assets, which put Mrs. Duvall's Medicaid eligibility in jeopardy. Id. at 620, 630. However, during the pendency of the appeal, Mrs. Duvall died, id. at 621, and the opinion does not address what action, if any, might be taken on Mrs. Duvall's behalf against the nephew.

In Arndts v. Bonner, 2004 WL 1532274 (Tenn. Ct. App. July 7, 2004), the daughter/conservator of a Medicaid applicant filed suit to recover assets transferred by the father's wife prior to her death. The wife had made transfers to her children (the Medicaid applicant's step-children) prior to her death, and those transfers disqualified the father from Medicaid coverage. Id. at *1.

The Arndts case was decided in the context of Tennessee statutes, including a fraudulent conveyance statute (providing that conveyances made with an intent to defeat a surviving spouse's elective/distributive share are voidable) and an elder abuse and exploitation statute, Tenn. Code Ann. §71-6-120, which allows for a civil action by or on behalf of an elderly or disabled adult for compensatory damages, punitive damages and attorney's fees for financial exploitation of the elder, which cause of action is not extinguished upon the death of the elder. Id. at *6.

After reviewing the transfers made, the Arndts court concluded, apparently on the basis of the fraudulent conveyance statute, that certain of the transfers were to be refunded to Mr. Arndts. However, the court also concluded that the transfers had been made by the now-deceased wife "personally, or at her express direction," and that, because there was no proof that the wife's children had made transfers "by fraud or otherwise," there had been no violation of the elder abuse and exploitation statute. Id. at 6. There is no indication as to how the Arndts decision impacted on Mr. Arndts' Medicaid eligibility, if at all.

In New Jersey, the administrative decision of I.L. v. Division of Medical Assistance and Health Services ("DMAHS"), 2004 WL 47444411 (N.J. Admin. 2004), *rev'd*, 2005 WL 4684709 (Jan. 27, 2005), *rev'd*, 389 N.J. Super. 354 (App. Div. 2006), an 87-year old petitioner who suffered from Alzheimer's disease was twice denied Medicaid eligibility, and those denials were appealed to the Office of Administrative Law and then to the Superior Court, Appellate Division.

The first and second Medicaid applications had been denied because the verification documentation required by Medicaid was not submitted on behalf of the applicant. The third application was denied because the applicant owned insurance policies with cash surrender values. Id. at *1.

After the second application was denied, the nursing home in which the applicant resided, recognizing that the applicant could not assist with the application because of her mental incapacity, began to assemble the verification documents. Id., 2005 WL 4684709 at *2. The facility soon learned that family members, who were not assisting in the Medicaid application process, had transferred $37,000 of the elder's assets to themselves following the elder's admission to the nursing care facility.

That transfer, which occurred during the Medicaid look-back period, resulted in the imposition of a penalty period for the applicant. However, the I.L. administrative decision notes that the parties stipulated that a penalty period resulted from that improper transfer, and that the issue was therefore "agreed

upon and not before me." Id., 2005 WL 4684709 at *2. On appeal to the Superior Court, Appellate Division, the court noted that,

> [t]he record clearly establishes that [the applicant's] daughter and granddaughter withdrew the entire balance ... and closed the [bank] accounts before [the applicant's] hospitalization.... The record does not disclose whether any action has been taken to recover those funds, but the Division does not contend that ... [Medicaid] eligibility ,... is affected thereby.

389 N.J. Super. at 358 and n. 4.

The Supreme Court of Iowa interpreted that state's statute permitting the investigation and disposition of cases of "dependent adult abuse" by the Department of Human Services, through its department of inspections and appeals. Mosher v. Department of Inspections and Appeals, 671 N.W. 2d 501 (Iowa 2003). In particular, a former employee of a nursing facility who received various gifts from a facility resident was found to have violated Iowa Code §235B.2, which penalizes financial exploitation of a "dependent adult" by a "caretaker." In affirming the district court's reversal of the Department of Inspection and Appeals decision that dependent adult abuse had been committed, the Mosher court determined that the defendant ceased being a "caretaker" when she left the nursing facility in which the elder was a resident, and that, as to gifts made during the period in which she was a caretaker, the elder was not a "dependent adult," even though he was certified for a licensed health care facility. Id. at 512.

The court stated that the elder in issue "serves as a good example of the distinction between residents receiving public assistance and private-pay

residents." Id. at 513. Although the elder in Mosher was not Medicaid-eligible, the court noted that the certification of need that would be required for an institutionalized Medicaid applicant would support a finding that the elder was a "dependent adult." However, the elder in Mosher was only certified for a licensed health care facility, which did not necessarily mean that he was a "dependent adult," and went on to conclude that the elder in Mosher in fact was not a "dependent adult." Id. at 515-516.

In the context of a guardianship action in which the elder's relatives were found responsible for "gross misappropriations" of the elder's assets, the court mentioned in a footnote that Adult Protective Services was directed to apply for "eligible financial benefits" on behalf of the elder; however there is no indication as to the disposition of that issue. Hayes v. Thompson, 952 So. 2d 498, 500 n. 1 (Fla. 2007).

ii. Cases Deciding Medicaid Issues

Although there are limited administrative decisions or cases regarding this issue, there is support for the position that a Medicaid applicant should not be penalized for the unauthorized transfer of the applicant's assets.

The most recent reported case involving this issue was decided in Connecticut, where a nursing home sued an elder's son (and power of attorney) and the attorney who had been appointed as the elder's conservator, alleging that the son's acts/omissions resulted in the loss of Medicaid benefits in the amount of $115,639.00. In Glastonbury Healthcare Center, Inc. v. Esposito, 2008

WL 2797003, No. CV-01-0811032 (Conn. Super. June 23, 2008), the court found that the son had filed a Medicaid application on behalf of his mother, an institutionalized elder suffering from Alzheimer's disease. He listed her sole asset as a $3,400 bond. He then transferred his mother to the plaintiff facility, and signed an Admission Agreement as his mother's power of attorney. The Agreement named him as the "Responsible Party," although he did not sign the Agreement in that capacity. Id. at *2. As "Responsible Party" to the Agreement, the son was required to take the necessary steps to ensure his mother's prompt Medicaid eligibility. However, because the son (and the son's attorney, who had become the mother's conservator) failed to reduce the mother's assets to $1,600 by a certain deadline, her Medicaid application was denied, which denial was upheld upon appeal. Id. at *3. Her Medicaid application was later approved when the conservator/attorney transferred the assets as requested by Medicaid.

The nursing facility settled with the conservator and the case against the son went to trial, alleging breach of contract, negligence, promissory estoppel and fraudulent misrepresentation. Although rejecting the fraudulent misrepresentation count, the court found in favor of the nursing facility on the other counts. It concluded that the son had failed to reduce the mother's assets, as directed by Medicaid; persistently and unreasonably claimed that a $15,000 bank account was not his mother's asset; and, as executor of the father's estate, failed to distribute income to his mother pursuant to his father's last will and testament. Id. at *5. In sum, the court concluded that the facility lost the

Medicaid payments that it would have received absent the son's actions/inactions, and found the son liable for that loss. Id. at *6.

In New Jersey, the issue of third party transfers and Medicaid eligibility was most recently addressed in the unpublished Superior Court, Appellate Division decision of A.H. v. Division of Medical Assistance and Health Services, 2008 WL 648922 (N.J. App. Div. Mar. 12, 2008), *certif. denied,* ___ A.2d __ (N.J. June 12, 2008). A.H. addressed transfers by a son of his parents' assets under a power of attorney, and the effect of those transfers on his parents' Medicaid eligibility.

In A.H., the son, who was his parents' agent under a power of attorney, applied for Medicaid benefits for his father. After initially being denied, the denial was appealed and the father was found Medicaid eligible, with a retroactive eligibility date of March 2002.

Shortly thereafter, the son used the power of attorney to mortgage his parents' condominium. He deposited the mortgage proceeds of $83,355.32 into his parents' joint bank accounts, and then wrote a $35,000.00 check to himself from those funds. The day after he wrote the check to himself, the son applied for Medicaid on behalf of his mother. In the mother's Medicaid application, the son failed to disclose her interest in the bank accounts. Id. at *1.

As the A.H. court noted, had the son disclosed the mother's ownership interest in the accounts, Medicaid would have imposed a penalty period. Id. at *1. Instead, her Medicaid application was granted.

Thereafter, the son wrote checks totaling $24,250 from the parents' accounts to himself. Medicaid advised him in June 2003 that, because the son had failed to submit a plan to liquidate the parents' condominium, their benefits would terminate on September 30, 2003. The son appealed and elected to continue Medicaid benefits pending the appeal. Id.

At the hearing, the administrative law judge had concluded that the parents' total resources exceeded the resource standard, and that a ten-month period of Medicaid ineligibility would be imposed with respect to Medicaid benefits that had been paid on behalf of the parents. The administrative law judge also ordered that the son would be personally liable for the repayment of $67,792.00 in Medicaid benefits. The Director of the New Jersey Division of Medical Assistance and Health Services ("DMAHS") adopted those findings, and the son appealed to the New Jersey Superior Court, Appellate Division.

The Appellate Division affirmed. Id. The A.H. decision does not directly address whether the parents had knowledge of the transfers, but there is no reference to the parents' involvement in these transfers, and it is clear that the court held the son responsible for the transfers. It reasoned that New Jersey Medicaid statutes authorize the imposition of liability upon,

> a recipient, legally responsible relative, representative payee, or any other party or parties whose action or inaction resulted in the incorrect or illegal payments [or] who received the benefit of the divestiture, or from their respective estates.

Id. at 2 (quoting N.J.S.A. 30:4D-7(i)). The A.H. court concluded that,

> [the son's] active role in dealing with his parents' assets, in applying for benefits, and in personally benefiting from those assets while, at the same time, ineligible benefits were provided for the benefit of his parents, more than amply triggered [the son's] personal liability for the repayment.

Id. at *2.

In Probate of Marcus, 199 Conn. 524, 509 A.2d 1 (Conn. 1986), the Supreme Court of Connecticut addressed a case in which the ward's conservatrices (her daughters) made unauthorized gifts to themselves and their family. The gifts totally depleted the ward's estate. The conservatrices then applied for Medicaid on behalf of the ward. Medicaid notified the probate court (which handled the conservatorship) that the gifts had been made, a hearing was held, and the gifts were disallowed by the probate court as unauthorized. Thereafter, Medicaid denied the ward's pending Medicaid application.

On appeal, the hearing officer held that the probate court's disallowance of the gifts rendered those funds "available" to the ward.

The Marcus case was further appealed to the Supreme Court of Connecticut, which impliedly held that, because the Medicaid applicant had an enforceable right against her daughters for the improper transfers, the funds would not be considered "available" to the applicant **if** she could demonstrate that those funds could not be recovered from the daughters (because, for example, the daughters were judgment-proof). The Marcus court found that the effect of the probate court's disallowance of the gifts was that the conservatrices were personally liable for the return of the gifts. In other words, the ward's

estate had a legally enforceable right against the conservatrices for restitution. However, the court continued that,

> [t]he mere fact that the conservatrices are personally liable for the unauthorized dispositions does not necessarily mean that these funds are "available" for purposes of determining eligibility for [Medicaid] …. The state would not be justified in denying benefits in the event that the conservatrices are unable to satisfy a judgment against them, or if for any other reason the funds due the estate are not actually available for the maintenance and support of the ward.

509 A.2d at 5.

The North Dakota Supreme Court in Linser v. Office of Attorney General, 2003 N.D. 195, 672 N.W. 2d 643 (N.D. 2003), considered a Medicaid termination based on a guardian's improper placement of funds into a special needs trust. The Linser court cited the Marcus case and reasoned that "an asset to which an applicant has a legal entitlement is not unavailable simply because the applicant must initiate legal proceedings to access the asset." Therefore, it concluded that,

> It is appropriate for an agency to find that assets which the applicant has a legal entitlement to are actually available to him where the record fails to demonstrate the applicant would be unsuccessful in exercising a legal right to obtain them.

Id. at 648.[3]

In a case in which a mother failed to pursue a cause of action against her daughter/power of attorney for "gifts" made under the power of attorney, the transfers resulted in the mother's Medicaid ineligibility. In the March 20, 2008

[3] As to the issue of when assets are "available" to an applicant, see also Miranda v. Barnhart, 2002 WL 1492202 (W.D. Tex. 2002), a case not involving financial exploitation of the elderly, which discusses the limits of responsibility to be imposed on an applicant when the attempt to claim one's rights over property would be economically futile.

North Dakota Supreme Court case of Makedonsky v. North Dakota Dept. of Human Services, 2008 N.D. 49, 746 N.W. 2d 185, 187 (N.D. 2008), a mother was found Medicaid ineligible based upon transfers made by her daughter.

Notably, the Makedonsky court began its analysis by noting that, "at all times relevant to her claim for Medicaid benefits, [the Medicaid applicant] was mentally competent and capable of understanding her business affairs." Id. The transfers were made by the daughter (as attorney-in-fact under the mother's power of attorney) to the daughter and her sisters. Although the transfers were made prior to the Medicaid "look-back" period, the mother signed a "statement of intention to gift" (stating that the transfers were gifts that she voluntarily made) during the look-back period. Thus, Medicaid eligibility depended upon the effective date of the transfers.

The North Dakota Supreme Court affirmed the administrative law judge's holding that (1) based upon North Dakota statute, transfers made by a fiduciary that benefit the fiduciary are presumed to be the product of undue influence; (2) therefore, **before** the mother signed the "statement of intention to gift," she had a legal cause of action against the daughter to return the "gifts"; (3) under Medicaid law, the mother was required to make a "good-faith effort to pursue available legal actions to have assets made available for purposes of Medicaid eligibility"; and (4) when she later signed the "statement of intention to gift", she relinquished that legal right to sue for the return of the assets, and at that point made a disqualifying transfer. The date of that "statement of intention to gift"

was deemed the transfer date, rendering the mother Medicaid ineligible during the resulting penalty period. Id.

The Makedonsky court cited the Linser decision for the proposition that,

> an asset need not be in hand to be "actually available," and an applicant may be required to initiate appropriate legal action to make the asset available.... If an applicant has a colorable legal action to obtain assets through reasonable legal means, the assets are available and the burden is on the applicant to show a legal action would be unsuccessful.

Id.

IV. CONCLUSION

Medicaid eligibility determinations involving financial exploitation of an applicant / victim will likely involve establishing the following elements during the application or appeal process: (1) the applicant's knowledge of, or consent to, the transfer(s); (2) the applicant's relationship to the wrongdoer; (3) the applicant's competency at the time of the transfer(s); and, (4) the steps taken by or on behalf of the applicant to recoup the transferred funds. Although eligibility determinations will be fact-sensitive, the foregoing legal authority may be used to advocate in favor of eligibility (or in favor of granting a hardship exception, in the event of a Medicaid denial) on behalf of an elderly victim of financial wrongdoing.

Donald D. Vanarelli, Esq., with offices in Westfield NJ, is a Certified Elder Law Attorney (by NAELA, accredited by the ABA), member of NAELA's Council of Advanced Practitioners and an Accredited Professional Mediator. Mr. Vanarelli, was selected as a Super Lawyer in 2007 - 2010 and is a founding member of the New Jersey Elder Mediation Center For more information, contact the Law Office of Donald D. Vanarelli, 908-232-7400 or visit his web site at www.dvanarelli.com.