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# Legal Notes

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## MAINTAINING A PAPER TRAIL TO AVOID MEDICAID PENALTIES

*By: Richard J. Shapiro, J.D*
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Many people know that when an application is submitted for nursing home Medicaid coverage, the county Department of Social Services is required by law to scrutinize all financial transactions engaged in by the Medicaid applicant during the five-year "look back" period prior to the date of the application.

> Asset transfers to family members during the look back period will receive particular scrutiny. Unless it can be proven that the transfers were made (i) in exchange for goods or services provided, or (ii) for a purpose other than to qualify for Medicaid, then such transfers will result in the imposition of a Medicaid penalty period.

With that unfortunate result, Medicaid coverage is delayed and the applicant's family will be required to shoulder what could be tens or even hundreds of thousands of dollars in long-term care costs.

A recent New York appellate court case, *Donvito v. Shah*, provides a great example of this pitfall. Between June 2007 and August 2008, Nicholas Donvito transferred funds totaling $54,162.05 to his son Mark and Mark's family. The final transfer of $6,500 was made one month after Mr. Donvito suffered a stroke, and just two months before Mr. Donvito entered a nursing home.

When Mr. Donvito subsequently applied for Medicaid nursing home coverage, the Onondaga County Department of Social Services ("DSS") imposed a seven month penalty period, which was determined by dividing the total amount of the transfers made during the look back period by the Medicaid "Regional Rate" then in effect. The effect of the Medicaid "penalty" was that Nicholas Donvito was responsible to cover his nursing home costs during that seven month period; since he had practically no assets at that time, the nursing home would have then looked to Mark to pay his father's nursing home bill during the penalty period. Mark, on his father's behalf, appealed the DSS determination and filed for an administrative "Fair Hearing."

At the Fair Hearing, Mark raised a couple of issues. First, he claimed that the final $6,500 transfer from his father was reimbursement for expenses that Mark had incurred on his father's

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behalf, and therefore was not a gift. Second, while conceding that the approximately $48,000 in other transfers during the look back period were gifts, Mark claimed that those transfers were part of a pattern of gift-making by his father, and therefore were made by his father for a purpose other than to qualify for Medicaid, which is a statutory exception to the penalty rules. The hearing officer disagreed, and after having their claim denied at the Fair Hearing, the Donvitos sought judicial relief.

Unfortunately for the Donvitos, they were unable to produce any receipts or other proof that the $6,500 transfer constituted reimbursement for expenses paid on Nicholas's behalf, so the appellate court rejected that claim. As to the other transfers that were conceded to be gifts, the court held that the family had failed to prove that such gifts were motivated for a purpose other than to qualify Mr. Donvito for Medicaid. The court stated "[c]ontrary to petitioner's contention, decedent did not have a consistent history of giving money to relatives; before the transfers in question, decedent's most recent gift was seven years earlier." Accordingly, the court upheld the seven-month Medicaid penalty period imposed by the DSS.

We regularly see families having moved funds from an ill parent to children, often for the legitimate purpose of reimbursing the family members for expenses they have covered for their parent. As in the Donvitos situation, however, all too often the family fails to retain receipts or other evidence proving that the transfer of funds from the parent constituted legitimate reimbursement for the parent's expenses. As demonstrated by the Donvito case, such shoddy record-keeping may prove to be an expensive oversight if nursing home Medicaid coverage is subsequently sought within five years of any such transfers.



# WHAT ARE YOUR REMEDIES IF YOUR PROPERTY IS IMPROPERLY ZONED?

*By: Jay R. Myrow, J.D.*
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The use of real property in New York (and throughout the country) is generally governed by zoning ordinances that are adopted as local laws by local municipalities. In New York, towns, villages, and cities are authorized by state law to adopt zoning ordinances that regulate the use of real property within their boundaries. As part of their adopted zoning ordinance, each municipality will create zoning districts and designate areas within the municipality where each district may be located. Typically, the districts created are "residential," "commercial," "industrial," "agricultural," and the like. The locations of the various districts are shown on the official zoning map of the municipality.

Upon creation of the various districts, the zoning ordinance will list all of the permitted uses of land within that district. Permitted uses are allowed as of right, so long as all of the area requirements imposed for each use can be met (the area requirement are referred to as the "bulk requirements"). Special exception uses may be allowed and those uses are allowed as of right so long as special conditions for such use set forth in the ordinance can be met. Accessory uses for each permitted use and special exception use may be listed as permitted uses incidental to the main use.

Since the creation of zoning districts and their locations are broad in scope, it cannot be expected that zoning will be "perfect" in that every parcel of real property in a designated zoning district will be suitable for the permitted uses in that district.

Parcels of land with peculiar characteristics that make it impossible to develop for any use permitted in its zoning district will render the property worthless. One faced with such a circumstance has two choices for relief from the applicable zoning restrictions. The first is to apply to the municipal zoning board of appeals for a "use variance." The zoning board of appeals is authorized by state law which also sets forth its authority that can be granted in a zoning law. One of the powers is to grant "use variances" upon proof of unnecessary hardship by proof that (1) the subject property cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4)

that the alleged hardship has not been self-created. The failure to prove any one of the four elements will require the denial of a use variance.

In order to prove that one cannot realize a reasonable return, the applicant must submit "dollars and cents" proof that no reasonable return could be had for each and every permitted and specially permitted use in the zoning district. As to proof that the unnecessary hardship was self-created, it must be shown that the zoning regulations were not in effect at the time of the applicant's purchase of the property.

> Proving unnecessary hardship under the law is difficult. Most applications will fail, as there is a presumption that the zoning regulations affecting the property are valid.

The second avenue for relief is to request a change to the zoning map or to the district regulations in the zoning law. This relief requires a legislative act by the Town Board, Village Board, or City Council, as the case may be. The procedures for amending a zoning map or ordinance are set forth in the state law and also typically in a zoning ordinance. A zoning change may be initiated by the municipal board or may be petitioned for by the municipal residents. A petition for a zoning change may or may not be considered by the municipality. There is no requirement that the petition be considered.

Before the municipal board may consider a zoning change, the matter must be referred to the municipal planning board for a recommendation as to the change being considered. Upon receiving the recommendation, the municipal board may act after a public hearing is held for comment on the proposed change.

Typically, a proposal to change the zoning district for a particular piece of property will have a better chance of success if the change would expand a zoning district adjoining the subject property to include that property. This usually avoids a charge of "spot zoning" which occurs when a zoning change is obviously made for the personal benefit of one property owner rather than the general welfare of the municipality.

Since neither use variances nor zoning amendments are encouraged except under extraordinary circumstances, it is imperative that a proposed purchaser of property be fully aware of the zoning restrictions affecting the property before purchase. In representing our clients, we provide a full zoning analysis of the proposed property to ensure that our clients will be able to utilize their property as planned.

# PROTECT YOUR LAND FROM ADVERSE POSSESSION OR, ARE YOU AN ADVERSE POSSESSOR?

*By: Rita G. Rich, J.D., rrich@mid-hudsonlaw.com*

The doctrine of adverse possession is an age-old method of acquiring title to land that in fact wasn't yours to begin with. Conversely, it is a procedure whereby you can lose title to your land. Loss of title can occur when your property is possessed and occupied by someone else, even though you have a deed and you've been paying taxes on that land ever since you acquired title, perhaps for many years.

In order to acquire title by adverse possession, the adverse possessor must be able to prove that his occupancy of property of another was, in the words of the statutes and case law, "adverse, under claim of right, open and notorious, continuous, exclusive, and actual." (NY Real Property Actions and Proceedings Law §501)

Generally, "adverse" means the use of property without permission. "Claim of right" means the adverse possessor intends to appropriate and use, as his own, another's land. "Open and notorious" is a term meaning the adverse possessor's use of the land is sufficiently apparent to alert the owner that someone is claiming his land. "Continuous, exclusive, and actual" requires uninterrupted use of the land over time for the adverse possessor's benefit, under his control, all without permission from the title owner.

The period of time required for adverse possession currently is ten years, reduced some time ago from fifteen years.

Loss of ownership in this manner may not seem fair, especially in rural areas where owners of vacant land pay the taxes when due but do not check the land for adverse activity. In 2008, New York passed legislation restructuring and clarifying Section 501. In addition, Section 543 was added, deeming minor, nonstructural encroachments beginning after July 7, 2008, to be permissive and non-adverse. Ownership by encroachments, including fences, hedges, shrubbery, plantings, sheds, and non-structural walls, cannot be claimed. Lawn mowing or similar maintenance across a boundary line is also considered permissive and non-adverse.

Note, however, that in 2010 the Appellate Division in New York's Fourth Department held that applying the 2008 laws to an adjoining landowner whose title vested by adverse possession prior to the 2008 enactment would be unconstitutional, so that there is still the

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possibility of a neighbor's claim of adverse possession with longstanding minor encroachments and activities.

The words "permissive" and "permission" are important. A claim for adverse possession is easily defeated when the owner has given permission for the adverse use, keeping in mind that permission can be retracted. Both permission, as well as its retraction, should be in writing.

Alternatively, if permission hasn't been granted, an owner can demand that an encroachment be removed, and if it is not, he can sue for its removal, provided that the ten-year period has not passed.

There are numerous recent court decisions on the subject of adverse possession, to be discussed in a future article.

## Find us at OC Partnership

BSR&B is proud to be a sponsor of the Orange County Partnership Annual Event, which will take place on Tuesday, Dec. 3. If you'll be there too, look for our booth, which will feature information about our firm and its services.

## Firm Highlights

### BSR&B Welcomes **Lauren Nelson**

Blustein, Shapiro, Rich & Barone welcomes the arrival of Lauren Nelson, a 2012 honors graduate of the University of North Carolina School of Law and 2004 graduate of Princeton University.

Nelson will focus her practice on general litigation as an associate under BSR&B Partner Gardiner Barone. Her most recent experience is working with the West Point Legal Assistance Office. She volunteers her time with the National Association of Women Lawyers and the Military Spouse J.D. Network.

Nelson joins a number of recent hires carefully selected to enter the growing ranks of Blustein, Shapiro, Rich & Barone, including Marcello A. Cirigliano, who joined the firm in March after serving five years as an assistant district attorney with the Orange County District Attorney's Office.

## Save the Date!

**February 25, 2014**

Builders | Developers | Construction Managers | Consultants

**The Ruby Group** and **Blustein, Shapiro, Rich & Barone, LLP**

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**Invite you to**


All proceeds from this event will go to benefit inspire (Where Challenges Become Opportunities)

*More info to come!*

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**December 10, 2013**
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**3:00 p.m. to 6:00 p.m.**

**February 20, 2014**
**3:00 p.m. to 6:00 p.m.**

*We'll explain little-known pitfalls and the best methods to protect your loved ones' inheritance after you're gone.*

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**To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Upcoming Events" link.**