



Cona Elder Law Secures Over \$100K in Reimbursement to Nursing Home Reversing DSS Decision

Cona Elder Law PLLC

Cona Elder Law prevailed in a uniquely challenging and complex Fair Hearing appeal against an upstate New York county regarding their chronic mishandling of a Medicaid application for an incapacitated nursing home resident. With creative advocacy and outside-the-box strategies, Cona Elder Law convinced the Department of Social Services to reverse its determination and retroactively approve 12 additional months of Medicaid benefits to the resident without the need for an appearance at a Fair Hearing.

Guardianship

In this case, the nursing home commenced a guardianship proceeding for the resident when it became apparent that the resident lacked the requisite capacity to sign a Medicaid application or otherwise address his need to secure a payment source for the cost of his nursing home care. The guardianship hearing was held in December 2018. Cona Elder Law represented the facility as Petitioner.

Asset Transfers

Since there were uncompensated transfers of the resident's assets to his daughter during the five-year look-back period, the resident's daughter, who was appointed as the resident's Personal Needs Guardian, was deemed ineligible to serve as the resident's Property Management Guardian. The Department of Social Services, aware of this potential conflict of interest between the resident and his daughter, and how that may impact the resident's Medicaid eligibility, was appointed Property Management Guardian of the resident, accepting the appointment on the record.

Cona Elder Law's attorneys immediately advised the Department of Social Services of the details of the transfer of assets during the look-back period, e-mailing copies of deeds evidencing the transfer of assets in an effort to ensure that the agency had the information it needed to take the necessary steps to secure institutional Medicaid coverage (and request an undue hardship, if necessary) for the resident. Although the facility was to file the resident's Medicaid application in order to secure provisional benefits, as a result of the pending guardianship proceeding, with a requested Medicaid pick up date of September 2018, due to a clerical error, the facility failed to file. However, the Department of Social Services itself inexplicably failed to file a Medicaid application for the resident until March 2019 (after the Order and Judgment Appointing a Guardian was signed). Then, even though the need for an undue hardship waiver was clear, the Department of Social Services failed to timely or adequately investigate the resident's financial eligibility for

institutional Medicaid benefits, and failed to timely request an undue hardship waiver, once the application had been filed.

Undue Hardship

Upon learning of these delays by the agency, Cona Elder Law attorneys engaged the agency in a conference call, during which the agency admitted it was not very experienced in undue hardship waiver requests, and with Cona Elder Law's guidance and assistance, the Department of Social Services (as Guardian) finally requested an undue hardship waiver on the resident's behalf. Unfortunately, the request was made many months after institutional Medicaid coverage was needed, and as an undue hardship waiver can only be applied three months retroactively from the date of the request, the agency's delay in requesting the undue hardship resulted in a substantial penalty period of ineligibility. As such, the resident was being penalized by the Department of Social Services for the Department of Social Services' own failure.

Fair Hearing Arguments: Medicaid, Guardianship, Undue Hardship, Supremacy Clause of the U.S. Constitution

Cona Elder Law escalated the case to a Fair Hearing, submitting a 98-page evidence packet which included a Fair Hearing Memorandum setting forth our arguments in support of the Fair Hearing appeal of the agency's decision. Among the arguments raised by Cona Elder Law was that the Department of Social Services' inherent conflict of interest, in acting as both Guardian of the applicant and the decision-maker with respect to the applicant's Medicaid application, resulted in its improper partiality and its mishandling of the application. Additionally, Cona Elder Law argued that it was improper for the agency to penalize the applicant for the timing of the undue hardship waiver request, when only the agency itself (as Guardian) had the ability to make such a request and satisfy the necessary elements of an undue hardship waiver. With respect to the timing of the application, which negatively impacted the earliest possible Medicaid pick-up date for the resident, Cona Elder Law invoked the Supremacy Clause of the United States Constitution in arguing that based on federal law, which supersedes New York regulations limiting who may file a Medicaid application, the agency had the ability to file a Medicaid application on behalf of a resident as long as they were "acting responsibly on behalf of the resident" regardless of whether the Order and Judgment Appointing Guardian had been signed by the Court or the Commission to Guardian issued. As such, Cona Elder Law's attorney argued that the Department of Social Services, as the agency tasked with protecting the most vulnerable members of society, should have taken the appropriate steps to file a Medicaid application as soon as it became aware of the resident's need for Medical Assistance, even before the agency was formally commissioned as the resident's Guardian.

The Result: \$100,000 in Additional Medicaid Reimbursement Secured

Upon review of the materials submitted and the strong arguments asserted by Cona Elder Law to the Department of Social Services in advance of the Fair Hearing, the Department of Social Services contacted Cona Elder Law and agreed to reverse its decision, authorizing coverage with an effective pick-up date of September 1, 2018 (i.e. the date on which coverage would have been authorized had the Department of Social Services filed a Medicaid application on behalf of the

resident immediately following the guardianship hearing and requested an undue hardship waiver at that time).

Accordingly, as a result of Cona Elder Law's advocacy, 12 additional months of institutional Medicaid benefits coverage were secured for the resident, recouping in excess of \$100,000 in reimbursement for the facility.

The experienced attorneys at Cona Elder Law can assist you in utilizing creative solutions to overcome adverse Medicaid benefits determinations for your health care facility residents thereby improving your bottom line. Please contact us for your free virtual "Best Practices" seminar specifically for LeadingAge New York members. Contact Christina Pecoraro at 631.390.5000 or cpecoraro@conalaw.com to schedule yours today.

Cona Elder Law PLLC is an award-winning Elder Law and Health Care Law firm. In practice for over two decades, Cona Elder Law offers unsurpassed expertise in Health Care Facility Reimbursement and Recovery, Elder Law, litigation and collections. Health care facilities turn to Cona Elder Law for innovative strategies and cutting-edge solutions regarding complex Medicaid eligibility matters, Guardianship proceedings, PRUCOL matters, collections, litigation, and other matters related to resident financial accounts and the facility's bottom line. Representing over 200 skilled nursing facilities, CCRCs and assisted living facilities throughout New York and New Jersey, Cona Elder Law is a preeminent law firm in this practice area. The firm has been ranked the #1 Elder Law Firm by Long Island Business News for eight consecutive years and received the Business Achievement Award from the Hauppauge Industrial Association (HIA-LI). For additional information, visit www.conaelderlaw.com.

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