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ISSUES PRESENTED

1. Whether New York should be able to ignore the bright line standard of a federal regulation uniformly defining residency for purposes of the fifty Medicaid programs based on where an incapacitated individual is institutionalized, and should it be permitted to use a case-by-case analysis which led to uncertainty and protracted eligibility disputes before that approach was repealed two decades ago?

The court below answered the question "No."

2. Whether a court violates the substituted judgment rule set forth in N.Y. Mental Hygiene Law § 81.21 by permitting a guardian to transfer assets of an institutionalized individual to his spouse for her benefit and that of their minor children, where such a transfer would have no adverse effect on his Medicaid eligibility or quality of care, where the transfer would reduce the potential liability for the cost of his care from his and his family's funds, and where such a transfer is both permitted and regularly made by individuals who face substantial long term care expenses but are not incapacitated?

The court below answered the question "No."

INTRODUCTION

This brief is filed on behalf of three organizations concerned for the rights of the elderly and disabled. The National Academy of Elder Law Attorneys ("NAELA") is a professional association of attorneys committed to advocacy for their elderly clients-- not just for post-mortem planning, but also for lifetime planning concerns involving issues such as financing long term care and guardianships, the issues raised in these appeals. NAELA has over 3500 members in all fifty states and the District of Columbia, including over 340 in New York State. The decisions herein may provide substantial precedent elsewhere in the country, as well as in New York, so they are of particular significance to members of NAELA and their clients.

The Coalition of New York State Alzheimer's Association Chapters, Inc., (the "Coalition") is a New York not-for-profit corporation with twelve regional chapter members; they seek to ensure access to and availability of services to meet the needs of New York residents who have Alzheimer's Disease and their caregivers. The decisions herein may affect the ability of individuals with Alzheimer's Disease to receive Medicaid after moving to New York to be closer to their loved ones, and may affect their rights to have their financial affairs handled in guardianship proceedings the same way they could have handled their finances were they not incapacitated.

Friends and Relatives of Institutionalized Aged, Inc. ("FRIA") is a New York not-for-profit organization which for two decades has worked for nursing home reform. FRIA is a consumer organization helping families and family organizations become effective advocates for residents of nursing and adult homes; it supports legal and regulatory change to improve quality of long-term care for New Yorkers. The decisions herein may affect the rights of the individuals and families it serves by affecting the rights of individuals to move freely between states to be

near loved ones when nursing home care is required, and by affecting the rights of incapacitated individuals to have their financial affairs handled the same way they would have been had capacity not been an issue.

Pursuant to Section 500.1 of the Rules of this Court, the *amici* state respectively: NAELA has no parents or subsidiaries; it is affiliated with the National Elder Law Foundation, an Arizona not-for-profit corporation which is approved by the American Bar Association to certify attorneys as specialists in elder law. The Coalition has no parents or subsidiaries; its members are the following local Chapters of the Alzheimer's Disease and Related Disorders Association, Inc.: Long Island (Patchogue), Mid-Hudson (Poughkeepsie), Mohawk Valley (Utica), New York City, Northeastern New York (Albany), Rochester, Rockland County (Pomona), Southern Tier (Endicott), Staten Island, Westchester/Putnam (White Plains) and Western New York (Depew). FRIA has no parents, subsidiaries or affiliates.

All three *amici* believe that it is important that Medicaid rules concerning residency are construed uniformly throughout the country when applied to people who are elderly or disabled. Otherwise, individuals who are institutionalized away from their state of previous long time residence, as frequently happens when elderly parents move to be nearer their adult children, will be at risk of having no Medicaid coverage for their long term care needs where they currently reside. Of equal import is the recognition that federal rules control the so-called "spousal refusal" doctrine, and its interaction with the substituted judgment doctrine which is the foundation for guardianship decision making throughout the country.

ARGUMENT

POINT I

FEDERAL REGULATION 42 C.F.R. § 435.403 SETS FORTH A BRIGHT LINE RULE THAT CONTROLS THE DETERMINATION OF RESIDENCY UNDER THE MEDICAID PROGRAM

The issue in the first of these appeals, the Article 78 proceeding concerning the question of whether Bipin Shah is a resident of New York for purposes of Medicaid coverage, revolves around the interpretation of 42 C.F.R. § 435.403, which sets forth the federal rule for determining residency under the Medicaid program. That regulation clearly supercedes any inconsistent State policy, *Dunbar v. Toia*, 45 N.Y.2d 764, 766, 408 N.Y.S.2d 495, 496, 380 N.E.2d 321, 322 (1978).

Both the plain language of the federal regulation and the public policy behind it must prevail over whatever policy arguments the State makes that residency should have a more flexible meaning or be determined in light of traditional legal concepts like domicile. The regulation was promulgated at 47 Fed. Reg. 43095 (1982) pursuant to authority vested in the Secretary of the federal Department of Health and Human Services under 42 U.S.C. § 1396a(a)(16) [Medicaid for coverage of "individuals who are residents of the State but are absent therefrom" is to be provided "to the extent required by regulations prescribed by the Secretary"] and 42 U.S.C. § 1396a(b)(2) [the Secretary shall approve a State Medicaid plan so long as it does not impose a "residence requirement which excludes any individual who resides in the State"].

Where a regulation has been promulgated by the Secretary pursuant to such a Congressional delegation of authority, it is entitled to extraordinary deference over and above the usual deference accorded to an administrative regulation. *Atkins v. Rivera*, 477 U.S. 154, 162,

106 S.Ct. 2456, 2461, 91 L.Ed.2d 131, 140 (1986). In such a case, the regulations of the Secretary are entitled to "legislative effect," just as if they had been enacted by Congress, *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405-2406, 53 L.Ed.2d 448, 456 (1977). The regulation here is clear on its face, and thus it is not appropriate to look behind its plain meaning to reinterpret it, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694, 702-703 (1984).

The regulation here is explicit and quite clear when its subsections are not read out of context. First, section 435.403(a) requires that Medicaid must be provided to "eligible residents of the State, including residents who are absent from the State." It thus poses the question raised on appeal of whether someone who lived in one state (New Jersey) prior to institutionalization remains the responsibility of that state under the phrase "including residents who are absent from the State," or whether such an individual's residence for purposes of Medicaid eligibility has changed to the state of institutionalization (New York).

The question of whether the individual is a resident of one state or the other is explicitly addressed in 42 C.F.R. § 435.403(d)(1):

> (d) Who is a State resident. A resident of a State is any individual who:
>
> (1) Meets the conditions in paragraphs (e) through (i) of this section….

In turn, the only provision in those paragraphs (e) through (i) that has any relevance to this case is in subparagraph (i)(3):

> (i) Individuals Age 21 and Over.
>
> * * *
>
> (3) For any institutionalized individual who became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual is physically present, except where another State makes a placement.

Under the plain language of that section, the legal conclusion must be that for purposes of Medicaid eligibility, Bipin Shah is a resident of New York since he is institutionalized, became incapable of indicating intent after age 21, and is physically present in New York (not having been placed here by New Jersey).

That conclusion, reached correctly by the court below, is consistent with the provisions of 42 C.F.R. § 435.403(j)(2) as well, which specifies that Medicaid eligibility may not be denied to an institutionalized individual "who satisfies the residency rules set forth in this section, on the grounds that the individual did not establish residence in the State before entering the institution." That regulation, which both appellants ignore in their briefs, describes precisely the appellants' interpretation of the residency regulation and proscribes it with equal precision.

The federal regulations, with their bright line rules, have been remarkably successful in avoiding court disputes about residency for Medicaid eligibility. Other than this case, there have only been eight other cases construing this federal regulation reported in the entire country in the nearly two decades it has been in place.[1] Of those, only one, *Lundgren v. N.Y.S. Dept. of Social Services*, 145 A.D.2d 792, 535 N.Y.S.2d 781 (3d Dept. 1988), involved the situation of an institutionalized individual who became incapable of stating intent after age 21; the other cases concerned minors or individuals who became incapable of stating intent prior to age 21.

Indeed, the interpretation advocated by the State in *Lundgren* is consistent with the ruling of the court below, not with the interpretation it now espouses. While in *Lundgren* there was insufficient evidence as to whether the elderly petitioner had the capacity to form an intent to

[1] The other decisions are *Bethesda Lutheran Home & Services v. Leean*, 122 F.3d 443 (7th Cir. 1997); *Benton v. Bowen*, 1986 U.S. Dist. LEXIS 25139 (E.D.Pa. No. 85-6286 May 23, 1986), *reversed*, 820 F.2d 85 (3d Cir. 1987); *Mack v. Secretary of HHS*, No. 90-1427V, 1997 U.S. Claims LEXIS 57 (Fed. Cl. Feb. 3, 1997); *State v. Stuckey Health Care, Inc.*, 189 Ga. App. 126, 375 S.E.2d 235 (1988); *Salem Hospital v. Commissioner of Public Welfare*, 410 Mass. 625, 574 N.E.2d 385 (1991); *Lundgren v. N.Y.S. Dept. of Social Services*, 145 A.D.2d 792, 535 N.Y.S.2d 781 (3d Dept. 1988); *Beasley v. Adult & Family Services Div.*, 48 Ore. App. 53, 616 P.2d 517 (1980); and *Pope v.*

reside either in New York or Massachusetts (where she was institutionalized), the State set forth the rule in its brief there (p. 11) as follows:

> If the State department had found that petitioner was not capable of forming an intent as to residency, no further inquiry would have been required because petitioner would have been considered a resident of Massachusetts, the State where she was physically present. 42 CFR 435.403(i)(3).

That is precisely the opposite of what it now says this regulation means.

The bright line approach set forth in this regulation should have prevented the tragic situation of Mr. Shah, whose residency and Medicaid eligibility have been in dispute for three years. The appellants would have patients seeking Medicaid for institutional care again face the sorts of hurdles that once were common here but have essentially ended since the adoption of section 435.403. For example, in *Corr v. Westchester County Dept. of Social Services*, 33 N.Y.2d 111, 350 N.Y.S.2d 401, 305 N.E.2d 483 (1973), Mrs. Corr had to appeal all the way to this Court to establish that she was a New York resident eligible for New York Medicaid where she had moved into a New York nursing home directly on moving from New Jersey. A great deal of time (nearly two years there) and no doubt expense, were spent evaluating all the traditional indicia of residence and domicile and the rules pertaining to them. Had the regulation been in effect, that delay and expense would have been unnecessary. In *Gibbs v. Berger*, 59 A.D.2d 286, 399 N.Y.S.2d 304 (3d Dept. 1977), a young woman in a coma had been brought to New York to be nearer her family after an automobile accident in California, where she had lived for several years. There the case required resolution by the Appellate Division, whose decision was based on a very complex analysis of the rules of domicile and residency.

Wisconsin Dept. of Health & Social Services, 187 Wis.2d 207, 522 N.W.2d 22 (1994). LEXIS Mega Library, Newer File, search request "Medical assistance or Medicaid or Medi Cal and 435.403."

Lengthy and tragic disputes such as those essentially came to an end in light of the clear rules prescribed in section 435.403. The appellants, however, would ignore that bright line rule in favor of the sort of case by case analysis required in *Gibbs v. Berger, supra*. They would rely on "traditional standards for determining residency" [State Brief, pp. 19-20] such as home ownership, tax domicile and business domicile [*Id.*, p. 18], the traditional rules of domicile, *e.g.*, 49 N.Y. Jur.2d Domicile and Residence [County Brief, p. 8], or the "Common Law indicia of residency" [*Id.*, p. 19]. As the County's Brief puts it, "*The regulation is irrelevant to the case at bar.* Indeed, as expressed above, residency and domicile are largely factual questions of an individual's intent" [County Brief, p. 9].[2]

The approach advocated by the appellants would reinstate the long repealed federal residency regulation as it existed prior to its 1982 recodification. When this issue was first addressed in 1979, 42 C.F.R. § 435.403(g) provided:

> (2) For any institutionalized individual who became incapable of indicating intent at or after age 21, the State of residence is the State in which the individual was living when he became incapable of indicating intent.
>
> (3) The State where the institution is located is the individual's State of residence unless that State determines that the individual is a resident of another State.

Under that former version of the rule, for a person like Mr. Shah, "the residence is the State where the person was living when he became incapable of indicating intent." 44 Fed. Reg. 41435 (1979). The commentary to the rule provided, as an example, that if someone had lived in

[2] The State Brief (p. 19) alternatively posits that the letter from the Acting Director of the New Jersey Department of Human Services (R. 47), issued June 12, 1997, after the initial county denial of Mr. Shah's Medicaid application and after the Department of Health administrative fair hearing record was closed (R. 22, paras. 12 & 13; R. 129), is an "interstate agreement" under 42 C.F.R. § 435.403(k) for resolving interstate residency disputes. While such agreements can be beneficial in some cases, this letter does not contain the safeguards that regulation requires, *e.g.*, it does not "contain a procedure for providing Medicaid to individuals pending resolution of the case." That prompt determination has not occurred here. Absent such a provision, if Mr. Shah were now required to apply in New Jersey he could be denied coverage there for all but the three months prior to the month of that application, for

California [here New Jersey] and became incapacitated, they would be a California [here New Jersey] resident even if in a nursing home in Washington [here New York]. The meaning of the rule was reiterated at 44 Fed. Reg. 41436 [1979]: if an individual lost capacity after age 21, there was no change of residency.

While the State and county might prefer that version of the regulation, at least on the facts in this case, it is not up to them to rewrite it. This Court should "decline the invitation to sit as a committee on revision" to permit the State to follow what it perceives to be a better course than that required by federal policy. *Barton v. Lavine*, 38 N.Y.2d 785, 787, 381 N.Y.S.2d 867, 345 N.E.2d 339 (1975). These rules were promulgated precisely because the Medicaid residency rules "have not been interpreted uniformly by States," 44 Fed. Reg. 41435 (1979). "The problem is particularly serious with respect to institutionalized persons who previously lived in another State," *id.*, precisely the situation here. If the appellants' efforts to rewrite the rules prevail, the controlling federal policy of uniformity in these rules of decision will be thrown into chaos. As described on behalf of a Coalition member and FRIA in the guardianship proceeding (R. 288-293), that will ill serve the thousands of elderly and infirm individuals who benefit from the clarity of the current bright line rule, many of whom are represented by members of NAELA, or who receive services through Coalition members or from FRIA.

The controlling federal regulations, like any effort to balance competing interests, need not be perfect in order to be honored and enforced. They have worked well for two decades and represent a reasoned approach avoiding the sort of protracted case-by-case determinations that appellants favor. These regulations benefit people who are elderly or disabled and their families, and this Court should reject the appellants' efforts to rewrite them.

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which coverage would be required by 42 U.S.C. § 1396a(a)(34). The three prior years of bills would be left uncovered.

POINT II

THE GUARDIANSHIP ORDER APPROPRIATELY HONORED FEDERAL LAW AND THE SUBSTITUTED JUDGMENT RULE

The order in the guardianship matter permitting Mrs. Shah to transfer her husband's assets to her name was appropriate under the substituted judgment rule. Had Mr. Shah been seriously injured or ill, but still competent, he could (and no doubt would) have done just that, with no approval required from either a court or the Medicaid program.

In order to understand why Mr. Shah would have done that, it is important to understand that such a course of action would not lawfully have had an adverse effect on his Medicaid eligibility in any State, including New Jersey. While there are assertions in the appellants' briefs (State brief, p. 11) that the course of action Mrs. Shah proposed, and the courts below approved, would not have been honored in New Jersey, controlling federal law would require the same result under the Medicaid program there.

Federal law concerning transfers of property from one spouse to another, and the right of one spouse to decline to make her assets available in computing the Medicaid eligibility of the other spouse, are quite clear. First, any transfer made from one spouse to the other does not affect the Medicaid eligibility of the transferor spouse. 42 U.S.C. § 1396p(c)(2)(B)(i) provides that "An individual shall not be ineligible for medical assistance by reason of paragraph (1) [the rule disqualifying individuals who have made transfers from Medicaid coverage for nursing home and similar care] to the extent that—(B) the assets—(i) were transferred to the individual's spouse…." Second, while generally the resources of a "community spouse" like Mrs. Shah [42 U.S.C. § 1396r-5(h)(2)] are counted in determining the Medicaid eligibility of an "institutionalized spouse" like Mr. Shah [42 U.S.C. § 1396r-5(h)(1)], there is an explicit

exception where the community spouse refuses to make her resources available. 42 U.S.C. § 1396r-5(c)(3) provides:

> The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—
>
> (A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;
>
> (B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or….

Federal law also requires that states have individuals with legal capacity assign to the state their support rights as a condition of Medicaid eligibility, 42 U.S.C. § 1396k(a)(1)(A), and, like New York, New Jersey goes farther and gives itself the right to bring a support proceeding against a community spouse even without an assignment. N.J. Stat. Ann. § 30:4D-7.1(c). Such provisions are common among the states, *e.g.*, Md. Code Ann. Health-General § 15-122; Mich. Comp. L. § 401.3 (Mich. Stat. Ann. § 16.123); Wis. Stat. Ann. § 767.08. *See*, Ohio Rev. Code Ann. § 3103.03(C) providing for recovery against a spouse by anyone who supplies the other spouse with necessaries.

Thus, where an institutionalized spouse is not mentally incapacitated, he or she is allowed to transfer any or all assets to the community spouse without adversely affecting Medicaid eligibility. On this appeal the State seeks to deny the benefits of these rules to those who are incapacitated.

With this as the background, it is apparent that under the doctrine of substituted judgment, long recognized in New York and other states, the guardianship order here was proper because what Mrs. Shah proposed to do was authorized by federal Medicaid law and the support statutes of both New York and New Jersey. The doctrine of substituted judgment has been

codified in New York in N.Y. Mental Hygiene Law § 81.21; it is similarly codified in New Jersey in N.J. Stat. Ann. §§ 3B:12-50 and 3B:12-58. It has been applied in several other states, including New Jersey, in the context of transfers of marital assets from applicants for Medicaid similar to those at issue here, *infra*, pp. 15-17.

The doctrine of substituted judgment was recognized at common law as early as 1844 in New York. It was first set forth in *Matter of Willoughby*, 11 Paige Ch. 257, 5 N.Y. Chancery Rep. 126 (1844), and was applied three years later to permit gifts even to non-relatives, *Matter of Heeney*, 2 Barb. Ch. 326, 5 N.Y. Chancery Rep. 661 (1847). After the turn of the Twentieth Century, the rule was articulated by this Court in *Matter of Lord*, 227 N.Y. 145, 149-150, 124 N.E. 727 (1919): "All of the authorities, so far as I am aware, where allowances of this character have been made, are upon the theory that the lunatic would, in all probability, have made such payments if he had been of sound mind." *See also, Matter of Flagler*, 248 N.Y. 415, 162 N.E. 471 (1928). Comprehensive summaries of the evolution of the rule in New York include Joyce Alexis Edelman, Comment, *The Development of the 'Substituted Judgment' Rule and its Application in New York as a Vehicle for Estate Planning for Incompetents*, 33 Alb. L. Rev. 597 (1969), and Patrick J. Rohan, *Caring for Persons under a Disability: A Critique of the Role of the Conservator and the 'Substitution of Judgment Doctrine,'* 52 St. John's L. Rev. 1 (1977).

Likewise in New Jersey, the courts recognized the authority of a representative to make gifts of the ward's property as a matter of common law before the doctrine was codified in statute, *In re Trott*, 118 N.J. Super. 436, 442-443, 288 A.2d 303, 306-307 (Ch. Div. 1972) [gifting was appropriate to save death taxes; citing authorities from other states].

The doctrine was codified in N.Y. Mental Hygiene Law § 81.21, as reflected in the Comments of the Law Revision Commission to that section of Article 81, Bill Jacket, Ch. 698,

Laws of 1992, pp. 85-86, reprinted after N.Y. Mental Hygiene Law § 81.21 (McKinney's): "This section gives statutory recognition to the common law doctrine of substituted judgment recognized by the courts of this state and other jurisdictions [citing cases]." Among the cases cited by the Law Revision Commission, the seminal modern decision is *Estate of Christiansen*, 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (Ct. App. 1967), which recognized that the substituted judgment rule permitted gifts to be made from the assets of the incapacitated person where there would be an accompanying saving of taxes. That had been recognized as an appropriate purpose in New York in *Matter of Carson*, 39 Misc.2d 544, 547, 241 N.Y.S.2d 288, 291 (Sup. Ct. Ulster Co. 1962), and it continued to be recognized in subsequent cases including Surrogate Radigan's decision (also cited by the Law Revision Commission) in *Matter of Florence*, 140 Misc.2d 393, 530 N.Y.S.2d 981 (Surr. Ct. Nassau Co. 1988). That purpose has generally been recognized among the states as an appropriate reason for a guardian to make gifts. *See, e.g.*, *Strange v. Powers*, 358 Mass. 126, 260 N.E.2d 704 (1970); Annotation, *Power of Court or Guardian to Make Noncharitable Gifts or Allowances Out of Funds of Incompetent Ward*, 24 ALR3d 863, § 16(a) (1969).

The reasoning of those cases, that the incapacitated person would prefer to have his limited assets preserved for relatives rather than for the government's coffers, applies with equal force here, particularly given that the relative who stands to benefit is not distant but rather his wife who has custody of their minor children. While the appellants might argue that no economic benefit would accrue in this case since the social services district would have a claim against Mrs. Shah in "implied contract" under N.Y. Social Services Law § 366.3(a), even if that were the standard[3] there would still be a substantial economic benefit to Mr. Shah and his

[3] Whether that would be the standard in any such subsequent recovery/support proceeding is not presented on this appeal, but the only appellate authority on point instead applies the normal rules of support under Article 4 of the

dependent wife since the Medicaid reimbursement rate is substantially below that generally charged to private pay patients by nursing facilities. *See*, N.Y. Social Services Law § 366.5(c)(4), establishing a presumption that the average monthly cost of nursing facility services provided to a private patient is 120% of the average Medicaid rate. Mr. Shah's transferred assets would thus be drawn down at a significantly lower rate even if the State and county were reimbursed in full for the Medicaid expenditures. That is a "direct and articulable benefit to the institutionalized person or persons shown to be [her] dependents," justifying the relief granted below. *Matter of Baird*, 167 Misc.2d 526, 530, 634 N.Y.S.2d 971, 973 (Sup. Ct. Suffolk Co. 1994).

While the Medicaid rate is less than the private pay rate, that should have no impact on the care received by Mr. Shah since N.Y. Public Health Law § 2807(3) requires that the Medicaid rate be set at a level "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." The care Mr. Shah will receive under Medicaid is no different than that he would receive in the facility if he were paying privately. *See*, *Matter of Street*, 162 Misc.2d 199, 202, 616 N.Y.S.2d 455, 457 (Surr. Ct. Monroe Co. 1994). This is particularly so since Helen Hayes Hospital, where he has resided since shortly after his accident, is itself operated by the New York State Department of Health.

This set of benefits from reducing the expense of his care to Mr. Shah and his wife, while leaving the Medicaid program free to seek support from Mrs. Shah to prevent unjustified public expense, is quite similar to federal estate and gift tax policy with which Congress was surely familiar. For estate and gift taxation, unlimited spousal transfers may be made tax free, but gifts

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N.Y. Family Court Act, *Allen v. Allen*, 236 A.D.2d 470, 653 N.Y.S.2d 661 (2d Dept. 1997). That individualized approach is consistent with the policy of Article 81 to meet the needs of the incapacitated person "in a manner tailored to the individual needs of that person," and which "takes in account the personal wishes, preferences and desires of the person," N.Y. Mental Hygiene Law § 81.01.

to others may be subject to tax, and subsequent gifts by the spouse may be taxed as may be the estate of the spouse. For Medicaid, unlimited spousal transfers are likewise permitted, but gifts to others may result in a loss of Medicaid eligibility which reduces cost to the government, and the government may also seek spousal support if excess assets were transferred to the spouse. That is a fair balancing of the benefits and burdens in tragic situations like that of the Shahs.

Implicitly recognizing the fairness of that approach, no state which has a substituted judgment rule like New York's has rejected the right of a guardian to make spousal transfers in light of the benefits accruing to the spouse of the incapacitated person under the Medicaid eligibility rules. Indeed, the substituted judgment doctrine has been expressly recognized in other states, including New Jersey, in the context of transfers to spouses as part of planning for Medicaid eligibility. *Matter of Labis*, 314 N.J. Super. 140, 145-146, 714 A.2d 335, 337-338 (App. Div. 1998) [transfer of interest in home]; *Guardianship of F.E.H.*, 154 Wis.2d 576, 589-593, 453 N.W.2d 882, 886-889 (1990). *Matter of Marcus*, 199 Conn. 524, 509 A.2d 1 (1986), which held that a conservator had no authority to make gifts from the assets of an incapacitated person seeking Medicaid, is not to the contrary since that case turned on four factors not present here. Unlike New York, in Connecticut the substituted judgment rule had not been recognized at common law, the subsequent statutory codification of the rule had an express exception if a purpose of the gift was to diminish the estate to qualify for public benefits, Conn. Gen. Stat. § 45-75(e)(5), and the gift there was not to a dependent spouse so it also resulted in a denial of Medicaid eligibility.

The case law and rationale for transfers such as those proposed by Mrs. Shah have been analyzed in detail in Hal Fliegelman and Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, 32 Wake Forest L. Rev. 341 (1997), and *Survey of New York Practice:*

Developments in the Law, Medicaid Planning under Mental Hygiene Law Article 81, 70 St. John's L. Rev. 823 (1996) [both discussing the numerous lower court cases from New York authorizing guardians to make gifts to facilitate Medicaid eligibility]. *See also*, A. Frank Johns, *Three Rights Make Strong Advocacy for the Elderly in Guardianship: Right to Counsel; Right to Plan; and Right to Die*, __ S. D. L. Rev. ___ (Summer, 2000; forthcoming).

It is not appropriate to carve out from the substituted judgment statute an exception for transfers permitted by federal law in light of "concepts of Equal Protection." *Matter of Labis*, *supra*, 314 N.J. Super. at 147, 714 A.2d at 338. A similar concern was set forth in *Matter of Baird*, 167 Misc.2d 526, 531, 634 N.Y.S.2d 971, 974 (Sup. Ct. Suffolk Co. 1994). *See also*, Fliegelman, *supra*, 32 Wake Forest L. Rev. at 369-370. The substituted judgment rule in section 81.21 is, in essence, a statutory guarantee of Equal Protection for the disabled. They should be treated no differently in terms of their rights and responsibilities than if they were not incapacitated.

Carve outs of certain categories of people under New York public benefits programs have been struck down on Equal Protection grounds. In *Lee v. Smith*, 43 N.Y.2d 453, 461-462, 402 N.Y.S.2d 351, 355-356, 373 N.E.2d 247, 259-252 (1977), this Court held that a statute excluding aged, blind and disabled recipients of Supplemental Security Income benefits from eligibility for supplemental Home Relief benefits violated Equal Protection: "While the State may have a legitimate interest in reducing the costs of the home relief program, it may not accomplish this result by arbitrarily denying one class of persons access to public funds available to all others," *id.*, 43 N.Y.2d at 462, 402 N.Y.S.2d at 356, 373 N.E.2d at 251-252. *Cf.*, *Bacon v. Toia*, 648 F.2d 801 (2d Cir. 1981), *aff'd. on other grounds sub nom.*, *Blum v. Bacon*, 457 U.S. 132, 102 S.Ct. 2355, 72 L.Ed.2d 728 (1982).

Any construction of Article 81 which would create a carve out to prevent incapacitated individuals subject to a guardianship from doing what the rest of us, or those just physically disabled, could do without court sanction not only raises Equal Protection problems, it also runs afoul of both the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 1231 *et seq.*, and section 504 of the Rehabilitation Act, 29 U.S.C. §794. *See, Olmstead v. L. C.*, 527 U.S. ___, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), applying the ADA to state Medicaid programs. A correct interpretation of the substituted judgment rule avoids any such problems since, if the rule is applied to permit the guardian to take whatever actions the incapacitated person could under the rules of the Medicaid program, there is no differential treatment due to the interplay between Medicaid and the guardianship.

The approach taken by the Supreme Court of Wisconsin in *Guardianship of F.E.H.*, *supra*, 154 Wis.2d at 589-593, 453 N.W.2d at 887-889, is correct. There the court recognized that the transfer in question was appropriate under the substituted judgment rule since public policy was codified in the Medicaid statute, and that law expressly permitted such an interspousal transfer. Similarly, in *Matter of Labis,* supra, 314 N.J. Super. at 143-144, 714 A.2d at 336, the court reversed the ruling by the trial court which had held that a transfer by the guardian should not be authorized because there was a public interest in preserving some of the assets to repay Medicaid expenditures. *Accord, Matter of Lauda*, N.Y.L.J., July 2, 1996, p. 31 (Sup. Ct. Nassau Co.): "If protection of DSS rights to Medicaid reimbursement was intended to be a consideration in guardianship transfers, then there should have been a clear expression thereof from the Legislature."[4] In fact, the policy is so strong that, given the crushing liability

[4] While there were some recent efforts at the federal level to penalize elderly or disabled individuals and their advisors for making transfers affecting Medicaid eligibility, they did not apply to cases like this since those statutes purported to penalize only people involved with transfers which resulted in the imposition of a period of Medicaid ineligibility. Here the proposed transfer to Mrs. Shah would have had no such effect, *see*, pp. 10-11, *supra*. The

facing persons with disabilities, one court has approved surcharging a guardian that failed to arrange the affairs of the incapacitated person so as to maximize eligibility for public benefits. *Guardianship of Connor*, 170 Ill. App.3d 759, 525 N.E.2d 214 (1988).

As the court below recognized, along with the Appellate Division, Third Department in its earlier decision in *Matter of John "XX,"* 226 A.D.2d 79, 652 N.Y.S.2d 329 (3d Dept. 1996), denying the guardian the power to transfer Mr. Shah's assets to his closest dependent, his wife who has custody of their two minor children, would be contrary to the statutory premise of Article 81 that incapacitated persons should have the same range of options as do competent individuals.

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first federal effort, section 217 of P.L. 104-191 (1996), was subsequently replaced by section 4734 of P.L. 105-33 (1997), currently codified at 42 U.S.C. §1320a-7b(a)(6). Section 4734 was conceded to be unconstitutional by the Attorney General and subsequently enjoined as violating the First Amendment, *New York State Bar Association v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998). That ruling was subsequently made final in an unreported decision.

CONCLUSION

For the foregoing reasons, the orders of the Appellate Division, that Mr. Shah is a resident of New York for purposes of Medicaid eligibility and that under the substituted judgment rule his guardian may make interspousal transfers, should be affirmed. Disregarding controlling federal regulations concerning residency for Medicaid eligibility, or denying the guardian authority to exercise substituted judgment to make legally appropriate interspousal transfers, would make New York alone among the states on these issues. The patients and families who are clients of the *amici* and their members should not have to face the delays and emotional costs borne by the Shah family that would result from that approach.

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Respectfully submitted,

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