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COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

Superior Court Department
Civil Action No. 10-[illegible]

Mother / Widow
Plaintiff

v.

Real Estate & Estate Planning Attorney
Real Estate & Estate Planning Law Firm

Defendants

AFFIDAVIT OF HARRY S. MARGOLIS, ESQ.

I, Harry S. Margolis, do hereby state under the pains and penalties of perjury:

1. I am an attorney-at-law, licensed to practice in the Commonwealth of Massachusetts since 1985. I am a partner in Margolis & Bloom, LLP with a principal place of business in Boston, Massachusetts.

2. My practice is focused on the field of elder law. I am the editor of ***The ElderLaw Report***, a monthly newsletter for attorneys, and I was the founding general editor of ***The ElderLaw Portfolio Series***, a compilation of in-depth studies on various aspects of elder law. I am the author of the ***ElderLaw Forms Manual*** and publisher of the ***ElderLaw News***, a quarterly newsletter for the firm's clients. I am also a Fellow and former member of the Board of Directors of the National Academy of Elder Law Attorneys and founding President of the Academy's Massachusetts Chapter. I have served on the adjunct faculty of Boston College Law School. I am also a Fellow of the American College of Trust and Estate Counsel.

3. I am familiar with the standard of care for the average qualified attorney in the Commonwealth of Massachusetts in 2007 regarding Medicaid planning and estate planning for elderly persons.

4. I am familiar with the facts and circumstances regarding certain real estate transactions involving Father and Mother for which they were represented by Attorney Attorney of the firm of Real Estate & Estate Planning Law Firm As I understand them, the facts are as follows:

5. Father , (D.O.B. 30) and Mother (D.O.B. 34), husband and wife, had owned a home at Parent's First House for many years.

6. In November, 1994, Attorney Attorney , of the firm of Real Estate & Estate Planning Law Firm Mass, prepared deeds to the Parent's First House property from Parents to their four adult children with reserved life estates. **See Deposition of Attorney , [hereinafter Atty Depo], Exhibit D, page 18, lines 14-20.1**

7. Attorney Atty testified at his deposition that he had suggested this arrangement to Father and Mother as "a way to protect the property." **See Deposition of Attorney [hereinafter Atty Depo], Exhibit D, page 18, lines 14-20.** Attorney Atty testified that "if either one of the spouses became a candidate for long-term care, their interest upon their death would expire by virtue of their death and the property would pass to, in this case, the siblings, free of the lien because there was no ownership interest left in the person on whose behalf the Medicaid dollars were spent." **See Atty Depo, Ex. D, page 21, lines 13-22.**

8. Parents 's Deed of their home at Parent's First House to the four children was recorded on April 5, 1995. **See Deed, Ex. E.**

9. Sometime around July, 2007, Parents , and two of their four children, Son and Daughter , met at Law Firm office to discuss Parents 's plan to move from First House to a property located at Second House

10. The hand-written notes of Attorney Atty regarding this meeting, **See Ex. F,** read as follows:

> Meeting with Parents , Son & Daughter re purchase of Father not well on oxygen. Discussed prospect of putti Second in Son & Daughter 's name so that no real estate to show up in their name if either becomes a candidate for long term care. They expressed that they wanted Son & Daughter to end up with house after both of them passed.

Discussed pros and cons of doing this. They were ok with it and kids said if they need care or $ for rest of their lives they would be there for them. Everyone agreed to go this way. No L/E.

11. Attorney Atty testified that "there was further discussion in terms of how they may protect this asset because they were changing what had been accomplished in Parent's First House for purposes of Medicaid, how they were going to preserve this asset for their children." **Depo of Atty Ex. D, page 49, lines 3-7.**

12. Attorney Atty testified that he discussed with Father and Mother that by selling the Parent's First House property, "they were essentially waiving what we had accomplished, namely the three-year transfer window done in 1995, and that a subsequent transfer now would—between them and a new owner--would start that clock essentially all over again." **Depo of Atty , Ex. D, page 45, lines 14-23.**

13. Attorney Atty testified: "[A]t that time (i.e., 1995) in a Medicaid application there was a three-year look back window in terms of a gift or transfer of asset between an applicant for Medicaid." **Depo of Atty , Ex. D, page 22, lines 6-9.**

14. Attorney Atty further testified that "The law, I believe, had changed or at least there was discussion that Medicaid was looking at changes in the law where they were going to assert a lien against a life estate as having some value and assessing that value based upon life expectancy tables in the event that some owner of a life-estate became a candidate for long term care and Medicaid was paid on their behalf. . . . There was discussion by me with them, and them being Mother and Father and it was decided by them there was no need for a---for reserving a life estate to them." **Depo of Atty , Ex. D, page 50, lines 4-24.**

15. Attorney Atty testified that he told Mr. and Mrs. Parents that reserving a life estate in the Second House could have a negative effect from a Medicaid point of view on their ownership. **Depo of Atty Ex. D, page 55, lines 2-10.**

16. Attorney Atty testified that there was a discussion about reserving a life estate in the Second House property to Mr. and Mrs. Parents, "but it was generally felt by them that if that was going to have any impact on future eligibility for Medicaid, that they didn't need it, that they trusted the two of these people, and that they didn't need to be assured in terms of their life estate reserved on a deed but they could live there for the remainder of their lives." **Depo of Atty , Ex. D, page 54, line 13 to page 55, line 1.**

17. Attorney Atty testified that he was not aware of, and that he did not offer Mr. and Mrs. Parents any other way that they could have acquired the Second House property and protected it from Medicaid liens and also preserve their eligibility for Medicaid. **Depo of Atty , Ex. D, page 62, lines 5-21.**

18. Attorney Atty testified that the arrangement that he suggested for Mr. and Mrs. Parents to protect their property from Medicaid liens was not something that he could recall ever having done for any of his other clients. **Depo of Atty , Ex. D, page 65, line 23 to page 66, line 7.**

19. Attorney Atty testified that in 2007, one of his partners, Attorney did a considerable amount of work in the field of elder law. **Depo of Atty , Ex. D, page 12, lines 5-14.** Attorney Atty has no recollection of consulting with Attorney Atty or any other attorney about optimal methods to accomplish Mr. and Mrs Parents' goals. **Depo of Atty , Ex. D, page 55, lines 13-24.**

20. Attorney Atty testified that although Parents wanted Son & Daughter to end up with the house after both of them had passed, "what actually happened is that Son and Daughter ended up with the house before either one of them passed." **Depo of Atty , Ex. D, page 57, lines 11-19.**

21. On July, 2007 Attorney Atty caused a deed from the remaindermen of the Parent's First House property (i.e, the four children) to be recorded, thus reconveying the property to Parents **Depo of Atty , Ex D, page 28, lines 17-19.**

22. Attorney Atty testified that at some point, he learned that Son , the son of Father and Mother was going to advance the money for the purchase of the Second House property until the Parents could sell the Parent's First House roperty. **Depo of Atty , Ex. D, page 64, line 16 to page 65 line 18.**

23. Attorney Atty testified that he was aware that the Parents would be giving Son a check to repay him for the amount he had advanced to purchase Second House **Depo of Atty , Ex. D, page 74, lines 3-13.**

24. Attorney Atty further testified that he does not know, and did not have any discussion with the Parents, about what the effect of giving this check to their son in 2007 would be on their eligibility for Medicaid. **Depo of Atty , Ex. D, page 74, line 24 to 75 line 21.**

25. Attorney Atty testified that he knew that the Parents did not receive any legal interest or any right to live in the Second House property for the rest of their lives as a result of giving this check to their son. **Depo of Atty Ex. D, page 77, lines 2-10.**

26. Attorney Atty testified that he knew that the son or daughter could evict them from the property at any time, or could sell the property at any time. **Depo of Atty, Ex. D, page 77, lines 11-16.**

27. Attorney Atty testified that he knew that any creditor of either Son or Daughter could attach the house and sell it to satisfy their debts. **Depo of Atty Ex. D, page 58, line 14 to page 59, line 1.**

28. Attorney Atty testified that he was not familiar with the use of reserved powers of appointment in connection with life estates. **Depo of Atty Ex. D, page 115, line 4-7.**

OPINIONS

29. Based upon the foregoing facts, and based upon my education, experience, training and knowledge, I have formed the following opinions with a reasonable degree of professional certainty:

30. At the time that Parents consulted with Attorney Atty in June or July, 2007, their life estate in the property at Parent's First House, would not have been counted as an asset of either one of them for purposes of determining their eligibility for Medicaid, and the value of their respective life estates would not have been subject to a lien or claim by the Commonwealth of Massachusetts if either of them received Medicaid benefits in or after 2007.

31. The provision of Massachusetts law which had authorized the Commonwealth to recover Medicaid assistance from the estate of a deceased person based upon a life estate they had owned was in effect only from July 1, 2003 (see St. 2003, c. 26, §329) until July 1, 2004, when it was repealed. See St. 2004, c. 149, §167 and §428. It was below the standard of care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007.

32. If Father and Mother, as life tenants, and their four children, as owners of the remainder interest in Parent's First House had sold their interests in that property and

acquired the same respective interests in the Second House property,[2] the life estate of Parents in the Second House property would not have been counted as an asset of either one of them for purposes of determining their eligibility for Medicaid, and the value of their respective life estates would not have been subject to a lien or claim by the Commonwealth of Massachusetts if either of them received Medicaid benefits in or after 2007. It was below the standard of care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007 and not to have advised his clients of this option.

33. Reserving a life estate for Parents in the Second House property would have given them a legally enforceable right to live in the premises so long as either of them was alive and would have protected them from being subject to eviction by either Son or Daughter by any creditor of either of their children. At the present time, Mrs. Mother is only a tenant at sufferance or a tenant at will of the owners of the legal interest in the premises who I understand to be their son and the Daughter's Trust.[3]

34. If title to Second House had been taken in the names of Parents as life tenants, and Son & Daughter as remaindermen, it would have been possible to obtain a home equity loan on the property with the cooperation of all of them which would have given Parents access to the accumulated equity in the property to pay their expenses. Parents as life tenants would also have had the legal right to mortgage the property even without the assent of the remaindermen.

35. At the time of the purchase of the Second House property, in addition to reserving a life estate for them, the deed could have created a special power of appointment for Parents. Such a power would have given Father and Mother right to change the remaindermen. i.e., to change who would become the full owner of the property upon the death of the last of them. Such a power can be drafted to permit the holder of the power to exercise it as often as chooses during his life. It can also be drafted to exercised in the holder's testamentary dispositions.

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2 If Parents wanted only Son & Daughter to have remainder interests in Second House that would not have affected the outcome.

3 This is a Revocable Trust created by Daughter The Trust includes a provision that Mother shall have the opportunity to reside in the subject premises owned by the trust for as long as she so desires." See Trust, Ex. O, Schedule of Beneficiaries, page 1. Because this Trust is revocable, Mother is still no

36. The existence of such a power would not have subjected the **Second House** property to a claim or lien by the Commonwealth if either **Parent** had received Medicaid benefits in 2007 or after, nor would it have disqualified them from receiving Medicaid.

37. The reservation of such a power gives the holders a high degree of control over the remaindermen, because the interests of the remaindermen, although vested, are defeasible. Thus, in this case, if either **Son** or **Daughter** failed to honor their promise to support their parents financially or to care for them, or if either of them refused to assent to a home equity loan which **Parents** wished to obtain, they could have recorded a document defeating the remainder interest of the uncooperative child, and appointing that remainder interest to someone who would cooperate with their wishes (not necessarily one of their children). It was below the standard of care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007 and not to have advised his clients of this option.

38. It was not necessary, and it was inadvisable, to have the four children re-convey the remainder interest in **Parent's First House** to **Parents** so that they could sell it. In July, 2007, when Attorney **Atty** recorded a deed from the four children conveying their remainder interest in th **Parent's First House** property to **Father** and **Mother**, that property lost the protected status it had with respect to Medicaid. Any subsequent transfer of **Parent's First House** property by **Parents** thereafter became subject to the five-year look back rule of Medicaid, meaning that any transfer of property by an applicant or recipient of Medicaid which had taken place within five years of the application would be scrutinized under Medicaid's rules to see whether the seller/applicant had received fair value for the transfer. It was below the standard of care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007 and not to have advised his clients of this.

39. The **Parents** received $229,112 from the sale of the **Parent's First House** roperty which presumably was an arms-length transaction for fair value. This sale did not disqualify them from receiving Medicaid, although converting their home into cash made at least part of that cash subject to "spend down" rules of Medicaid if either **Father** or **Mother** applied for Medicaid after the sale. More importantly, when the **Parents** later gave $193,476 of the sales proceeds to their son **Son** to repay to him the money he had used to buy the **Second House** property, that payment would be considered by Medicaid as a transfer for less than fair value, because the **Parents** got nothing in return for it. They received no legal or equitable interest in **Second House**. The money would therefore be determined by Medicaid to be a gift. It was below the standard of

care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007 and not to have advised his clients of this.

40. The consequences of such a determination would be that if Mr. or Mrs. **Parents** applied for Medicaid within five years following the date of the gift, they would be ruled to be ineligible for Medicaid assistance for approximately 24 months, determined by dividing the amount of the money transferred by the average cost of care (at this time about $8,333). The penalty period would begin to run once the applicant has spent down any assets required to be spent and has entered a nursing home. The payment of $193,476 to Paul occurred on September 14, 2007. This means that if Mrs. **Mother** needs and applies for Medicaid coverage any time between now and September 14, 2012, she would be disqualified for a period of about two years. [$193,476 / $8,333 = 23.21 months]. It was below the standard of care for the average qualified attorney practicing elder law or Medicaid Planning not to know this in 2007 and not to have advised his clients of this.

SIGNED AND SUBSCRIBED UNDER THE PAINS AND PENALTIES OF PERJURY.

Date: 5/26/11

Harry S. Margolis