



**BROOKS  
&  
BROOKS, LLP**



## ***Brooks & Brooks, LLP Expands!***

Teddar and Kameron are pleased to announce that Jay William Frantz of Gowanda, New York has recently joined the firm. Jay is a graduate of Gowanda Central School, holds a BS degree in Interdisciplinary Engineering and Management from Clarkson University and a Juris Doctor degree from Wake Forest University School of Law.

After five years of general practice, Jay received an invitation to join Brooks & Brooks, LLP and concentrate his practice in estate and asset protection planning, tax planning, business succession planning and trust and estate administration. We are pleased to have Jay with us and appreciate his technological expertise as our firm moves forward in adapting and using technology to better serve our clients.

We welcome Jay's existing clients to our firm and we look forward to serving all of our clients, existing and new, for decades to come.

Welcome aboard Jay!

## ***Powers of Attorney - Is yours strong enough?***

The most common thought process as to why someone needs a Power of Attorney centers around the concern that if I am not able to pay my bills, I will need someone to do it for me. This is true. And it is probably the most common use of Powers of Attorney. However, there is more .... much more that Powers of Attorney can do, and should do.

After the change in the law in 2009, agents' authority to do somethings on behalf of a principal (the person giving the Power of Attorney) were stripped away from the standard Power of Attorney Form. The state legislature had determined that these powers are of an estate planning nature and, therefore, should not be given as part of a standard short form Power of Attorney. To give these "extra" powers, the legislature provided for an additional document, called a "Statutory Gift Rider," which if completed and signed by the principal the Gift Rider could be attached to the Power of Attorney and thus give the agent the extra powers to assist the principal with a number of things, if it should become necessary. A December, 2013 Appellate Division, 3d Dept. case, *Jacobs v. Mazzei, Jr., et. al.*, 2013 N.Y.App. Div. LEXIS 8262: 2013 Slip Op. 8320, illustrates why these powers may be necessary and when they can be used.

The facts of the case are as follows: in 2007, the individual opened an individual investment account and a retirement account with Morgan Stanley Smith Barney (now Morgan Stanley). As is usual, the investment account was solely in the principal's name and, in addition, there was no beneficiary on the retirement account.

Four years later (2011) and being in poor health, the individual signed a statutory short form Power of Attorney, but did not include the Statutory Gift Rider

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## **Free Workshops**

September 8, 2016

Bartlett Country Club, Olean  
6:30 to 8:30 p.m.

September 22, 2016

Wellsville Country Club  
with Kevin Gildner  
6:30 to 8:30 p.m.

October 4, 2016

Jamestown Holiday Inn  
with Luke Buehler  
6:30 to 8:30 p.m.

**POWERS OF ATTORNEY, cont'd.**

with it. The Power of Attorney appointed the principal's neighbor and good friend as her agent. Subsequently, the agent directed Morgan Stanley to add the agent as a joint owner on the investment account and name her as the beneficiary of the retirement account. Morgan Stanley refused. The agent then presented some personal notes signed by the principal expressing her desire to make the agent a joint owner on the investment account. Morgan Stanley still did not make the change and a few days later the principal died. The agent then brings suit against Morgan Stanley for negligence of breach of contract.

At the trial level court, Morgan Stanley moved for summary judgment dismissing the claim against it, which was granted. The agent then appealed the lower court decision to the Appellate Division, 3d Dept. Her arguments were 1) Morgan Stanley owed a duty to her as the agent; 2) in addition to her authority to the Power of Attorney agent, she was acting as intermediary for the now deceased principal; and 3) she was a third-party beneficiary of the principal's contracts with Morgan Stanley.

The Appellate Court makes its decision with ease. It affirms the lower court's summary judgment motion in favor of Morgan Stanley. The Court reasoned that the Power of Attorney contained no Statutory Gift Rider and the contracts with Morgan Stanley made no mention of an interest in anyone other than the decedent.

The lack of a Statutory Gift Rider is an all too often occurrence. It is not uncommon for one of our attorneys to be involved in a Medicaid planning or Medicaid application case where a well designed Power of Attorney becomes a very important document; especially once that contains a Statutory Gift Rider. For instance, assume the following fact pattern: a married couple where one spouse goes to a nursing home and the other spouse continues to live at home. The spouse at home would be entitled to the family residence as an exempt resource. To qualify for Medicaid, the institutionalized spouse cannot own an interest in the home, nor would we want him or her to continue to own the home with the other spouse. A deed must be recorded conveying the institutionalized spouse's interest in the house to the community spouse, often

using a Power of Attorney. It is common that the agent under the Power of Attorney does not have authority to deed the institutionalized spouse's interest in the home to the community spouse.

*We at Brooks & Brooks recognize the shortcomings of a standard Power of Attorney and are equipped to give our clients the additional powers, and thus flexibility, that they may need in the future.*

**How Not To Do A Medicaid Application**

A New Jersey Superior Court case, *A.T. v. Div. of Medicaid Assistance and Health Services*, reinforces the long standing rule that once an individual commits to a Medicaid Application, it is up to that individual (whether the Medicaid recipient or an agent under a Power of Attorney) to continue to pursue it.

In the above case, a nursing home resident's son applied for Medicaid on her behalf. The State requested verifications bank account statements, deed for property and proof about a life insurance policy. The son did not provide the requested verification and the State denied the Application. The nursing home filed a complaint against the mother and son for non-payment of services. The son, in an attempt to avoid the lawsuit, appealed the original denial of Medicaid benefits from his first application for his mother. The hearing officer ruled that the original application was properly denied due to lack of verifications. The son appealed to the Court, arguing that the State did not distinguish which documents were necessary to make an eligibility determination.

The Appellate Court affirmed the original denial of benefits, stating that the State could not determine whether the property and life insurance policy were available resources until it received the requested verifications.

This case emphasizes the importance of diligence concerning Medicaid Applications and knowing what the ramifications are for a denial. When a person is in the nursing home and Medicaid benefits are not awarded, he or she will be charged the private pay rate and the nursing home will look back to the original Admissions Contract to find a person who has liability to sue.