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Elder Law Attorney

A publication of the Elder Law Section
of the New York State Bar Association

Chair to Chair

Louis W. Pierro
Outgoing Chair

As we head into summer, and prepare for the Elder Law Section's Summer Meeting, August 7-11 in Toronto, it is a good time for reflection on where our professional practices have brought us, and in what direction the practice of elder law will go in the future. Consider, for example, the request by the state of Connecticut for a waiver from the federal government to amend its Medicaid rules, and provide that any transfer of assets would result in a penalty to be imposed from *the date of the Medicaid application*, rather than the date the transfer was made. Such a waiver would completely alter the way we think and practice, and with mounting pressure on state budgets, should Connecticut be successful, other states will be sure to follow.

In order to chart the course for our Section over the coming years, the Long-Range Planning Committee held a retreat in Albany on April 10th and 11th, attended by nearly all of the Section's past chairs, current officers and other Section leaders. In conducting the retreat, the facilitator asked us for the Section's

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Cora A. Alsante
Incoming Chair

I am extremely fortunate to begin my year as Chair with the benefit of having attended our Section's Long-Range Planning Retreat in April. It was an amazing experience for me to have had the opportunity to brainstorm with past chairs, current officers and chairs of key committees to develop a Strategic Plan for our Section. For a part of the retreat we broke out into different subgroups. My group's task was to identify our Section's strengths and I am happy to report, though not surprised, that my group had no problem listing our many strengths even though our Section has existed for only 12 years. Our newsletter, listserve and continuing legal education programs are only a few of the strengths we identified. One of my goals as Chair is to continue to focus on these successes and to implement new ideas that emerged during our retreat.

A draft Strategic Plan has been completed and a Task Force has been established to implement the plan. Under the capable direction of Lawrence Davidow, Mitchell Rabbino, Joan Robert, Kate Madigan and

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Inside this Issue

Outgoing Chair's Message *(Continued from page 1)*

strengths and our weaknesses, and then for ways to address the problems that the Section faces. What struck me in going through this process was the number of significant achievements our Section has to its credit over the past ten years, due in large part to the leadership of our past chairs. There are significant challenges which lie ahead, and only through the active participation of each Section member will we be able to meet those challenges.

Following the conclusion of our retreat, a group led by Lawrence Davidow is fashioning a final report, which will help us formulate new policies and programs for the Section. There will be a proposal presented to the Executive Committee at our Toronto meeting, which will then be discussed at the general session.

Another significant development in elder law which will be thoroughly discussed at the Toronto meeting will be the new rules promulgated by Chief Judge Kaye in response to the findings of the Birnbaum Commission. Our Section has been very active, along with the New York State Bar Association, in providing input on the proposed rule changes. It is uncertain at this time, however, whether our work will have a significant impact, and each of us who practices in the guardianship area will need to address the new rules when they are announced. The program in Toronto, chaired by Ira Miller, has brought together a group of speakers from the bench and bar who can shed light on the new rules, and help us educate our membership and formulate our Section's policies on guardianship.

Our Section is also finalizing the Report of the Task Force on Long-Term Care Reform, which again is well-timed in light of current events. One interesting editorial which appeared in *The New York Times* several weeks ago was entitled "Trading Health for Wealth," and the author crystallized the impact of current policies in the federal government. With shrinking tax revenues and expanded spending on homeland security and other federal programs, the benefits available to our seniors and persons with disabilities once provided through Medicare and Medicaid are dwindling. While the infrastructure of our health care system deteriorates, and health care costs escalate at a double-digit pace, tax breaks, including a repeal of the estate tax, could prove fatal to providing basic health care coverage in coming years. Our Task Force will help the Elder Law Section shape its policy in terms of long-term care, provide legislative proposals for New York State and assist each of us in serving our clients' needs in the health and long-term care areas. At the time I write this article, it is reported that in the Senate, 59 of the 60 votes needed to repeal the sunset provision in the President's tax legislation are currently in line, with a vote that had been pledged to be held by June 28th.

The past year has seen tumultuous changes, and I fear that the future will continue to bring us problems of increasing gravity for our senior and disabled clients. I hope to see you all in Toronto, and as always, I strongly encourage you to stay active in the Elder Law Section.

Louis W. Pierro

Save the Dates!

NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION

SUMMER MEETING

August 7-11, 2002

Four Seasons
Toronto, Canada

Editor's Message

This is the ninth and final edition of our *Elder Law Attorney* that I will have the *privilege* to edit. I say privilege because I have had the opportunity to work with a diverse group of intelligent and dedicated people who go the extra mile to make a difference in our practices and in the lives of the persons we serve. Together we tried to make our newsletter a vital part of our practices and the envy of the entire New York State Bar Association. This was not my doing alone. This was a team effort.

As you sit there in your offices reading this newsletter, I want you to think about the regular NEWS columnists that selflessly contribute hour after hour to this quarterly project. They do it because they have a passion for what they do. They have made me look good, but next time you see them, join me in patting them on the back and telling them "Job Well Done!" They deserve it. And they deserve their names mentioned by me one more time as I leave this job. Here are some of the heroes of our Section:

Judith B. Raskin:	New York Case News
Steven H. Stern and Howard S. Krooks:	Legislative News
Vincent J. Russo:	Practice News
Ami Longstreet and Anne Ruffer:	Tax News
Stephen J. Silverberg:	Technology News
Ellice Fatoullah and René Reixach:	Fair Hearing News
Ellyn Kravitz and Ari J. Markenson:	Health Care Continuum News
Louis Pierro and Ed Wilcenski:	Regulatory News
Daniel G. Fish:	Publication News
Julie Osterhout:	Snowbird News
Valerie Bogart:	Public Elder Law Attorney News
Ellen Makofsky:	Advance Directive News
Ronald Fatoullah and Stacey Meshnick:	Public Policy News
Robert Kruger:	Guardianship News
Gerard Wallace:	Grandparent Rights News
Michael L. Pfeifer:	Capacity News
Steven M. Ratner:	National Case News
Sholom Koplovitz:	Practical Planning News

I would also like to thank, on behalf of the entire Section, our staff at the New York State Bar Association, who do all the real editing work. After I compile the materials, they make it look like the gem it has become . . . and always in a timely manner. Our thanks to Dan McMahon, Pat Stockli, Wendy Pike and Lyn Curtis. They are all professionals and have been a pleasure to work with.

Moving along now to this edition: It is sometimes not enough to just be a good lawyer, that is, a good technician. If we are running our businesses, then we must also be entrepreneurs and managers. Bringing clients in the door and managing the practice can be a full-time job in and of itself. As an aside, anyone interested in reading a good book about the three personalities needed to run a business—the technician, the entrepreneur and the manager—should read *The E-Myth Revisited* by Michael Gerber.

It is with all this in mind that I dedicate this Summer 2002 edition of the *Elder Law Attorney* to PRACTICE MANAGEMENT AND PRACTICE DEVELOPMENT ISSUES.

The theme is developed with four articles. The first article was written by one of our past chairs, Vincent Russo, together with one of the past chairs of the New Jersey State Bar Association Elder Law Section, Tom Begley, Jr. They have written an excellent article about, among other things, the right numbers to look at to understand your practice.

The second article was written by JoAnn Grisolia. JoAnn is the director of marketing for my elder law firm. Her article, from the perspective of a marketing professional, concerns the use of seminars as a marketing tool.

The third article was written by Katherine Heaviside, the owner of Long Island's most prestigious public relations firm. Her article will describe the need to bring public relations within your overall marketing plan.

The fourth article, written by Henry G. Bramwell, Jr. and Kathy Sullivan, makes the statement that with more and more lawyers promoting business, it's vital

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Incoming Chair's Message *(Continued from page 1)*

Martin Petroff, the Task Force will initially work on our short-term goals which will be implemented during my year as Chair. I am extremely committed to the goals, vision and mission of our Section with the Strategic Plan as our road map. Our goal is to present the Strategic Plan to our Executive Committee for review at our summer meeting in Toronto on August 8th, with the ultimate goal of obtaining official approval of the plan by our Executive Committee at the Annual Meeting in January in New York City. I encourage input from all our members, not only the Executive Committee members. If you would like to review a copy of the Strategic Plan, please contact Terry Scheid, our Section's staff liaison at the New York State Bar Association, and she will be glad to send you a copy. You can call Terry at (518) 487-5537 or e-mail her at tscheid@nysba.org.

During my year as Chair-Elect, I had the privilege of being involved in a variety of critical issues—the Birnbaum Commission and its report on fiduciary appointments, the federal litigation challenging the Department of Social Services' position with respect to limited powers of appointment in Medicaid trusts, the new Principal and Income Act and its effect upon grantor income-only trusts and long-term care reform, to name only a few. We will continue with our efforts concerning these issues and I stand committed to addressing new issues as they arise this year.

I encourage all of you to attend the Summer Meeting at the Four Seasons Hotel in Toronto August 7-11. We have an outstanding program chaired by Ira Miller entitled "Practical Elder Law." The program will focus on a variety of core issues affecting our clients, the elderly and individuals with disabilities. It will include an in-depth discussion on the current status and future of guardianships with a panel of key individuals and judges moderated by Howard Krooks. The city of Toronto has so much to offer and I encourage you to bring your spouses, significant others and families to join in the social activities we have planned. I promise it will be a worthwhile venture and I hope to see you there.

I have the pleasure of serving this year with an outstanding team of officers: Joan Robert, Ira Miller, Mitch Rabbino and Howard Krooks; our financial officer, David Pfalzgraf; and our most valuable resource, our liaison, Terry Scheid. One of our first challenges will be to seek approval of and begin to implement our Strategic Plan.

I thank all of our Section members who are actively involved and strongly encourage others to become involved. I have already received several letters from members asking to join a committee or to assist with a project and am thrilled to see such interest. If you would like to join a committee or task force on an issue or topic of particular interest, please contact me. I would be happy to help coordinate your participation. This year we have added vice chairs to each committee with the hope that more members will become actively involved.

As Chair I cannot effectively succeed without your invaluable involvement. I am energized and ready for an exciting year and look forward to working with you. Join a committee, become part of a task force on an issue of particular interest, participate in CLE or write an article for our newsletter. There are so many ways to participate to enrich our Section.

Cora A. Alsante

Editor's Message *(Continued from page 3)*

that practices are differentiated. Therefore, creating a recognizable corporate identity is the first step in such an endeavor.

Besides our THEME section, please also enjoy this edition's NEWS section, which contains timely articles on the many aspects of our elder law practices. Please also welcome a new column entitled Practical Planning News by Sholom Koplovitz. In Sholom's usual humorous style, his column will highlight drafting and other techniques that will improve our wills and trusts drafting.

I hope you enjoy reading this edition of our newsletter. Like all the others during my tenure as your editor, it was fun to work on.

Thank you! All my best! Keep smiling!

Lawrence Eric Davidow, CELA

Demystifying the Numbers: Financial Tools to Keep Your Firm Moving Forward

By Thomas D. Begley, Jr. and Vincent J. Russo

Thomas D. Begley, Jr.

We elder law attorneys are constantly striving to provide quality services to our clients. But as our practices expand, it is important that we pay attention to practice management and development as well. If our practices are to be as successful as they could be, we need to understand their financial aspects and focus on a well-thought-out plan for success. This in turn requires an understanding of the various reports and numbers that can lead to successful management and development of the practice.

Drawing on a combined 30 years as elder law practitioners, we suggest in this article realistic budgetary and marketing goals for a firm and describe the array of ratios and other numerical indices available to monitor a firm's progress in achieving those objectives. In the process, we offer guidelines for gauging a firm's performance as the budgetary year unfolds.

The Formula for Success

The overall formula for a firm's success consists of establishing goals, designing strategies, and then implementing, monitoring and revising those strategies.

Establishing Goals

Goal-setting should be part of a business plan. The goals must be in writing and they must be measurable. Define financial goals for the firm as a whole and by area of practice. How many files do you intend to open in the coming year? How many files will there be in each area of practice? What will be your gross income for the coming year? How will this break down by area of practice?

Designing Strategies

Your strategies must be in writing. How will you market and to whom? How much money will you spend on marketing? How will you get the work done? What are your staffing requirements and what equipment will be needed to implement your marketing plan?

Vincent J. Russo

Implementing Strategies

It is not enough to know what should be done and how to do it. You actually have to do it. Take action. Develop time lines. How and when will your strategy be implemented and by whom? It is important to fix responsibility for individual people to perform defined tasks.

Monitoring Strategies

As you begin to implement your plan, you will notice that some of your strategies work and others do not. Some will work even better than expected. You must constantly review the progress you are making toward achieving your goals and understand which strategies are working and which are not.

Measuring Success

The three most important tools in measuring success are: a budget, a good timekeeping system, and a good marketing plan, all of which are discussed in detail below.

Revising Strategies

By monitoring your strategies and tracking your progress, you will see which strategies need to be abandoned and which need to be tweaked. This is a constant process. Always develop timelines. Always fix responsibility for a particular person to perform each task.

The Budget

A budget enables a firm to establish goals and monitor progress in achieving those goals. Budgets need to be prepared annually, which means that you will be establishing your goals at least once a year. Budgets will generate an income and expense statement that will allow you to track your progress toward achieving your goals on a monthly basis. Fall is the time to prepare a budget for a calendar year. As a suggestion, you should start the process in September and complete the budget by November.

It is absolutely critical that we practice elder law in a professional manner, but we must also run our practice as a business. One immediate concern of all practitioners is to accurately assess the cash flow required to properly operate an elder law practice. By "cash flow" we mean enough money to run your business when taking into account revenue received less the payment of expenses and salary to yourself. There should be sufficient funds to pay you and also maintain enough cash flow to pay for estimated operating expenses for a prescribed period (such as 60 days).

A budget can be prepared on any type of spreadsheet (Excel is one). There are also computer software programs, such as PC Law, that include budgeting in their accounting systems.

Income

The top portion of the budget consists of the areas of practice from which you expect to generate income. Typical categories of revenue sources for an elder law practice might include Estate Planning, Medicaid Planning, Health Care Issues, and Guardianship. These are targets for the year in each area of practice and they represent your goal for total income for that year.

Expenses

The next portion of your budget is the expense side. Know what it costs to provide your services (the "KWIC Principle"). Make a list of all expenditures from your business, and be as detailed as you believe is necessary. Typical expense categories might include Employment and Overhead Costs. The items on the list are your expense targets for the year. The difference between your income and your expense is your profit on a cash basis.

Once completed, the budget can be used as a tool to measure progress. The column in the budget can be broken down as follows:

Current Month, Monthly Budget
+/- Month, Current Year to Date, Year to Date Budget
+/- Year to Date

Each month, you should review the income and expense statement, which is predicated on the annual budget. This will allow you to see how close you are coming to reaching your goals, and to adjust strategies accordingly.

Ratios

Budgets can reveal a number of important ratios that will tell you how much various expense categories are costing you as a percentage of income.

1. Overhead

What is your overhead as a percentage of your income? First, subtract all partners' compensation from your total expenses. This includes salaries, bonuses, contributions to your retirement plan, and any other fringe benefits relating to your partners. What is left is your overhead. Divide this by your gross income to yield your overhead ratio. Overhead ratios range from as little as 30 percent of income to as high as 70 percent. A high overhead ratio is not necessarily a bad thing. It may indicate an efficient operation with maximum delegation to staff.

Talk to colleagues with practices similar to yours and see what their overhead ratios are. The overhead ratio is used to fix fees; once it is known, discounting of fees stops. Let's assume a solo practitioner with an overhead ratio of 70 percent charges $2,000 for an estate planning package, including wills with A and B trusts, living wills, powers of attorney, and assistance with retitling of assets. This means that it costs the attorney $1,400 to produce the estate planning package before paying himself or herself. When the practitioner realizes this, he or she is much less likely to discount the fee in order to get the business.

2. Department Revenue

It is helpful to monitor the cash flow of the firm on a regular basis, and you should be able to monitor by practice area as well. This way you can better understand how much revenue is required by each practice area, allowing you to set goals for each department in the firm.

3. Occupancy Expense

Occupancy expense consists of rent or mortgage payments, taxes, insurance, utilities, maintenance and janitorial costs. This figure should be in the range of 5 to 7 percent of gross income. Obviously, the lower the occupancy expense, the greater the profit.

4. Marketing

A marketing budget should also be developed (discussed below). The overall budget should include a total figure for marketing which should be in the range of 7 percent to 10 percent of gross income. If you are spending more than 10 percent, you are devoting too many resources to marketing. Less than 7 percent is probably too little.

Timekeeping

Even if you do not bill on an hourly basis, your firm should keep time. Firms that bill on a flat-fee basis

need to know whether their fees are adequate. Also, timekeeping is another tool to measure progress. It is important that you account for the time of associates and paralegals who bill for their work. From an accounting standpoint, this will allow you to analyze how time is being spent by each billable person in your office—for example, how much time is being spent on meetings with clients, supervision of staff, drafting of documents, marketing the firm, etc. Timekeeping also allows you to monitor and analyze an attorney's effort and the amount that can be billed to clients from that effort.

In addition to recording time, you should compare the number of hours worked to the number of billable hours. This will give an indication of the proficiency of the attorney and the types of matters that the attorney is working on. It is important to set goals for each billable person. This will also allow you to project the revenue that will be coming in for the month based on the billable hours spent by the billable people in your office (i.e., attorneys and paralegals).

There are many good software programs available to do timekeeping, including Juris, TimeSlips, and PC Law. Proprietary software can also be developed.

Report of Hours per Timekeeper per Month

One of the benefits of timekeeping is that it enables the firm to see how many hours each timekeeper is working each month. Each timekeeper should be given a quota. For lawyers, the quota should be approximately 200 hours a month, including both billable and nonbillable time. For non-attorney timekeepers, the quota should be approximately 150 to 160 hours a month. For each timekeeper, a ratio of expectancy between billable and nonbillable hours should be established. Individuals keeping time can quickly see how hard they are working. Your timekeeping can be broken into billable and nonbillable hours and into practice type, as well as categories for practice development and practice management. Practice management time should be further subdivided into significant projects such as development of business plans, marketing, and so forth, and unavoidable management such as opening the mail and brief exchanges with staff.

It is recommended that everyone (partners, associates, and administrative personnel) record their time as they work. This is more likely to happen if individuals account for all hours, not just those that are billable.

Your inventory is your time, and all attorneys should budget their use of their inventory, with a minimum of weekly monitoring. Keep a target of billable hours in mind.

Keep time daily rather than going back and reconstructing a couple of days or a week at a time, and be sure the hours recorded correspond with the hours actually worked. "Real" realization is what goes into the bank versus what could have gone into the bank. Improved realization has a profound effect on profits, going straight to the bottom line.

Timekeeping Ratios

1. Billable/Nonbillable

As has already been noted, goals for billable/nonbillable time should be established. Attorneys need to be encouraged to spend time on nonbillable matters such as practice development and practice management. The billable/nonbillable ratio should be approximately 75 percent billable to 25 percent nonbillable, although this ratio will vary depending on the attorney's responsibilities. For example, a ratio of 65 percent billable to 35 percent nonbillable may be acceptable. If you spread the practice development/practice management functions throughout the firm, no one person will be saddled with an extraordinary amount of nonbillable time. On the other hand, it may be more effective to have one managing partner in the firm while several attorneys market the practice. Depending on the firm's size, you may want to employ an administrator to oversee the staff and day-to-day operations.

2. Practice Development

Each attorney should be encouraged to spend 15 percent to 25 percent of his or her time on practice development. Here, it is important to assess the different skills of your attorneys. One attorney may be better suited to giving presentations while another may be proficient at writing articles. It is also helpful to educate your staff on how to promote the law firm. You may want to consider giving bonuses or rewards to staff members who generate new clients.

3. Practice Management

Attorneys should be encouraged to spend at least 10 percent of their time on significant practice management. These responsibilities could include developing a business plan, marketing plan, or budget; working on forms and new projects such as a document assembly program; or getting involved in other activities of significant benefit to the firm. Since these activities do benefit the firm, they need to be rewarded.

4. Realization Ratio

This is the ratio between what should be received and what is actually being received. This ratio should be analyzed by biller and by practice area. What should be received can be determined by multiplying the biller's hourly rate by the number of billable hours, broken down by category. As a guideline, if the realization ratio is less than 90 percent, then something is amiss and action needs to be taken. Let's suppose an attorney has a rate of $200 per hour. Is he or she actually receiving $200 per hour? Is it more? Is it less? Why the difference? What does it mean? Are certain categories of practice losers?

5. Hourly Billable Rate Received by Practice Area

By flat-fee billing and efficient operation, it is possible to attain actual receipts that are significantly higher than the attorney's hourly rate. It is important to know which practice areas are the most lucrative and which are not. For example, an analysis of the numbers should reveal that Medicaid planning is significantly more profitable than real estate. Once this analysis has been done, a firm will direct its marketing effort to those areas that yield the highest return. There may be certain practice areas that are actually losing money and should be abandoned. There may also be a practice area that is important to you even though it is not lucrative. Understanding the economics of each practice area will allow you to make an informed decision about what areas you practice in and their economic consequences. This is not simply a matter of gross dollars, but of gross income less gross expense.

6. Hourly Total Rate Received (Billable Plus Nonbillable)

A properly run law firm needs to spend 25 percent to 33 percent of its time on nonbillable matters. Practice development will help the firm attract clients, while practice management will enable the firm to run efficiently. Both are crucial to success. However, in order to establish realistic fees, this nonbillable time needs to be factored in. Divide your total income by the total billable and nonbillable hours to learn your true hourly rate. This is based on income actually received, not simply billed.

Tracking Payments

Retainers

Most firms use an engagement letter or retainer agreement, which usually includes a payment schedule that can include interest after a set time. Confront the billing and collection arrangement up front. If rates change yearly, there should be a written and understood clause about the change; otherwise a new letter needs to be sent that includes the information.

Set a firm policy on retainers, and make sure you get them. This ensures accountability to the firm. For most work, you should insist on a 50 percent initial retainer, although you may want to ask for 100 percent of the retainer for smaller cases, such as those under $1,000. Accept credit cards.

Consider applying the retainer payment against the last rendered bill, if appropriate. Decide whether the retainer is refundable based on time expended, or whether it is part of a fixed fee that allows you to keep the retainer even if less time is expended on that particular matter. Give a range of fees in your agreement, if appropriate. You can always discount the fee above a certain level.

Receivables

Your accounting program should print out a list of receivables every month. Wherever possible, billing should be on something other than a strict hourly basis. Flat fees or minimum fees subject to an hourly rate are preferable. Clients like flat fees because they know what things will cost. Hourly fees reward inefficiency, while flat fees reward efficiency. In an elder law planning practice, accounts receivable should be under 30 days.

If there is an outstanding statement, there should be a collection program in place to: 1) send out past-due notices, 2) follow up after so many days (i.e., 30 days) with a telephone call and 3) take steps for collection through a collection agency or by legal action, when appropriate. This last step should be implemented only after careful consideration of the pros and cons. Take fee collection as seriously as getting retainers. You have already done the work and should be paid for your services. You will collect less money the longer it takes you to get paid, so get paid up front and quickly after the work is done. This will keep receivables to a minimum.

Working Capital

Working capital is the amount of cash in the bank and accounts receivable less accounts payable. Sometimes the definition of working capital includes a credit line from the bank as part of the operating capital, or your draw as part of expenses. The amount of working capital required will depend on your comfort level. A minimum of one month (perhaps two) of anticipated cash expenses may be sufficient capital to run your practice. You may want to establish a line of credit to allow you the flexibility in borrowing funds to subsi-

dize the growth of the law firm, although you should avoid using the line of credit to cover overhead and salaries.

Monthly Reports

1. New Matter Report

Your firm should receive a report of the numbers of files opened by each attorney by practice area. This will allow you to project how many cases on average need to be opened to meet your income projections. Over time you will be able to project the amount of revenue that will be received per case or practice area.

2. Source of Revenue by Practice Area

The monthly report should include a breakdown of each type of business in which the firm engages and the referral sources per type of business. For example, you should track deposits of the fees collected on a regular basis (monthly, semimonthly, or weekly). You should then be able to analyze how revenue is being generated by each department area of your practice, i.e., Elder and Estate Planning, Medicaid, Guardianships, Real Estate, Trust and Estate Administration. This will show you whether you are making or losing money on a particular department and to what extent.

3. Source of Business by Type of Referral

Where are your referrals coming from? Are they coming from CPAs? Financial planners? Medicaid workers? Hospital discharge planners? Existing clients? Attorneys? These source categories should be further broken down into practice types. For Medicaid planning, you would expect to find more referrals from other attorneys and from hospital discharge planners. For estate planning you would expect to find more referrals from financial planners and CPAs. Track each individual referral source over the course of a year. Try to refer back to the source in proportion to the referrals received.

The Marketing Plan

A marketing plan is a vital part of the strategy for a firm's success. Key members of your firm need to establish measurable marketing goals and a marketing budget. Some marketing efforts will succeed; others will fail. They all need to be monitored and adjustments need to be made from time to time.[1]

The marketing plan is tied to the firm's income goals. Elements of the plan include:

- an analysis of the marketplace (legal, elder law)
- an analysis of the firm's competition
- a list of potential referral sources
- a list of potential audiences for speaking engagements
- collateral materials, such as newsletters and brochures
- a Web site
- media advertising

The plan's broad outline is then filled in by specific strategies that include timelines and the assignment of responsibilities to individual persons.

The Marketing Budget

The marketing budget is a line in the firm's overall budget, but it should be broken down more specifically for the marketing department. The budget categories might include:

- Marketing Director compensation
- Outside marketing consultant
- Newsletter
- Open house
- Sports and theater tickets
- Client lunches and dinners
- Web site
- Yellow pages
- Donations
- Audiocassettes
- Brochures
- Media
- Trade shows
- Community activities
- Seminars
- Newspaper or mailing list
- Audio-visual
- Facility costs
- Food costs
- Handout packages
- Staff time in overtime

Associate Marketing Compensation

For a firm to grow, all its members need to be in the community carrying the firm's message. To encourage this, associates should be rewarded for their marketing efforts. One approach is to give associates from 10 percent to 15 percent of the gross fee of any file they bring to the firm. If a firm's overhead is 70 percent and it pays 10 percent to the associate bringing in the business, then the associate is receiving one-third of the law firm's profits over and above the regular compensation paid to the associate. Another approach is to compensate associates as part of their salary or in a bonus program.

Tracking Initial Calls

Different firms have different methods of scheduling appointments. In some, a secretary schedules appointments; in others, attorneys do the scheduling. In either case, a system can be developed to track initial calls that may lead to client appointments. This report is done on an individual attorney basis. The number of calls is tracked as well as the percentage of those calls that ultimately become clients of the firm. This information will be helpful in guiding your marketing efforts. Also, prospective clients who do not schedule an appointment can be marketed further through seminars and printed materials.

The "TK" Report

Once you have established the number of files opened by attorney by type, as described above, you can develop a report to track how many of the files that are opened actually become clients of the firm. Those who do not become clients of the firm can be broken into "no-shows"—individuals who do not keep the appointment—and "TKs" (tire kickers), who come to the office for the appointment, but do not engage the firm. It costs money to open the file. It costs a lot of money to meet with the individual for an hour and a half or two hours and not be retained for further work.

With figures in hand on the number of people failing to keep appointments, you should try to determine the reason. In our experience, there are three main reasons for "no-shows": the potential Medicaid client dies; the potential client is overwhelmed by the intake form; the potential client is informed of the consultation fee and given an estimate of actual fees on the telephone when scheduling an appointment, but lacks the courage to say then and there that they are not interested.

People who are only concerned with cost do not make good clients. It is better to give them complete information, including anticipated costs, at the earliest possible juncture. If the anticipated costs are too high in the client's view, it is better not to even schedule the appointment. If the appointment is scheduled, it is better for such clients not to keep the appointment because once the potential client comes to the office, the attorney is spending valuable time and does not want to waste it. Have a follow-up system to call new clients prior to the meeting to confirm the appointment. If the new client wants to cancel, then have an attorney speak to the client to find out why. Sometimes a new client does not understand the importance of the consultation. After an explanation by the attorney, the client may be willing to keep the appointment.

One way to test whether a potential client is a good prospect is to give the client an investment in the process. The client who insists on an appointment in the evening or on Saturday is not making an investment. If it is not important enough to the client to take time off from work, he or she is unlikely to proceed. Similarly, the client who refuses to fill out intake forms in advance of the appointment is unwilling to make an investment and is not a good prospect. The potential client who is unwilling to pay a consultation fee is likely simply shopping for information and unaware that they have a serious problem that requires top legal assistance.

Once your firm is retained by the client, you should do everything you can to make things easy for the client. However, prior to the firm being retained, little barriers like appointments during the business day, required intake forms, and consultation fees let both the law firm and the client measure the client's commitment.

Monitoring Cash Flow

Having a software-based bookkeeping system will allow you to monitor cash flow. You may want to look at office cash flow once or twice a week to make sure you are meeting your goals for the month. If you are not achieving your targets and are entering the latter part of the month, you can make a concerted effort to collect funds through an aggressive accounts receivable collection program or by taking larger retainers on new matters.

In addition, preparing a budget in advance of the year and comparing that budget to actual results greatly aids in monitoring cash needs. There is no reason to let time and money slip away!

Conclusions: What Do We Do with the Numbers?

Once you have gathered all the numbers in your budget, timekeeping system, and marketing report, you are seriously measuring your progress toward your goals. You can see what is working and what is not. For areas that are not working, you may need to revise your strategies. Such periodic course changes need to be institutionalized within the firm. Following are some ways to accomplish these strategy revisions:

Attorney Meetings

At least monthly (some firms meet weekly), an attorney meeting should be held with all attorneys in the firm, plus key non-attorneys, such as office managers. For a solo law firm, the meeting can be with an attorney and his or her key secretary. An agenda needs to be prepared relating to the firm's business plan. Minutes from the meeting should be kept and these minutes should assign tasks to individual persons and give timelines for competition.

Department Meetings

In firms that are departmentalized, each department should hold such a meeting at least once a month. All department personnel and the supervising attorney should attend. Again, the purpose is to measure progress toward achieving goals. What strategies are working and what are not? What needs to be refined? Minutes need to be taken. Tasks must be assigned to individual department members and timelines established.

Staff Meetings

A staff meeting attended by every member of the firm should be held at least monthly. Every staff member should participate in the meeting by making suggestions for improvement. This is a way to obtain "buy-in" to firm goals. Staff members will have suggestions for strategies that never would have occurred to attorneys. The more input, the better the product. We are only as good as our staffs.

Marketing Meetings

A meeting should be held with the marketing director and key personnel at least on a monthly basis. The marketing plan should be discussed together with the strategies that are working and not working and revisions that need to be made.

Budget Meetings

A budget meeting should be held in early fall of each year and a meeting with your bookkeeper or accountant on a periodic basis throughout the year to review the budget and make adjustments.

Firm Retreat

You may want to consider a retreat for the entire firm or with key personnel to take a fresh look at the vision for and value of the firm and to enlist everyone's participation in ensuring a successful practice.

Reward the Attorneys and Staff

If you benefit by the efforts of the attorneys and staff of your firm, then reward them for allowing you to benefit from their efforts.

By employing the many strategies outlined above, you can plan, monitor and ensure the success of your elder law practice.

Endnote

1. For a complete marketing plan, see materials from the National Academy of Elder Law Attorneys' Symposium in Las Vegas, Nevada, November 1997, *Marketing to a New Clientele* by Thomas D. Begley, Jr.

Thomas D. Begley, Jr., has committed to practice law in New Jersey since 1962. He is a Fellow of the National Academy of Elder Law Attorneys and is a Certified Elder Law Attorney. He is past Chair of the Elder Law Section and the Real Property Probate and Trust Law Section of the New Jersey State Bar Association. He is co-author of *Representing the Elderly Client* (Aspen Publishing Co.), co-author of *Representing the Elderly or Disabled Client* (Warren Gorham Lamont), author of *How to Develop and Manage an Elder Law/Trust and Estates Practice* (New Jersey ICLE) and co-author of *Profitable Law Firm Management* (New Jersey ICLE).

Vincent J. Russo, J.D., LL.M., CELA, Managing Shareholder of the law firm of Vincent J. Russo & Associates, P.C. of Westbury/Islandia, New York, has a Masters of Law in Taxation, and is admitted to the New York, Massachusetts and Florida state bars. He is the co-author of *New York Elder Law Practice*, published by West Publications. Mr. Russo is a Founding Member and Past Chair of the Elder Law Section of the New York State Bar Association; a Founding Member, Fellow and Past President of the National Academy of Elder Law Attorneys (NAELA); and Founder of the Theresa Alessandra Russo Foundation, which supports children with disabilities.

Seminar Marketing

By JoAnn S. Grisolia

As part of my quest for law firm marketing techniques, I decided to attend a myriad of seminar presentations to get a feel for how they are currently being presented. It was certainly enlightening, as well as educational.

In recent years, the seminar has become an acceptable and effective vehicle for law firms to promote themselves to a targeted audience. The attendees are usually potential clients who have some interest in the topics being presented. Hopefully, after receiving all the valuable information from the seminar, they will act out on their good intentions. However, all that valuable information can become an obstacle if not presented clearly and succinctly.

Upon arrival, I was presented with various materials: folders, brochures, charts and graphs, questionnaires, and pages of definitions of terms and concepts. Are these materials functioning as the great promotional tools we've designed them to be or are they intimidating to the layman?

Even though I am thoroughly familiar with the subject matter (I promote the same topics for my firm), I found it a bit intimidating. Immediately, I realized that the materials needed to be made more "user-friendly."

Now, when I put together a seminar, I remind myself of how I felt during those presentations. Our materials are attractive but limited in number. The language of the materials is always written for the layman; it should be. This type of literature should only answer some commonly asked questions, shed some light on the subject and hopefully spark enough curiosity so that the attendee will follow up with a call requesting a consult.

The speakers you choose should be energetic, humorous, enjoyable to listen to and, of course, informative. Choose the attorney in your firm who has the appropriate personality: outgoing, personable, approachable, not necessarily the most knowledgeable one. Get the audience involved, walk up and down the aisles, and make eye contact with anyone who will allow it. This is a forum. Use it as an opportunity to begin to establish a client-lawyer relationship consisting of trust and confidence.

If someone feels comfortable with you and what you are representing, they will be more likely to approach you. It is not a lecture hall and the attorney should not function as a professor would. The speaker should take advantage of this situation; he or she should establish his or her own credibility as well as the firm's. These people are interested in choosing a professional they can count on; convince them that you and your firm are the one.

Lastly, include a technique which supplies incentive to work with the firm. You don't want to offer the free consult, but you do want to motivate them to take the next step. We came up with a good idea that seems to be working.

Our firm asks the question: "After listening to tonight's presentation, what three planning ideas would be most appropriate for your personal needs?" This is printed on the back of the evaluation forms (we really do welcome the *constructive* criticisms). When it gets turned in, we have their name, address and their three ideas. After six weeks, we mail this form back to them, in their own handwriting, and remind them of what they thought they should be acting on.

Today's innovative and aggressive law firms should take advantage of the seminar. Properly used and marketed, it can be one of the most efficient and effective methods of reaching an audience that actually wants to hear what your firm has to say. But remember, don't try to prepare them to pass the bar in those two hours—just get them to like you!

JoAnn S. Grisolia is the Director of Marketing for the Elder Law and Estate Planning firm of Davidow, Davidow, Siegel & Stern, located in Islandia, New York. For the past eight years Ms. Grisolia has been overseeing the department of this practice in the areas of advertising, public relations and marketing. She brings an 11-year background combining New York City agency and brand-identity experience for such products as Gitano, Martini & Rossi, and Random House publications. Ms. Grisolia has been asked to speak and write for various marketing associations and legal education programs.

Using PR to Build Your Practice

By Katherine Heaviside

"It's just not fair," you mutter out loud, staring at your morning newspaper in disbelief. There, right on the front of the business section, is a larger-than-life photograph of one of your competitors. Worse yet, his photo accompanies a major article on living wills, and he is quoted throughout the piece as an expert on the subject. To add insult to injury, his practice is so much smaller than yours that you didn't even consider him competition! Now everyone and his grandmother will be calling this guy. How could this have happened? Feeling your breakfast turn in your stomach, you wonder how he even knew the article was being written.

Across America, the above scenario is played out week after week. Fortunately, the flip side is much more pleasant. The lucky attorney quoted in the article is immediately inundated with calls, some from old friends he hasn't heard from in 20 years, several from family members, but a respectable sample from potential clients looking to use the services of his firm.

Luck, of course, has nothing to do with it.

Public relations is a critical part of any practice development program. In its simplest form, it is a program to communicate your experience and knowledge to clients, potential clients and referral sources. You are undoubtedly using some public relations elements to build your practice now. What is the bigger challenge is to approach public relations on a consistent and cost-effective basis.

The first step is to develop some sort of written plan. It does not need to be elaborate, but you should write it down. Just like New Year's resolutions, it is too easy to let public relations efforts slide when you are busy and the time spent on billable hours seems much more appealing. A plan will also help you identify strategies that are effective, but only require a minimum of your time. It will also help you make decisions along the way when you have several opportunities that could occupy your time. Do you accept the offer to talk before an association of independent accountants or address a high school class on career day? Having your goal in writing forces you to confront the choices that you make.

Taking Aim at the Target

In every elder law practice, the most likely source for new business is referrals from clients, accountants, insurance professionals, bankers and others in the financial services area. These are the primary targets and warrant a targeted public relations approach. The more difficult target will be all those potential clients who are not aware of your practice but could use your services.

"In every elder law practice, the most likely source for new business is referrals from clients, accountants, insurance professionals, bankers and others in the financial services area."

Make a list of those who are currently your referral sources and those who are potential referral sources. Building a strong referral network is all about building relationships beyond the traditional "thank you" letter. Considering that we all have limited hours in the day to devote to relationship building, it is important to maintain these relationships efficiently and effectively. For example, when a referral's name appears in a local paper, tear out the page and send it with a short note, "Thought you may want an extra copy for your family or friends." With current software, it is easy to make note of every contact with a referral source and track new information. Is the accountant's son looking for a job or considering going to law school? Offer to spend an hour of your time talking to him.

For the second group—those people who are in a position to refer business to you but have not done so—establishing them as a referral source sometimes is as easy as taking the direct approach. "I'm putting some emphasis on practice development and would be interested in any clients that you feel I could help." At one time we represented Bob Cohen, the matrimonial attorney who has clients such as Ivana

Trump and Marla Maples. The joke around his office was that he could go to the deli and come back with a client. I asked him why he was such an effective rainmaker. His answer was, "It's easy. I always ask for the business." Sometimes the people who could refer business to you just need to be asked. Even if their answer is, "My brother is an elder law attorney," the exchange is valuable. You can then eliminate them from a potential referral list and can put your energies elsewhere.

The third target—the large number of people out there who are potential clients or are the adult children of potential clients—must be reached by a broad-based communications program that contains a healthy dose of publicity. This public relations program has the additional advantage of assuring current clients and referral sources of the wisdom of their choice of elder law attorney.

"Generating publicity for your practice starts by knowing which reporters or television producers cover law or issues dealing with seniors."

Loading the Ammunition

Generating publicity for your practice starts by knowing which reporters or television producers cover law or issues dealing with seniors. Make a list of the names of everyone you see writing a story about these issues. Read their articles carefully to become familiar with what they seem to be most interested in covering. Then take your list of referral sources and look at it closely. In addition to the general weekly and daily newspapers, accountants, insurance professionals and bankers will often have local association newsletters or magazines. Those periodicals, called "trades," should also be on your list.

Now FIRE!

Once again, it is about relationships. The reporters on your lists have many other attorneys who are also vying for their attention and space in their paper. The value you can bring to them which will help establish a relationship is to be helpful in identifying a potential story. Was there an article in the paper that covered the death of well-known person whose will is being contested? Is there legislation pending that will affect the elderly? Did the reporter write a particularly insightful article on which you can comment? A well-thought-out letter or e-mail can help start a relationship with the reporter.

Sometimes knowing when a story is scheduled to appear is not as much about looking into a crystal ball as it is about getting something called an "editorial calendar." Most business papers of any size have determined what week in the year they will cover certain issues. Call the newspapers and ask for them to send you one. At least six weeks in advance contact the newspaper and ask who is doing an article on seniors and contact them by phone to offer your assistance with some concrete suggestions of current concerns of clients.

The newspapers for your referral groups will generally allow you to write the article yourself. Be sure it is well-written and free of any jargon or legalese. Once the article appears, your job is not done. Have copies made and mail it to all the people you have on your mailing list along with a brief "Thought you may be interested" note from you.

The Small Artillery

While the big story about you and your practice is the home run of publicity, you can still score with consistent publicity on awards you have received, volunteer efforts and speaking engagements. This information is generally sent to a different department in the paper in the form of a press release. Call and find out how they want the material sent to them and whether they accept photos. Invest in professional 5-by-7 head-and-shoulders photos of yourself and include them with the press release if the paper accepts them.

The press release itself should have all the essential information contained in the first two or three clear, easy-to-read sentences. The ensuing paragraphs elaborate and develop the details in descending order of importance. This is called the "inverted pyramid" style, which allows editors to easily shorten stories without losing the essentials. Be accurate, objective and brief. One page, double-spaced, is all anyone needs to tell most stories. Use plain white paper if you go to a second sheet, again indicating whom the release is from and that it is "page two."

At the bottom of each page, except the last one, type "-more-". At the end of the release, type "-30-" or "####". This is the journalist's way to say "The End."

Be sure to:

- Type in double-space with wide margins.
- End each page with a complete paragraph.
- Keep your entire release less than two pages long.
- Put your name, address, phone number and e-mail address in the upper left-hand corner. Be sure to list a day and night number, if they differ.
- If there is no reason to delay publication of a story, put "For Immediate Release" above the story and to the right. Include your own headline, if you like, to get the editor's attention.
- Keep your writing clean, free of unnecessary adjectives and to the point.

A sometimes-overlooked public relations tool is the letter to the editor. Next to the advice columnists, the letters to the editor section is the most widely read part of the newspaper. When an article appears that you can add to, dispute or even agree with, a well-thought-out letter from you that appears in print will raise your visibility and add to your credibility.

Getting the Medal

In addition to publicity, brochures, Web sites, and speaking engagements are also tools for a strong public relations program. They all take time, energy and commitment, but an alternative to doing it all yourself is to engage a public relations firm or a freelancer to help put a public relations program together. In any case, it is a big investment, but a good public relations program will pay for itself many times over. And who knows? Next time around your competition may be the one in for a shock when they see you quoted in that Front Page story.

Katherine Heaviside has a national reputation in the field of marketing communications and public relations. She is the founder and president of Epoch 5 Marketing, Inc., one of the metropolitan area's leading mid-sized public relations firms. Katherine has published articles in national magazines and major daily newspapers, appeared on national television and radio, and has presented seminars on marketing and public relations throughout the United States. On a more regional level, she has been selected as one of Long Island's "Top 50 Women" and "Top 100 Influentials."

Under her direction, Epoch 5 was awarded the 1999 Silver Anvil Award, the PR industry's most coveted award, and the national Mercury Award, for recognition of excellence in the PR community. Brochures and designs by Epoch 5 have also been singled out for high honors over the years.

Active in both the business and charitable life of Long Island, Katherine currently serves on the boards of several educational and humanitarian organizations, as well as corporate and business associations, including: Board of Directors, Long Island's United Way; Board of Directors, United Way of New York State; and U.S. Congressman's Citizens Review Board. Former affiliations include: Suffolk County Small Business Advisory Commission; Chair, Board of Directors, Huntington Township Chamber of Commerce; Board of Directors, Long Island Partnership; Board of Directors, Family Service League; Board of Directors, Nassau County Boy Scouts; and Board of Directors; Stony Brook Foundation.

She is the recipient of the 1998 Public Relations Professionals Lifetime Achievement Award, the 1995 Long Island Distinguished Leadership Award, and the 1994 Small Business Administration's Women in Business Advocate Award. Other honors include the United Way Caring Award for Long Island, the Good Deed Award by the Suffolk County Council, Boy Scouts of America and honoree of The Vanderbilt Museum.

The Legal Profession and Corporate Identity

By Henry G. Bramwell, Jr. and Kathy Sullivan

Up until about 25 years ago, it was considered inappropriate for lawyers and physicians to solicit business through advertising. But during the 1970s, the U.S. Supreme Court relied on the strength of the First Amendment to overturn categorical bans on lawyers advertising, and prompted a fresh look at legal professionals promoting their practices.

With more and more lawyers promoting business, it's vital that practices are differentiated. Creating a recognizable corporate identity is the first step in such an endeavor.

> *"Corporate image is a* perception that is usually earned*."*

What's in a Name (or a Symbol?)

What do you envision when you hear the term "golden arches"?

If you're like most American adults, you've probably been inundated with enough imagery and advertisements to know that the "golden arches" are a nearly universal symbol made famous by the restaurant chain McDonald's.

But there are millions of other organizations whose names or corporate symbols are not familiar to most of us. And yet, regardless of the public's ability to recognize corporate symbols or names, many organizations steadfastly maintain these icons or marks as part of their corporate identity. Why?

1. Provision of Identity

Like people, organizations have their own characteristics, individual attributes, and philosophies. And a symbol or a stylized set of text can assert identity, often reflecting the culture and philosophy of an organization. It also can help to mold a positive image for an organization. But the concepts of identity and image are two very different things.

Corporate identity is the symbol or name that represents the way in which an organization *desires to be perceived.* The corporate identity gives an organization the opportunity to create an impression or to help mold opinions.

Corporate image is a *perception that is usually earned*. The public at large may develop a perception of an organization based on any number of factors: reputation, personal experience, history, location and so on.

2. Make it Memorable

One of the most basic tenets of success in marketing is to make information memorable. For many people, it's simpler to recall a symbol than to remember the name of a corporation or its product. If both symbolism and a name are utilized, the ability to recall this information is improved.

3. Emotional Attachment

There's a lot of truth behind the maxim, "A picture's worth a thousand words." In general, studies demonstrate that imagery is received and processed differently than text.

For instance, when most people see a word, the meaning is interpreted through a cognitive process. However, imagery or stylized type is translated largely through an emotional process, whereby readers unconsciously attach an emotion to a symbol. Hence, inclusion of a symbol within a corporate identity can inject a carefully selected emotional springboard for the general public.

The Corporate Identity System

The corporate identity is comprised of a system of visual elements, including logotype or symbol, color, and typography. These elements work in tandem to deliver a message to the public about your company.

In particular, the color chosen conveys specific information and qualities about a firm. It also facilitates perception, recall and awareness. Just as other

elements are explored (symbol and typography), the color should be explored to determine what tones best express the objectives of an organization. Different colors evoke varying emotions, so experimentation is crucial before a commitment is made.

In addition, a complete corporate identity must be useable in a wide variety of sizes and formats: stationery, brochures, business cards, Web sites, signs, packaging, advertising, and promotional specialty items.

Symbols, Logos and Marks

There are three primary symbol categories, each of which provide the public with varying degrees of information about an organization.

1. Typographic symbols: Utilizing an organizational name or its initials, the typographic symbol provides a unique perspective. The term *logotype* is used to describe an identity created using only the company name. Monograms utilize the company's initials in a free-form design. A *seal*, however, is words or initials designed to fit within a form, such as a box or a circle.
2. Abstract symbols: Sometimes a symbol is created not to make a direct comment about a particular organization, but to provide a stylized inference. More often than not, an abstract symbol will require more promotion than other, more direct types of symbols.
3. Descriptive marks: A symbol that provides a direct reference to a company's services or products is called a descriptive mark. For instance, a bookstore that utilizes the symbol of an open book in its identity is using a descriptive mark.

Determining Corporate Identity

One of the most challenging aspects of determining a corporate identity is for decision-makers to assemble a cohesive idea of how a firm is perceived, and how the firm *wants* to be perceived.

There are a number of steps that will help a firm to narrow its focus on identity:

1. Review the firm's mission statement and marketing strategies.
2. Talk to people within the company and outside the company to assess perceptions.
3. Evaluate areas of weaknesses and strengths.
4. Review competitors' materials, when possible, to assess positioning and prevent infringement.
5. Analyze all of the above and prepare a few ideas distilled from your responses.

Once a cohesive list of "characteristics" has been created, the firm is ready to move forward and consult a design firm that specializes in developing corporate identity.

"One of the most challenging aspects of determining a corporate identity is for decision-makers to assemble a cohesive idea of how a firm is perceived, and how the firm wants *to be perceived."*

Selecting a Design Firm

Occasionally an organization will decide to develop a corporate identity using internal staff and available resources, such as simple imagery or standard fonts. This often results in a design that may either meet the firm's needs for the short term, or perhaps not at all. In either case, the design has usually been created utilizing minimum resources, a factor which may be evident.

It's always a good idea to contact an experienced design firm to develop some ideas for corporate identity. Design firms generally differ from standard advertising agencies in that most agencies don't employ design consultants. In addition, since agencies usually have a vested interest in a client's identity, an agency may lack objectivity, a necessary part of effective identity construction.

Most reputable design firms will be pleased to show you examples of work performed for other clients. You can also ask for references so that you can speak with other clients about their experiences.

The Process

The task of the designer is more complex than simply creating some pleasing imagery and text as an identity. The corporate identity must incorporate the elements of both attractiveness and functionality. To

accomplish this, the designer must understand an organization's history and offer designs that give consideration to future strategies and direction.

The design process is generally broken down into several steps:

1. Analysis – The phase during which a designer gathers information about the client and establishes objectives.
2. Design Exploration – The creative phase of an identity project, whereby a designer begins to map out potential imagery for use in the final identity.
3. Design Refinement – Approval of basic design by client. This phase is divided into levels of design revision until the preferred look is achieved.
4. Implementation – The completed design is implemented, and any acceptable variations (reverse designs, use of design with street address, etc.) are designed and documented for reference.

Corporate identity should give form to a company's message; it should communicate a sense of purpose and a set of values. Designers use typefaces, colors, symbols and images to transmit these messages with an ultimate goal of eliciting a favorable response to that company.

A law firm's logo or corporate symbol needs to have strength and meaning because it may be the only representation of that firm that the public sees. But that is not enough; the logo must be consistently applied across all media to develop recognition and ultimately increased market share for the firm.

Henry G. Bramwell, Jr. is President of Visionary Graphics & Marketing, a marketing communications firm with offices on Long Island and in New York City. Visionary works with regional and national companies to enhance their images through the use of visual forms.

Henry Bramwell's experience as an identity consultant and designer spans over 20 years. Before establishing Visionary Graphics & Marketing 12 years ago, Henry was employed as a senior designer at studios on Long Island and in Manhattan. Although his company employs seven designers, he still prefers to remain active as a designer.

Kathy Sullivan, Vice President of Visionary Graphics & Marketing, has been involved in the marketing communications industry for more than 15 years. Prior to joining Visionary Graphics & Marketing in 2001, Kathy was employed at an international medical imaging manufacturing firm as director of marketing communications. In addition, she has a broad background in copyrighting, public and media relations, and video production.

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ELDER LAW NEWS

REGULAR COLUMNS

New York Case News

By Judith B. Raskin

We actively solicit receipt of New York cases that you would like to see included in the New York Case News article. Please send your New York cases to Judith B. Raskin, Esq., Raskin & Makofsky, 600 Old Country Road, Suite 444, Garden City, NY 11530.

Article 81

Petitioner seeks appointment as property manager for her brother to replace his deceased conservator appointed under Article 77 of the Mental Hygiene Law. At issue is whether the appointment should be made as conservator or as Article 81 guardian and what procedure should be followed. Petitioner appointed Article 81 guardian without hearing. *In re Stephen D.*, Feb. 27, 2002 (Sur. Ct., Bronx Co.).

Stephen resided in a psychiatric facility with the expectation that his need for property management would continue for his lifetime. In 1986, a conservator of his property was appointed pursuant to Article 77 of the Mental Hygiene Law. In 1992, Article 77 and Article 78 were replaced by Article 81, providing for the appointment of a guardian in lieu of a conservator or committee. Article 81 provided more flexibility in dealing with the complex needs of incapacitated persons. However, the legislative intent in 1992 was not to vacate orders under Article 77 and so the conservator continued to serve under Article 77.

Upon the death of the conservator, Stephen's sister sought court appointment to replace the conservator as property manager. All necessary parties were served and there were no objections to the application. Stephen's needs remained the same as when the conservator was appointed.

The Surrogate's Court found that a property manager would have more flexibility as Article 81 guardian rather than as conservator under Article 77. The court dispensed with a hearing, appointed the petitioner as Article 81 guardian and set forth in the decision the powers granted to the guardian.

Gifting

Petitioner administrator appealed from a holding that a lifetime transfer of the decedent's funds was a valid gift and not part of his estate. Reversed. *In re Estate of Clouse*, (App. Div., 3d Dep't 2002).

In 1986, Mr. Clouse appointed his daughter as his attorney in fact. In 1987, his daughter met with the attorney who prepared the power of attorney. She wanted to find out how to sell her father's bonds to

pay for his care and whether she could be compensated for services she rendered to him. She then cashed in the bonds from her father's safe deposit box using his key. Her husband and Mr. Clouse's long-term nurse witnessed his signature on the bonds. The nurse confirmed that Mr. Clouse told his daughter to keep any funds remaining after payment for his care in appreciation of all of the years of service she gave to him. Just before Mr. Clouse's death, his daughter removed the funds remaining from the bond proceeds and deposited them in her own account.

Mr. Clouse's son, as the administrator of his father's estate, brought an action to compel respondent daughter to return the funds to the estate. She argued that the transfer to her was a valid lifetime gift and that the attorney did not discourage her from her actions. The court held that these were not testamentary funds and that Mr. Clouse intended to make the gift. The administrator appealed.

The Appellate Division reversed. Respondent did not meet her burden of establishing that Mr. Clouse "made an irrevocable present transfer of his ownership of these funds to her during his lifetime such that he relinquished full dominion and control over them."

MHL § 13.29

Petitioner parents and co-guardians of a developmentally disabled son sought permission to create a device pursuant to MHL § 13.29 which is similar to a Supplemental Needs Trust. Granted. *In re Larson*, 190 Misc. 2d 482, 738 N.Y.S.2d 827 (Sur. Ct., Nassau Co. 2002).

David, under age 65, received SSI and Medicaid and resided in a residence run by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD). In 1995, the court granted an application to set up a Supplemental Needs Trust to

receive an inheritance of $25,000 that David received from his grandmother's estate. The trust was never set up.

The petitioners, David's parents who are also his co-guardians, then sought to have the funds deposited with the state to be put into a device that would be managed pursuant to MHL § 13.29. MHL § 13.29 provides for state management of funds for patients when a Supplemental Needs Trust is not feasible. The Commissioner of OMRDD receives these funds on behalf of the state and manages them for the benefit of the patient. He must use the funds "for purposes of the office of mental retardation and developmental disabilities, including but not limited to the maintenance, support or benefit of one or more patients in a facility." The existence of the device would not affect David's entitlement to the government benefits he was receiving.

There are only two prior court decisions regarding MHL § 13.29 over its 160-year existence. In one relevant case, the fund was not established because the court did not order a gift of the patient's funds to the state. The funds remained the patient's property. Therefore, this court considered the issue of a gift of the inheritance to the state.

The court ordered the gift to the Commissioner pursuant to MHL § 13.29, basing its authority to do so on the ability of a 17-A guardian to transfer funds to a Supplemental Needs Trust by court order and the doctrine of substituted judgment. The court held that a reasonable person would elect to make the gift to the Commissioner to be used for their benefit rather than have the funds used to pay claims. The Commissioner was ordered to file an annual inventory and account.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky, a firm devoted to providing competent and caring legal services in the areas of elder law, trusts and estates, and estate administration.

Judy Raskin maintains membership in the National Academy of Elder Law Attorneys, Inc.; the New York State Bar Association, where she is a member of the Elder Law and Trusts and Estates Law Sections; and the Nassau County Bar Association, where she is a member of the Elder Law, Social Services and Health Advocacy Committee, the Surrogate's Trusts and Estates Committee and the Tax Committee.

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National Case News

By Steven M. Ratner

This column addresses recent cases in jurisdictions other than New York. Questions or comments regarding this column can be sent to the author at smr_law@yahoo.com.

Wisconsin Department of Health & Family Services v. Blumer, 534 U.S. ___ (Feb. 20, 2002)

Summary

In a much-anticipated decision, the U.S. Supreme Court recently held that the "income first" method of interpreting the Medicare Catastrophic Coverage Act of 1988 (MCCA or the "Act") is a permissible interpretation of the Act. The Court's decision was predicated on its interpretation of the plain meaning of the Act and deference to the states under what it called "cooperative federalism."

Discussion of the Case

The Court first addressed the relevant statutes at issue. The Court noted that MCCA, also known as the "spousal impoverishment provisions," was enacted to protect community spouses from pauperization while preventing financially secure couples from obtaining Medicaid. To accomplish these objectives, the Act creates two allowances—the minimum monthly maintenance needs allowance (MMMNA) and the community spouse resource allowance (CSRA).

The MMMNA is an amount determined by Congress to be sufficient to support the community spouse. If the income of the community spouse is less than this allowance, the community spouse is entitled to a contribution from the institutionalized spouse's income to make up the shortfall. This contribution is called the community spouse monthly income allowance. The CSRA is the amount of resources that a community spouse may retain when his or her spouse is institutionalized and applies for Medicaid.

The dispute in *Blumer* centered on 42 U.S.C. § 1396r-5(e)(2)(C). This section provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such allowance) is inadequate to raise the *community spouse's income* to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

In applying this provision, states apply two different interpretations of the term "community spouse's income"—the "income first" and the "resource first" method.

Under the income-first method, "community spouse's income" includes not only the actual income received by the community spouse, but also any potential income that can be paid from the institutionalized spouse pursuant to the community spouse monthly income allowance. Only if the community spouse's actual income plus this income allowance are less than the MMMNA, can the community spouse obtain an increased CSRA.

Under the resource-first method, the community spouse monthly income allowance is not considered. If the community spouse's actual income is less than the MMMNA, the CSRA is raised to reserve additional assets sufficient to generate income to meet the shortfall.

The Court wrote that the question presented was "whether the income-first prescription of the Wisconsin statute, requiring that potential income transfers from the institutionalized spouse be considered part of the 'community spouse's income' for purposes of determining whether a higher CSRA is necessary, conflicts with the MCCA."

Blumer (the respondent) raised two primary arguments in support of the resource-first method. Respondent first argued that the use of the possessive in the phrase "community spouse's income" requires the use of the resource-first method. In other words, respondent argued that this phrase means what it says—that only the community spouse's actual income and not income attributed from the institutionalized spouse should be counted. The Court disagreed. The Court wrote that the use of the possessive is often "indeterminate" and could be interpreted to include the institutionalized spouse's income.

The respondent's second argument rested on the structure of the MCCA. She claimed that the Act makes a distinction between the rules governing the initial determination of Medicaid eligibility and those that apply post-eligibility. This structure, she contended:

> [S]hows that Congress intended the CSRA enhancement and the CSMIA to operate at discrete stages: The former remedies a shortfall in the income possessed by the community spouse prior to eligibility, while the latter provides further relief post-eligibility if the previous CSRA enhancement proves inadequate.

The Court rejected this argument, writing: "Although that hearing is conducted pre-eligibility, its purpose is to anticipate the post-eligibility financial situation of the couple. This procedure seeks to project what the community spouse's income will be when the institutionalized spouse becomes eligible."

In support of its conclusion, the Court also wrote that the Medicaid statute is designed to promote "cooperative federalism" between the states and federal government. The Court believed that the income-first method is a permissible interpretation of the Act.

Author's Comment

Blumer was a close case. Both Justice Ginsburg's majority opinion and the dissent, written by Justice Stevens, were convincing. The author believes that deference to the states is proper where a Medicaid provision is susceptible to more than one reasonable interpretation.

Schubert v. Reynolds, 95 Cal. App. 4th 100 (Jan. 10, 2002)

In *Schubert v. Reynolds,* the California Court of Appeals recently held that an agent under a power of attorney may not establish a trust and alter the beneficiaries under the principal's estate plan unless the agent is expressly authorized to do so.

Schubert involved a decedent who died in 1997 leaving four children. About two months before he died, the decedent signed a power of attorney designating his daughter as his agent. This daughter established an *inter vivos* trust one day before the decedent's death. This trust provided that the decedent's residence was to be left to the daughter for life, with the remainder passing to the decedent's grandchildren. This trust had the effect of bypassing the decedent's three other children.

The three other children brought suit, claiming that their sister did not have the power to alter the decedent's will that left his estate in equal shares to the four children. The three children relied upon a provision in the California Probate Code that provides that an agent under a power of attorney may not change the beneficiaries of the principal's estate unless expressly authorized in the power. The court agreed holding that when "the defendant executed a trust providing a life estate in the decedent's residence to herself with the remainder to the decedent's grandchildren, she attempted to change the beneficiary designation" in violation of the probate code.

Estate of Fuite v. Holst, 242 Mich. App. 499 (Dec. 4, 2001)

In *Estate of Fuite v. Holst*, the Michigan Court of Appeals recently held that an attorney retained by a client to draft a durable power of attorney does not owe a duty to the client to ensure that a responsible agent is selected.

The facts of this case were straightforward. In January 1996, the defendant, Richard Holst, an attorney, was contacted by Mark Hall to provide estate planning services for Helen Fuite, a widow in her eighties. Thereafter, Holst prepared a will, durable power of attorney, and two deeds. The will named Hall as sole beneficiary of Fuite's estate to the exclusion of Fuite's relatives. The power of attorney named Hall as her agent. The two deeds transferred two parcels of Fuite's real estate into joint ownership with Hall.

It was undisputed that Hall abused his powers as agent under the power of attorney. In April 1996, a conservator was appointed for Fuite and the court ordered the return of the real property to Fuite, set aside the will, and ordered Hall to pay damages to Fuite.

The conservator then commenced legal proceedings against Holst (the attorney) for legal malpractice. The conservator claimed that Holst committed malpractice in allowing Fuite to appoint Hall.

The court first noted that it was undisputed that an attorney-client relationship existed between Fuite and Holst. The court then rejected plaintiff's argument that attorney Holst had a duty to dissuade the principal from appointing Hall as her agent. The court wrote:

> In this case, defendant had a duty to use reasonable care and skill to draft a power of attorney that comported with Fuite's intentions and legally accomplished her objectives. We have failed to ascertain any authority that would impose the additional burden of ensuring that Fuite, the principal, designated an appropriate agent . . . Therefore, as a matter of law, defendant did not have a legal duty to prevent Fuite from designating the agent of her choice and the trial court properly dismissed the claim.

Fair Hearing News

By Ellice Fatoullah and René H. Reixach

We actively solicit receipt of your fair hearing decisions. Please share your experiences with the rest of the Elder Law Section and send your fair hearing decisions to either Ellice Fatoullah, Esq., at Fatoullah Associates, Two Park Avenue, New York, New York 10016 or René Reixach, Esq., at Woods Oviatt Gilman, 700 Crossroads Building, 2 State Street, Rochester, New York 14614. We will publish synopses of as many relevant Fair Hearing decisions as we receive and as is practicable.

In re the Appeal of R.T.

Holding

A Medicaid application for nursing home benefits may not be denied because of an improper transfer of assets so long as the assets are returned to the Applicant—even if the return happens after the date benefits are requested to start.

Ellice Fatoullah

Facts

On January 12, 1999, Appellant and his wife transferred their home to their two adult sons, reserving a life estate for themselves. The transfer was without consideration, although the two sons took their remainder interest subject to a mortgage, which at the time of the transfer was $11,966.66, the amount due on the original note. The assessed value of the real property as of July 1, 1998 (the most recent assessment available to the applicant) was $94,800.

On April 3, 1999, the Appellant was admitted to the Veterans' Administration Hospital in Bath, New York, for respite care. He remained there until April 15, 1999, when he entered a skilled nursing facility.

On June 19, 1999, the Appellant died in the skilled nursing facility.

On July 2, 1999, the Appellant's two sons deeded the property back to the Appellant's spouse.

On August 4, 1999, Appellant's widow applied for Medicaid for the Appellant to cover nursing home costs retroactive only to May 1, 1999; prior costs of Appellant's care were covered by the VA and by Medicare.

The Agency determined to impose a penalty period; and computed the penalty period as follows: $94,800 divided by the monthly regional rate for nursing home care in effect at that time of $5,113 equals 18 months.

By notice dated October 20, 1999, the Agency advised the Appellant's widow that it had determined to deny the Appellant's application for Medicaid for nursing home care because the Appellant transferred assets for less than fair market value.

On December 2, 1999, Appellant's widow requested a fair hearing to review the Agency's determination.

René H. Reixach

Applicable Law

Administrative Directive 96 ADM-8, dated March 29, 1996, at page 23, states in pertinent part:

> 5. All or part of the assets transferred for less than FMV have been returned to the individual.
>
> If all transferred assets are returned to the individual prior to the MA eligibility determination, no transfer penalty is imposed. If a portion of the transferred assets is returned prior to the MA eligibility determination, the uncompensated value of the transfer is reduced by the amount of assets returned.
>
> If all transferred assets are returned after the MA eligibility determination, the existing penalty period is rescinded and the individual's eligibility for MA during such period must be redetermined as though the assets were never transferred. If a portion of the transferred assets is returned after the MA eligibility determination, the existing penalty period is recalculated, reducing the uncompensated value of the transfer(s) by the amount of assets returned . . .

Discussion

The record establishes that the property at issue was transferred back to the Appellant's widow short-

ly after the Appellant's death. Although the Agency contended it had properly imposed a penalty period because the re-transfer of the property occurred after the time period of the requested coverage, the Agency's contention is without merit. Based upon Administrative Directive 96 ADM-8, at page 23, the Agency should have ignored the initial transfer once it became clear that the property was returned to the Appellant.

Fair Hearing Decision

The Agency's decision to deny Appellant's Medicaid application for nursing home benefits because Appellant transferred assets for less than fair market value, was not correct and is reversed.

Editor's Comment

This decision stands for the generally recognized principal that returned assets will reduce the transfer of assets penalty period. What is interesting here is not only that the return happened after the date for which Medicaid benefits were requested, but also the decision's restatement of the rule contained in 96 ADM-8 that even after Medicaid eligibility is determined, if the assets are returned, the transfer of assets penalty period will be re-computed. This highlights New York's interpretation of 42 U.S.C. § 1396p(c), and in this author's opinion the better view, that transferring too much and applying early is not necessarily a "trap for the unwary" because assets can always be returned—even after the initial adverse determination of eligibility.

The Appellant at this Fair Hearing was represented by Kathryn Grant Madigan, Esq., of Binghamton, New York.

In re the Appeal of M.B.

Holding

There is no right to a fair hearing on the question of whether the Agency's imposition of a lien on an applicant's home was correctly placed.

Facts

The Appellant is in receipt of Medical Assistance. She is 60 years old and has resided in a skilled nursing facility since May 3, 2000.

Appellant has an interest in certain real property located at 132 Zoa Avenue, Johnson City, Broome County, New York.

On or about December 20, 2001, the Agency filed a lien in the Broome County Clerk's Office affecting the Appellant's interest in the aforementioned property.

On December 10, 2001, the Appellant requested a fair hearing to review the Agency's act of filing a lien against her interest in the Broome County property.

Applicable Law

Social Services Law § 22(1) states in pertinent part: "Any person described in subdivision three of this section, or any individual authorized to act on behalf of any such person, may appeal to the department from decisions of social services officials or failures to make decision upon grounds specified in subdivision five of this section."

Social Services Law § 22(5) states in pertinent part: "Grounds for such appeals shall be specified in regulations of the department, but shall include at least the following: . . . (c) Inadequacy in amount or manner of payment of assistance."

The Department's regulations, 18 N.Y.C.R.R. § 358-3.1(f), concerning fair hearings provide in pertinent part:

> As an applicant or recipient you do not have the right to a fair hearing in all situations. For example, you do not have a right in the following situations:
>
> (6) a local social services agency has demanded restitution, in accordance with the provisions of section 104 or 106-b of the Social Services Law, of public assistance paid, other than by a reduction of the public assistance grant[.]

Discussion

Appellant filed for a fair hearing to review the agency action of placing a lien on her Broome County property. However, the decision found that the Commissioner has no jurisdiction to review the Agency's action. The decision explained that the only conceivable statutory authority for such a review would be found in Social Services Law § 22(5)(c), quoted above, regarding the right to a fair hearing on any issue concerning the "amount or manner of payment of medical assistance." Further, the department's regulations made clear that not every action taken by the Agency gave rise to the right to a fair hearing. The decision reasoned that the phrase "For example" in 18 N.Y.C.R.R. § 358-3.1(f) should alert the reader that the listing of circumstances under which a fair hearing would be denied was not intended to be exhaustive or exclusive. The decision further reasoned that issues concerning restitution under Social Services Law § 104 or 106-b were matters to be litigated direct-

ly, and therefore by analogy, the placement of a lien being the first step for such a recovery, was also an issue to be litigated directly without the right to go to a fair hearing first. Thus, the decision found that Appellant had no right to a fair hearing on the issue of the placement of the lien on her property.

At the hearing, although not reported in the decision itself, the local Agency contended that Appellant's home was not the Broome County property at issue, but rather a nearby trailer. Conversely, Appellant introduced uncontroverted evidence that she only stayed at the trailer from time to time when she had disagreements with her mother, who also resided in the Broome County residence. Appellant also introduced the DSS's notice of the impending lien itself, which explicitly acknowledged Appellant's Broome County residence as her exempt homestead. Appellant also contended that since she had a sibling who had an equity interest in the property and has resided there for a least one year immediately prior to the date of Appellant's institutionalization, the lien would be improperly placed, in light of 18 N.Y.C.R.R. § 360-7.11(A)(3)(ii), which forbids the placement of a lien under such circumstances. The fair hearing decision, however, sidestepped the facts concerning the appropriateness of the lien, and ruled as a matter of law, it lacked jurisdiction to decide the issue.

Fair Hearing Decision

The Commissioner does not have jurisdiction to review the Agency's act in filing a lien against the Appellant's interest in certain real property.

Editor's Comment

The decision failed to cite the following additional relevant provisions of law:

1. 42 U.S.C. § 1396p(a)(1)(ii), which provides that no lien may be placed upon the home of a Medicaid recipient who is a nursing home resident "with respect to whom the State determines, after notice and opportunity for a hearing . . . that [the individual] can not reasonably be expected to be discharged from the medical institution and to return home" . . . ; and
2. 18 N.Y.C.R.R. § 358-3.1(0(5), which provides that there is no right to a fair hearing on the question of the "amount of any lien taken by a social service agency."

The decision also did not reflect the fact that Appellant received a "Notice of Intent to Impose a Lien on Real Property" form which stated, "We have determined that you are an inpatient in a medical institution who is not reasonably expected to be discharged and return home." The Notice then listed the address of the Broome County property at issue, and stated that, "We intend to impose a lien (a secured legal claim) on the above listed property for Medical Assistance paid or to be paid on your behalf." The Notice also stated that, "This property is exempt or disregarded as a resource to determine your Medical Assistance eligibility since the property is your home and you have expressed your intent to return to the home." Finally, the Notice gave the Appellant the right to a fair hearing on the issues raised in the determination if she believed the "action taken is wrong." It was on the basis of this Notice that Appellant appealed.

At the hearing, Appellant based her objection to the proposed Agency action on the fact that she fit within the "sibling with an equity interest" exception to the Agency's right to place a lien on Appellant's property.

Apparently, the New York State Office of Temporary and Disability Assistance found no right to a fair hearing to contest the placement of a lien on Appellant's property, presumably because the placement of a lien on a recipient's property did not affect the "amount or manner of payment of assistance."

As a general rule, if the question does not affect the ". . . inadequacy in the amount or manner of payment of assistance" and is outside the matters delineated at 18 N.Y.C.R.R. § 358-3.1(b), the regulation listing matters from which a fair hearing appeal may be taken, the affected individual is entitled to bypass the fair hearing process and go directly to court to redress a grievance.[1]

For many reasons, we think the instant fair hearing decision was not correctly decided. First, when Medicaid benefits are granted and a lien is placed on an applicant's property, in essence, the benefits are being paid on the condition of the lien's placement. Therefore, this is a "manner of payment of assistance." Second, the Notice of Intent to Impose a Lien specifically allows the individual to appeal if the individual believes the ". . . agency action is wrong." Third, the state regulation specifically carves out of the fair hearing process the question of "the amount of the lien,"[2] but not the placement of the lien itself. In light of the express language of the Notice itself, this negative reference seems to imply that the state Agency recognizes that the question of the appropriateness of placement of a lien is an appealable issue.

Finally, it is important to note the distinction between an applicant's expression of the subjective intent to return home, which is recognized by the

department for the purpose of determining eligibility,[3] and the objective "can not reasonably be expected to return home" standard, which must be met (absent meeting other statutory exceptions), in order to avoid having a lien placed on a recipient's property, once eligibility is established.[4] So long as the applicant—or the applicant's power of attorney—expresses a subjective intent to return home, the property will be deemed an exempt homestead—as opposed to excess resources in the dollar amount of the property—and assuming no other problems with the case, the application will be approved. However, in order to avoid the placement of a lien on the applicant's property as a condition of the applicant's eligibility for benefits, the more rigorous objective "not reasonably expected to return home" standard must also be met.

The bottom line here is to transfer property well before filing an application for Medicaid benefits whenever possible in order to avoid the potential placement of a lien on the recipient's property.

The good news from this fair hearing decision is that even after the adverse determination, counsel for the Appellant met with local counsel for the department and negotiated the release of the lien in order to avoid a future Article 78 proceeding.

The Appellant at this fair hearing was represented by Arlene Sanders, Esq., of Binghamton, New York.

Copies of the fair hearing decisions analyzed above may be obtained by visiting the Western New York Law Center, at www.wnylc.com/fairhearingbank.

Endnotes

1. *See, e.g.*, *State of New York v. Mersack*, 202 A.D. 2d 899, 609 N.Y.S.2d 418, (3d Dep't 1994), where the Third Department affirmed a lower court determination that held there was no right to a fair hearing on the question of Medicaid's right to restitution. However, that general rule does not apply in this case.
2. 18 N.Y.C.R.R. § 358-3.1(f)(5).
3. *See Anna W. v. Bane,* 863 F. Supp. 125 (W.D.N.Y. 1973).
4. *See* 42 U.S.C. § 1396p(a)(1)(ii).

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Legislative News

By Howard S. Krooks and Steven H. Stern

Proposed Legislation Seeks to Lift the Ban on Partnership LTCI Plans

Howard S. Krooks

As elder law attorneys, we must be very familiar with all of the options available to seniors and their families in paying for the high cost of long-term care. In many cases, long-term care insurance (LTCI) may be the best option. Growing in popularity, LTCI can be the best way to pay for the costs of long-term care without spending down one's life savings or relying on the Medicaid program. In guiding seniors and their families through the process of researching LTCI and purchasing an appropriate policy, practitioners must be educated not only in the criteria of a good policy, but the various types of policies that are available. This requires that practitioners be thoroughly familiar with "partnership" policies.

> *"Growing in popularity, LTCI can be the best way to pay for the costs of long-term care without spending down one's life savings or relying on the Medicaid program."*

In the early 1990s, with support from a grant by the Robert Wood Johnson Foundation, four states—New York, California, Connecticut and Indiana—initiated programs to create public-private long-term care partnerships to provide citizens with options for long-term care coverage without having to spend down to Medicaid eligibility. Under the partnership program, states authorize the sale of approved long-term care insurance policies that meet certain benefit requirements. Individuals who purchase approved policies would receive a guarantee from the state that should their policy benefits be exhausted, the state would then cover the cost of their continuing care through Medicaid. The primary incentive for purchasing partnership policies is asset protection. The benefits of the program are significant for both seniors and government: Individuals are encouraged to take responsibility for their own long-term care needs rather than relying on a state benefit. It can avoid forcing middle-class individuals to spend down to Medicaid levels, but gives these same individuals the knowledge that the government will be there if they need it. This program has been successful in the goal of keeping people from needing to use Medicaid. Under this program in four states, there are nearly 66,000 policies in force, and to date, only 28 policyholders have exhausted their long-term care insurance benefits and accessed Medicaid assistance.

Steven H. Stern

However, current law prohibits additional states from including asset protection in any public-private partnerships they may develop. Other states may set up the policies, but the beneficiaries receive no asset protection in the event they exhaust the long-term care insurance policies. They would be forced to spend down to Medicaid levels, thereby removing the key incentive behind the partnership program—asset protection. Senator Larry Craig (R-NV) has introduced a bill to amend Title XIX of the Social Security Act to permit additional states to enter into long-term care partnerships under the Medicaid program in order to promote the use of long-term care insurance. The proposal, S.2199, is the "Long-Term Care Insurance Partnership Program Act of 2002," and would amend section 1917(b)(1)(C) of the Social Security Act by effectively striking the provision which provided a cutoff date of May 1993, after which no other states could implement their own partnership programs. If enacted, this proposal could have a significant effect on LTCI across the nation.

Push to Restore Provisional Eligibility

In 1996, New York State reversed a long-standing rule which allowed individuals "provisional" eligibility for Medicaid as they sought to liquidate non-exempt real property or other nonliquid assets which, if counted as an available resource, would render them ineligible. This change has caused considerable pain, anxiety and suffering among cash-poor Medicaid applicants, including seniors, who are being denied Medicaid coverage. Previously, New York permitted provisional eligibility for Medicaid. A person was provisionally eligible for Medicaid coverage under the condition that when the nonliquid

resource was sold, the proceeds from the sale were assigned to the social services district or a lien was imposed against the excess resources.

The inability of a person to obtain provisional eligibility under Medicaid causes great difficulty. The problem frequently arises when a person must enter a nursing home for long-term care and the family home must be sold to comply with the applicable regulations. If the family home is unmarketable, that person will be ineligible for Medicaid. In most areas of the state, a home cannot be sold quickly, causing cash-poor persons to do without needed health benefits.

New proposed legislation would once again allow applicants to be provisionally eligible for benefits while efforts are made to sell excess nonliquid assets. Specifically, the bill (A.04565) would amend paragraph (7), subdivision (2), section 366 of the Social Services Law to permit an applicant for Medicaid to provisionally receive benefits until excess nonliquid assets can be sold. In addition, according to the bill summary, this measure would restore provisional Medicaid eligibility and also eliminate those earlier provisions which were considered violative of federal law.[1] This bill creates a rule that will allow recipients a reasonable time to sell excess property while they receive benefits. It will ensure that once the property is sold, the amount received is counted as income in the month received and as resources afterward. This would render the individual ineligible for Medicaid in the month(s) in which he or she has the funds. The individual would be required to pay for health care from personal funds during this period. This change would be most welcome for seniors and their families, helping to ensure that needed care is provided and not wrongfully denied due to nonliquid resources which require time for disposal.

Endnote

1. The 1996 discontinuation of "conditional" or "provisional" Medicaid was based on an incorrect interpretation of federal law. Nothing in the federal regulations precludes New York from granting provisional Medicaid eligibility, although the repayment provisions in the old New York rule did violate federal policy.

Howard S. Krooks is a partner in the law firm of Littman Krooks & Roth PC, with offices in New York City and White Plains. Mr. Krooks devotes substantially all of his professional time to elder law and trusts and estates matters, including representing elderly clients and their families in connection with hospital discharge and nursing home admission issues, preservation of assets, Medicaid, guardianship and related elder law matters. Mr. Krooks is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association, where he serves as the Chair of the Medicaid Committee. Mr. Krooks co-authored a chapter ("Creative Advocacy in Guardianship Setting: Medicaid and Estate Planning including Transfer of Assets, Supplemental Needs Trusts and Protection of Disabled Family Members") included in *Guardianship Practice in New York State*, a book published by the New York State Bar Association. Mr. Krooks has lectured frequently on a variety of elder law topics for the National Academy of Elder Law Attorneys, the National Guardianship Association and the New York State Bar Association. In addition, Mr. Krooks serves as an instructor for the Certified Guardian & Court Evaluator Training: Article 81 of the Mental Hygiene Law program sponsored by The Association of the Bar of the City of New York.

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Regulatory News

The Lesser-Known Recovery Right: Medicare Recoupment in Personal Injury Settlements

By Louis W. Pierro and Edward V. Wilcenski

Louis W. Pierro

Elder law attorneys are often called upon by litigation counsel to assist in the settlement of personal injury cases when the plaintiff is receiving Medicaid and other government benefits. In our experience, this phone call often comes later than we prefer—usually after a settlement has been reached and, on occasion, without any consideration of government benefit eligibility. Indeed, the failure of litigation counsel to consider government program benefits and the impact of settlement on such benefits can result in liability for personal injury attorneys.[1] There is also a New York ethics opinion which suggests that the failure to consider third-party liens (private or public) is a breach of an attorney's ethical obligations.[2]

"Elder law attorneys are often called upon by litigation counsel to assist in the settlement of personal injury cases when the plaintiff is receiving Medicaid and other government benefits. In our experience, this phone call often comes later than we prefer . . ."

Most elder law practitioners are familiar with the issue of third-party recovery by the Medicaid program out of personal injury proceeds, following the line of cases decided by the Court of Appeals beginning with *Cricchio*[3] and ending with *Gold*.[4] In short, those cases solidified the Medicaid program's right, through the assignment and subrogation provisions of federal and state Medicaid law, to recover for past Medicaid benefits paid as a result of an injury "off the top" of a personal injury settlement, and before any proceeds can be transferred to a Supplemental Needs Trust for the plaintiff's benefit. And most practitioners are also aware that the use of a "First Party" Supplemental Needs Trust (i.e., one funded with the assets of the disabled beneficiary receiving government benefits) is essential in maintaining future eligibility for the Medicaid and SSI programs.[5]

Edward V. Wilcenski

The more unfamiliar recovery right is that maintained by the Medicare program. In cases where a plaintiff has Medicare coverage (through the receipt of social security disability or retirement benefits at the time of the injury), the Medicare program is entitled to recover out of the settlement proceeds for Medicare funds expended on behalf of the injured beneficiary. Similar to the Medicaid lien, the regulations governing Medicare recoupment provisions are premised on the principles of assignment and subrogation, and must similarly be limited to Medicare funds paid as a result of the injury giving rise to the third-party liability.[6] Also similar to the Medicaid program, the Medicare administration (Centers for Medicare and Medicaid Services, or CMS) has the right to bring an independent action to recover its payments.

Attorneys consulted to assist in situations where a Medicare lien may exist should begin by contacting the Medicare Secondary Payor (MSP) Claims Investigation Project, PO Box 5041, New York, New York 10274-5021. This office serves as an information clearinghouse of sorts, and maintains primary responsibility for developing information on other potential sources of insurance or other funding that would be primary to (i.e., "responsible for") paying for a particular good or service that may have otherwise been billed to Medicare. The office updates the claim, and then transfers the case to the Medicare intermediary responsible for processing claims in the region where the claimant resides. This process is known as "Coordination of Benefits" or COB, and is explained in more detail, with relevant statutory and regulatory cross references, on the agency Web site.[7] Similar to the system as it existed before the COB system was developed in 2001, the intermediary continues to be responsible for processing Medicare claims, comput-

ing the lien, and negotiating its satisfaction out of settlement proceeds. In New York, the intermediary is Empire Medicare Services, PO Box 4751, Syracuse, New York 13221-4751.

Notice is traditionally provided by a correspondence which provides the plaintiff's social security and Medicare numbers, the date of the injury or accident, and the nature and extent of the injuries received. Once the case is in the hands of the intermediary, it will request information about the settlement, including costs, expenses and attorney's fees. The regulations provide for a reduction in Medicare's recovery amount in order to recognize the expenses incurred by the plaintiff that gave rise to the recovery for the Medicare system.[8] It is interesting to note that the Medicaid program is not as generous, and as a result, the Medicaid program benefits directly from the efforts of an injured plaintiff and his or her counsel, without bearing any cost, contribution or offset, and notwithstanding Medicaid's independent right to pursue third parties for recovery in similar cases (in which case the Medicaid agency would be responsible for the time, energy and expense associated with the lawsuit).

Once the relevant information is provided to the intermediary, it will generate an itemized list of expenses incurred on behalf of the covered individual and reflecting a total cost figure. Just like the list of charges supporting a Medicaid lien, this list should be reviewed to ensure that the charges are accurate, that they have not already been paid by another third party (such as the plaintiff's primary health insurer), and that the charges are directly related to the injury that serves as the source of the recovery. Presuming the services and charges are correct, the intermediary will then compute its lien amount, with an offset for its pro rata share of costs, fees and expenses as previously listed.

Once all is in order, counsel should then request that the intermediary prepare a Discharge Agreement reflecting that all charges have been paid in full and releasing the plaintiff from any further liability for the charges covered by the Agreement. This Agreement is prepared by the intermediary and should be reviewed for accuracy. Just as with the Medicaid lien, we recommend that the Medicare recovery amount be satisfied out of the settlement proceeds prior to the transfer of any funds to the Supplemental Needs Trust or, in the case where no trust is being established, the injured plaintiff.

One interesting issue concerns the liability on the part of plaintiff's counsel for failing to consider the Medicare program's interest in third-party settlements. The language of the recoupment statute suggests broad recovery rights against any entity "that has received payment . . . with respect to the item or service [that has already been paid for by Medicare],"[9] and includes provisions for double damages in the event that settlement funds that are otherwise due to Medicare in accordance with its recoupment rights are distributed without paying Medicare its share. This provision, and specifically the implementing regulations at 42 C.F.R. § 411.24(g), have been interpreted by some to provide the Medicare agency with some sort of "super recovery right," independently enforceable against the plaintiff, the insurance company *and* the attorney handling the litigation, if Medicare's interest is not satisfied when a case is settled or an award paid.[10] However, in an article written on behalf of the Center for Medicare Advocacy,[11] the author takes the position that the governing statute and regulations provide Medicare with a direct right of recovery only in the case where counsel (or anyone, for that matter) has liability proceeds in his or her possession, and not when the funds (including any share that is properly allocated to reimburse Medicare) have already been distributed to the plaintiff or to a trust. At that point, according to the author, Medicare would only have the right to proceed against the liability insurance company directly, and it is only the insurance company that would be liable for double damages. We tend to agree with the latter interpretation, but while this may provide a successful defense to a direct suit by Medicare, we also believe that addressing Medicare's potential recovery right as a standard step in the settlement process is simply good lawyering, as it is the client who suffers from a disruption in medical coverage should the issue become a matter of dispute.

Endnotes

1. James L. Dam, *New Malpractice Danger for P.I. Lawyers as a Result of Medicaid—Workers' Comp, Estate Planning, Divorce Also Affected*, Lawyers' Weekly USA, July 29, 1996.
2. NYSBA Comm. on Professional Ethics, Formal Op. 717 (April 15, 1999) (re: plaintiff's obligation to satisfy third party liens from settlement proceeds).
3. *Cricchio v. Pennisi*, 660 N.Y.S.2d 679 (1997).
4. *Gold v. United Health Servs. Hosps.*, 723 N.Y.S.2d 117 (2001).
5. 42 U.S.C. §§ 1396p(d)(4)(A), 1382b(e)(5); N.Y. Social Services Law § 366(2)(b)(2)(iii).
6. 42 U.S.C. § 1395y(b)(2)(B)(iii) and (3).
7. www.hcfa.gov/medicare/cob.
8. 42 C.F.R. § 411.37.
9. 42 U.S.C. § 1395y(b)(2)(B)(ii).
10. Elizabeth E. Little, Esq., *Early Assessment of Potential Liens is Critical to Assure That Recovery Meets Client's Expectations*, N.Y.L.J. (Mar./Apr. 2001).
11. Sally Hart, Esq., *Recovery Powers Under Medicare's Secondary Payer Program*, Trial Magazine (Sept. 1997).

Louis W. Pierro is a graduate of Lehigh University and Albany Law School of Union University. Mr. Pierro was admitted to the bar in January 1984, and is licensed to practice in all New York state and federal courts. His practice focuses on representing individuals, families and small business owners on estate planning, long-term care planning, estate and trust administration and business succession planning. Mr. Pierro is also a frequent lecturer and author on the topics of estate planning, estate and gift taxation and elder law, and served as adjunct professor at Siena College from 1988-1995. Mr. Pierro is past Chair of the New York State Bar Association Elder Law Section, and past Chair of its Committee on Insurance for the Elderly (1995-1998). He was appointed to serve on the Task Force on Long Term Care Financing, formed by Governor Pataki and legislative leaders to study long-term care issues in New York State. Mr. Pierro also is Vice-Chair of the New York State Bar Association Trusts and Estates Law Section Committee on Estate Planning, and serves as a member of that Section's Executive Committee. Mr. Pierro is a member of the Estate Planning Council of Eastern New York, the National Academy of Elder Law Attorneys and the American Bar Association, Probate and Trust Section. He serves on the Board of Directors of the Capital Area Consortium on Aging and Disability, Senior Services of Albany and McAuley Living Services.

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Tax News

IRS Finally Issues Final Rules on Distributions from Retirement Plans and IRAs

By Stephen J. Silverberg

On April 16th the Internal Revenue Service announced final regulations covering distributions from deferred compensation and IRA accounts. These final regulations were issued some 27 years after the enactment of ERISA and almost 15 years after proposed regulations were issued in July 1987. In the interim, the proposed regulations were amended in 1997 and 2001. These final regulations encompass the changes that were proposed in 1997 and 2001 as well as suggestions made by attorneys, accountants and other financial specialists in retirement planning. These final regulations greatly simplify the process of determining who is a Designated Beneficiary of an IRA and how the required minimum distribution (RMD) is determined.

Life Expectancy

As initially proposed last year, RMDs are determined by dividing the life expectancy of the account holder by his life expectancy taken from a standard IRS table. The identity of the beneficiary no longer plays a part in the calculation. The regulations also finally put to bed the concept of joint life calculations or recalculation of life expectancy. These regulations also include the new life expectancy tables mandated by the Economic Growth and Tax Relief Reconciliation Act of 2001. Accounting for current longevity, the new tables provide for smaller annual distributions, thereby allowing distributions to occur over a longer period than previous tables.

For example, the divisor for a 70-year-old increases to 27.4 from 26.2. Thus, the minimum distribution to a 70-year-old with IRA account balances (as of the end of the previous year) of $500,000 decreases from $19,083 ($500,000 ÷ 26.2) to $18,248 ($500,000 ÷ 27.4) under the new tables. The smaller distributions in earlier retirement years allow for larger account balances in later retirement years. Over the long term the new life expectancy tables can make a substantial difference in the total distributions to a family. In the above example, if the account holder died at age 86 and only withdrew his RMD, he would receive almost $90,000 more than under the prior table. If his Designated Beneficiary picked up payments at his death withdrawing only her RMD, she would receive $2,000,000 more over her life expectancy.

The final regulations answer the question of what happens if the value of the account declines by the time the RMD is taken and the total account is

Age	Distribution Period	Age	Distribution Period	Age	Distribution Period
70	27.4	86	14.1	102	5.5
71	26.5	87	13.4	103	5.2
72	25.6	88	12.7	104	4.9
73	24.7	89	12.0	105	4.5
74	23.8	90	11.4	106	4.2
75	22.9	91	10.8	107	3.9
76	22.0	92	10.2	108	3.7
77	21.2	93	9.6	109	3.4
78	20.3	94	9.1	110	3.1
79	19.5	95	8.6	111	2.9
80	18.7	96	8.1	112	2.6
81	17.9	97	7.6	113	2.4
82	17.1	98	7.1	114	2.1
83	16.3	99	6.7	115+	1.9
84	15.5	100	6.3		
85	14.8	101	5.9		

less than the calculated RMD (a number of those invested in dot.com companies have seen this phenomenon). In such case, the account holder must withdraw the entire account, and the 50 percent excise tax for taking less than the calculated RMD will not apply.

Beneficiary Rules

The deadline for determining a designated beneficiary is advanced from December 31 to September 30 of the year after a plan participant's year of death, allowing more time for determination of the initial distribution that must be made by the end of that year. The rules provide a clearer road map for post-mortem planning by use of disclaimers. The IRS has made it clear that beneficiaries can be eliminated, but not added during that period. If the IRA owner has named beneficiaries that should be eliminated for distribution planning purposes (e.g., charities, or spouse to fund estate tax credit shelter trust), that can be done by either distribution of the entire benefit, division into separate accounts, or timely disclaimer. For example, under the regulations an estate or charity is deemed to have no life expectancy. Before 2001, if an account holder died with a charity and a child as his beneficiaries, the shortest life expectancy (the charity) had to be used to determine how payments would be made to the child. Under the final regulations, if the charity is paid its share before September 30 of the year following death, the child could use her own life expectancy to determine her RMD.

Note that the September 30 date for determination of the designated beneficiary corresponds with the nine-month period for a qualified disclaimer under I.R.C. § 2518. That is, there will always be at least nine months after an IRA owner's death to make the disclaimer. However, if the decedent did not take his RMD in the year of death, one must proceed carefully. The remaining RMD is based upon the decedent's life expectancy but belongs to the beneficiary. If the beneficiary accepts this distribution they will be unable to disclaim as they will deemed to have accepted a benefit.

The new rules specify that a beneficiary who dies after the IRA owner's death but before September 30 of the following year is still treated as the designated beneficiary. (The rules do not answer the question of whether a disclaimer by the deceased beneficiary's estate would be recognized, and, if so, whether it must be completed by September 30 of the year after the IRA owner's death.)

In the event a trust is the Designated Beneficiary, the deadline for reporting the required documentation under the regulations is October 31 of the year following death.

Separate Accounts

The new rules clarify how multiple beneficiaries can create separate accounts with different beneficiaries, thereby allowing each separate account owner to invest separately and calculate minimum distributions separately. The separate accounting must allocate post-death gains and losses on a reasonable, pro rata basis among the accounts before separation.

IRA Trustee Reporting

Prior to the 2001 proposals, there was no reporting requirement by an IRA custodian to the IRS. As a result, compliance with the RMD rules was spotty at best despite a 50 percent excise tax on under withdrawals. The 2001 proposals required the IRA custodians to report the amount of all RMDs to the IRS. The final regulations provide that in 2003, IRA custodians will be required to report the RMD amount to IRA owners, or to calculate it for the owners on request, but not report the RMD amount to the IRS. Starting in 2004, trustees will identify to the IRS each IRA for which a lifetime minimum distribution is required for the year. However, these reports will *not* be required by the IRS for post-death distributions to beneficiaries of IRAs. Additionally, the final regulations extend the penalty tax to inherited Roth IRAs. In the past, since these were income tax-free, the penalty did not extend to these accounts.

The final regulations will take effect in 2003. Significantly, the rules will apply even with respect to beneficiaries of individuals who die before 2003. Thus, for example, these beneficiaries will be able to reconstruct the applicable distribution period based on the new life expectancy tables beginning in 2003. For 2002, taxpayers have the option of using the new rules, which are favorable in most cases, or using prior guidance, which may be more favorable in some cases. In fact, there are transitional rules that will allow a beneficiary who has begun distribution under one set of rules to switch to the more favorable rules contained in the final regulations.

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Advance Directive News

Marketing with Advance Directives

By Ellen G. Makofsky

Advance directives are serious stuff. Death with dignity is a powerful thought that deserves much examination and discussion. The need to explore the issues involved in advance directives makes them a good vehicle for marketing the elder law attorney. As elder law attorneys we wear many hats and juggle many balls. We dispense legal advice. We are legal scholars keeping abreast of the latest laws, rules, regulations and directives. We draft documents and supervise their execution. We litigate and we mediate. We serve as office administrators, manage our practices and are responsible for bringing in new business. Elder law is not a practice built on cultivating repeat business from a small client base. The successful elder law practice requires a steady stream of new clients.

The constant turnover of client base requires us to think about how to market ourselves as elder law attorneys within the community. Successful marketing techniques lead to growing, vibrant practices. But how do we do this? What works to market soap to the housewife, does not work for selling the services of a law firm. What's more, most firms concentrating in elder law do not have budgets sufficient for television and radio campaigns or a barrage of print ads.

Our knowledge regarding advance directives can be used to effectively market our firms' services. Public speaking is a powerful tool for introducing yourself to a client who may have never previously had a connection to an attorney. Money is money, but in the end nothing is more important than health and medical issues. For many of our elderly clients, the fear of pain and suffering is greater than the fear of loss of life. Our clients are worried about being powerless in the grip of the machinations of modern medicine, which sometimes seems to have a mind to move forward regardless of the patient's wishes. When you have a compelling topic, audiences will come, and these audiences are fascinated when you begin to explain how advance directives work, and distinguish between the different types of documents.

When I speak on advance directives, I often try to personalize the issues by relating the stories behind the cases. I tell the story of Nancy Cruzan, a Missouri resident who suffered a devastating brain injury following an automobile accident. Physicians held no hope for Ms. Cruzan's recovery, and she was being kept alive through artificial nutrition and hydration. I explain the personal and legal travails of Ms. Cruzan's parents, who had to appeal the case up to the Supreme Court of the United States and then have it remanded to the lower court in Missouri to determine whether the facts of the case met Missouri's standard of clear and convincing evidence so that the feeding tube could be removed.[1] This story has a real impact on the audience when I tell them that the only other state in the United States which requires the stringent "clear and convincing evidence" standard for removing life support is New York State.[2]

"Money is money, but in the end nothing is more important than health and medical issues. For many of our elderly clients, the fear of pain and suffering is greater than the fear of loss of life."

Another story audiences find interesting concerns New York resident Jean Elbaum, who suffered a brain hemorrhage which left her in an irreversible, persistent vegetative state with no hope of recovery. Although Mrs. Elbaum had made several oral representations that she would not want to be kept alive with no hope of recovery, she had no advance directive in place. A feeding tube was inserted early on in her treatment, and it was only after three years of litigation that the court determined Mrs. Elbaum's discussions with others regarding artificial nutrition and hydration constituted clear and convincing evidence of her wishes and ordered that Mrs. Elbaum's wishes must be followed. What makes this case especially interesting to audiences is that Mrs. Elbaum's husband refused to pay for the care she received at Grace Plaza nursing home because, contrary to Mrs. Elbaum's expressed oral wishes, the nursing home refused to remove the feeding tube. The nursing home bills reached $100,000 and Grace Plaza sued Mr. Elbaum for payment. The court determined that because Mrs. Elbaum had no advance directive in

place, the nursing home could not have known her wishes and was therefore required to continue to treat her. Mr. Elbaum therefore was required to pay for the treatment provided.[3]

Changes in current law provide additional opportunities for the elder law attorney to demonstrate to the community his or her specialized knowledge and to increase visibility within the community. Last year new legislation was enacted that specified that organ and tissue donation provisions could be included in Health Care Proxies.[4] This provides the perfect occasion to seek audiences who might be interested in this new development. It is also an opportunity to create partnering relationships with other organizations which would benefit from your presentation on the topic of advance directives and organ donations. For example, fire departments might be interested in sponsoring a seminar because they are generally interested in tissue donations for burn units. Organizations concerned with kidney disease, failures in eyesight, liver disease and heart disease might also welcome a seminar about advance directives and organ donation.

The places to speak are out there. The value of presenting yourself as a professional who has expertise to share with the community is enormous. You can accomplish several worthwhile goals: you provide a true service to your community while at the same time potential clients get to meet you and perhaps engage your services as an elder law attorney.

Endnotes

1. *Cruzan*, 497 U.S. 261 (1990).
2. *In re Eichner (In re Storar)*, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981); *In re Westchester County Medical Center On Behalf of O'Connor*, 72 N.Y.2d 517, 534 N.Y.S. 2d 886 (1988).
3. *Grace Plaza of Great Neck, Inc. v. Elbaum*, 588 N.Y.S.2d 853, 869 (1992).
4. N.Y. Public Health Law § 2982(2).

Ellen G. Makofsky is a *cum laude* graduate of Brooklyn Law School. She is a partner in the law firm of Raskin & Makofsky with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration.

Ms. Makofsky is a member of the New York State Bar Association (NYSBA) and serves on its Elder Law Section's Executive Committee. She is Chair of the Health Care Committee of the Elder Law Section. She is also a member of the NYSBA's Trusts and Estates Law Section. Ms. Makofsky is a member of Nassau County Bar Association, Elder Law, Social Services and Health Advisory Committee and the Surrogate's Court Trusts and Estates Committee. She is a member of the National Academy of Elder Law Attorneys, Inc. (NAELA). Ms. Makofsky is also a member of the Estate Planning Council of Nassau County, Inc.

Ms. Makofsky currently serves as Co-Chair of the Long Island Alzheimer's Foundation (LIAF) Legal Advisory Board and is the immediate past president of the Gerontology Professionals of Long Island, Nassau Chapter. She is the former co-chair of the Senior Umbrella Network of Nassau. Ms. Makofsky is the First Vice President of the Port Jewish Center in Port Washington, New York. She serves on the Board of Directors of Landmark on Main Street.

Capacity News

A Few More Interesting Cases

By Michael L. Pfeifer

Here are a few cases that contain an interesting issue concerning capacity.

* * *

In re the Estate of Marie Antoinette, ___ A.D.2d ___, ___ N.Y.S.2d ___ (3d Dep't 2002)

In a will contest, tried before a jury, the grandnieces of decedent alleged that the respondent, a niece of decedent by marriage, used undue influence in convincing decedent to change her will. The change made the respondent the residuary beneficiary of decedent's will. A prior will gave the grandnieces decedent's entire estate. The jury found that the respondent had used undue influence to induce the decedent to change her will, the trial court refused to admit the will to probate and the Third Department affirmed.

However, when the estate later filed a separate petition asserting that the respondent also used undue influence to persuade decedent to make her a joint tenant with rights of survivorship on two investment accounts, the Surrogate's Court, with the Surrogate acting as the trier of fact, held that undue influence was not proved. The Third Department affirmed, reasoning:

> It is axiomatic that application of the doctrine of collateral estoppel "precludes a party from relitigating in a subsequent * * * proceeding an issue clearly raised in a prior * * * proceeding and decided against that party * * *, whether or not the * * * causes of action are the same" (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500). In order to invoke the doctrine, the proponent must demonstrate that the precise issue at bar was decided in the prior proceeding and is decisive of the present matter (*see, e.g.*, *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71). That having been said, it seems self-evident that the issues involved in the will contest, while similar to those involved here, are sufficiently discrete to preclude invocation of the doctrine. The inquiries involve two separate and distinct transactions and, more importantly, involve different participants, so that if we were to permit invocation of the doctrine, respondent would be precluded from eliciting the testimony of, among others, Joseph Biondo, the employee of the investment agency who personally dealt with decedent in establishing the accounts in question (*see*, *Reed v. Whipple*, 140 Mich. 7, 103 N.W. 548: *see generally*, Annotation, *Judgment Denying Validity of Will Because of Undue Influence, Lack of Mental Capacity, or the Like, as Res Judicata as to Validity of Another Will, Deed, or Other Instrument*, 25 ALR2d 657).
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> With regard to petitioner's assertion that the findings of Surrogate's Court were against the weight of the credible evidence, we disagree. Petitioner's argument in that regard distills to a challenge of the court's resolution of credibility issues, which are entitled to considerable deference on our part (*see*, *Sawhorse Lbr. & More v. Perrotta*, 279 A.D.2d 733, 734), and we cannot say that its conclusions could not have been reached upon any fair interpretation of the evidence (*see*, *id*., at 734).

In my opinion, what makes this case interesting is that undue influence was found with respect to the will but not with respect to the joint account form. I think this case demonstrates what we all know already: attorneys should never be in the prediction business. I also wonder whether the fact that the first matter was tried before a jury and the second before the Surrogate made a difference.

In re Rosen, ___ A.D.2d ___, ___ N.Y.S.2d ___ (2d Dep't 2002)

The decedent's will was admitted for probate even though the witnesses, including the supervising attorney, could not remember the execution of the will.

> The Surrogate's Court properly determined that the proponent met her burden of establishing that the purported will was duly executed (see, Matter of Collins, 60 N.Y.2d 466). Although the attesting witnesses did not recall the execution ceremony, they did identify their signatures on the will and affidavit of execution. Moreover, while the attorney who notarized and signed the affidavit of execution did not recall the execution, he was able to identify his notary stamp and signature on the affidavit, and there was other evidence tending to establish that he supervised the execution, giving rise to the presumption of due execution (see, Matter of Ziele, 242 A.D.2d 576, 577). The objectants' general allegations of lack of due execution failed to raise a triable issue of fact.
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> The Surrogate's Court also properly determined that the proponent met her burden of establishing that the testator was competent at the time the will was executed (see, Matter of Kumstar, 66 N.Y.2d 691). The affidavit of the attesting witnesses, the dispositions of the will, the inclusion of the objectants in the will, the testimony from the attesting witnesses that they would not have signed the will had they believed the testator lacked testamentary capacity, and testimony from an acquaintance demonstrated that the decedent had testamentary capacity at the time of execution (see, Matter of Kumstar, supra). In opposition, the objectants' general allegations of lack of testamentary capacity, which was admittedly conjecture, failed to raise a triable issue of fact.

In re Ruth Levenson, ___ A.D.2d ___, ___ N.Y.S.2d ___ (2d Dep't 2002)

Regular readers of this column know the heavy burden of proof required for an objectant to prove improper execution, lack of testamentary capacity, fraud and/or undue influence. This case demonstrates that the court will not hesitate to grant summary judgment against an objectant who cannot make a *prima facie* showing.

> The objectants asserted that the will should not be admitted to probate on the grounds of improper execution, lack of testamentary capacity, and fraud and undue influence. The petitioner moved to dismiss those objections. By order dated December 1, 2000, the Surrogate directed the objectants to submit an "affidavit of merit" in support of their objections, "supported by evidence and not just bare conclusory allegations". The so-called affidavit of merit submitted by the objectants contains hearsay, speculation, and surmise. No allegations are made with respect to the preparation or execution of the will. The objectants allege that the decedent's doctor diagnosed her as suffering from mild Alzheimer's disease in 1996. However, the doctor is not identified, and his alleged statements are inadmissible hearsay.
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> In view of the complete inadequacy of the so-called affidavit of merit, the petitioner's motion to dismiss the objections should have been granted (see, Lesster v. Lesster, 178 App. Div. 438).

* * *

I hope you find above cases helpful to you and your clients.

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Guardianship News

Selected Musings About Medicaid Planning in the Context of Article 81

By Robert Kruger

Introduction

The second half of the 1990s was unkind, judicially, to Medicaid planning efforts. The Via Dolorosa of battles fought and lost, starting with *Gomprecht v. Gomprecht*[1] (on enhanced MMMNA), *Spellman v. NYCDSS*[2] (liability of the community spouse for excess CSRA), *Cricchio v. Pennisi*,[3] *Calvanese v. Calvanese*[4] and *Gold v. United Health Services Hospitals*[5] (the three horsemen of the apocalypse on Medicaid liens in the personal injury context), *Golf v. New York State Dept. of Social Services*[6] (on income first), not to mention, among others that come quickly to mind, *Dionisio v. Westchester County DSS*[7] (on waivers of right of election) and others.

Bright spots were few, among them *Robbins v. De Buono*[8] (on income first). Joining *De Buono* at the top of the list were *In re Shah*[9] and *John XX*,[10] cases which validated Medicaid planning in the court-supervised context of Article 81.

In re Shah, as aforesaid, involved a successful request by a community spouse, who was court-appointed guardian for her husband, to transfer the institutionalized spouse's resources to herself. The institutionalized spouse had been grievously injured and was the plaintiff . . . along with his wife . . . in a tort case. The Court of Appeals allowed the transfer of assets and deferred CSRA questions to the administrative process.

John XX involved a successful request by a daughter, who was court-appointed guardian for her institutionalized father, to transfer assets to his children, applying 36-month look-back methodology.

These two decisions resulted in a profound judicial "relaxation" of previous resistance to transfer applications. In saying this, I do not forget earlier decisions in Kings County by Judge Sebastian Leone, *In re Klapper*[11] among them, which first broke the ice on Medicaid planning in Article 81 cases. These remarks are not, however, about pride of place. Rather, they mark the decisions with the greatest impact in this area.

It is meet at this time to visit the decision in *In re Shah*.

I. *In re Shah*

In re Shah, as aforesaid, involved an application by a community spouse, a court-appointed Article 81 Guardian for her husband, to transfer her institutionalized spouse's assets to herself. The Court of Appeals, in sweeping language, approved the transfer. The decision of the Court of Appeals speaks for itself:

> Since shortly after Mental Hygiene Law Article 81 was enacted, various sources of authority have described transfers for Medicaid planning as being within the scope of the article (see, *Matter of John XX*., 226 A.D.2d 79, 652 N.Y.S.2d 329, lv denied 89 N.Y.2d 814, 659 N.Y.S.2d 854, 681 N.E.2d 1301; Bailly, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 34A Mental Hygiene Law § 81.21, 2000 Supp Pamph, at 84; see also Russo and Rachlin, New York Elder Law Practice, § 5.42, at 229). We now confirm that a guardian spouse is permitted to effectuate this kind of Medicaid planning on behalf of an incapacitated individual pursuant to Mental Hygiene Law article 81.
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> * * *
>
> In determining whether to approve a specific application for a transfer of assets, the court shall consider several factors, including: "whether the donees or beneficiaries of the proposed disposition are the natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts" (Mental Hygiene Law § 81.21[d][4]); and "whether the proposed disposition will produce estate, gift, income or other tax savings which will significantly benefit the incapacitated person or his or her dependents" (Mental Hygiene Law § 81.21[d][5]).

> Considering these factors, a court may grant the application if satisfied by clear and convincing evidence that, among other things, "a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances" (Mental Hygiene Law § 81.21[e][2]). We agree with the common sense verity uttered by the Appellate Division that the transfer here was properly authorized because "[t]here can be no quarreling with the Supreme Court's determination that any person in Mr. Shah's condition would prefer that the costs of his care be paid by the State, as opposed to his family" (Matter of [Kashmira] Shah, 257 A.D.2d 275, 282, 694 N.Y.S.2d 82, lv granted 94 N.Y.2d 755, 701 N.Y.S.2d 712, 723 N.E.2d 5670).
>
> * * *
>
> The specifically enumerated potential powers of the New York guardian are unlimited and certainly not contingent on the particular purpose for the transfer—the guardian can make gifts, provide support for dependents and, simultaneously, apply for government benefits (see, Mental Hygiene Law § 81.21[a]). The only "limitation" is that of the doctrine of substituted judgment—the guardian's actions must "take[ ] in account the personal wishes, preferences and desires of the [incapacitated] person" (Mental Hygiene Law § 81.01; see also, Law Revision Commission Comments, McKinney's Cons Laws of NY, Book 34A, Mental Hygiene Law § 81.21, at 376).[12]

The Court of Appeals, significantly, cites *In re John XX* with approval.[13] In *John XX*, the transfers from a parent to a child triggered periods of ineligibility for the parent, as in the case presented here. This is clear from the Third Department's opinion in *John XX*:

> In June 1995, petitioner made application pursuant to Mental Hygiene Law § 81.21(b) for Supreme Court's approval of her outright transfer of approximately $640,000 of John's assets to his adult daughters, respondents Elizabeth M. Rose and Katherine A. Clobridge. The transfers, intended as a Medicaid and estate planning device to shield the bulk of John's assets from a potential Medicaid lien for the cost of nursing facility services and other medical services, were designed to leave John with approximately $150,000 in assets. Those assets, together with John's annual income from a pension and Social Security (approximately ($33,000), were allegedly sufficient for John's reasonable needs during the 36-month Medicaid look-back period (see, 42 U.S.C. § 1396p[c][1][B]), at the conclusion of which John would rely on Medicaid for the cost of Medical care in excess of his income.[14]

Based upon evidence of permanent and pervasive cognitive dysfunction and evidence of a close relationship between parent and children, and absent evidence to indicate a contrary intention, the Third Department upheld the decision of the lower court approving the transfers. The court referred to the guardian's gift-giving power contained in MHL § 81.21(a)(i), as well as the powers granted the guardian in § 81.21(a)(3) and (a)(10) to release interests in property and estates. To rule otherwise, the court held, would have the effect of depriving incapacitated persons of the range of options available to competent individuals.[15]

When applying *Shah* and *John XX*, one would do well to review MHL § 81.21 and ensure that the potential donees are the natural objects of the incapacitated person's bounty. If the IP has a will, that should be conclusive on that subject. If not, the appointment of a family member as guardian suggests the comfort level the court had with the applicant (and the family). This is not an area that DSS is focused on, and applications to transfer tend to be unopposed. One would do well, however, to omit no distributee from the bounty; playing favorites invites a contest and close scrutiny of relationships in a context where time is money.

II. Statutory Basis of a "Rule of Halves" Application

Courts, by and large, lack familiarity, much less intimacy, with the Social Security Act and the Social Services Law. Counsel will be well advised to set forth the statutory basis . . . and the mathematical methodology, for the amount sought to be trans-

ferred. Remember, the court will need all the help it can get on these applications . . . spell it out, as I tried to do below.

The consequences of a transfer of a portion of the IP's resources is governed under federal law by 42 U.S.C. § 1396p(c)(1)(E)(i), which determines the period of ineligibility generated by a transfer of assets. The section deals with institutionalized individuals (those residing in nursing homes basically) and states

> With respect to an institutionalized individual, the number of months of ineligibility under this subparagraph for an individual shall be equal to
>
> (I) the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) on or after the look-back date specified in subparagraph (B)(i), divided by
>
> (II) the average monthly cost to a private patient of nursing facility services in the State (or, at the option of the State, in the community in which the individual is institutionalized) at the time of application.[16]

In our prototypical case, the IP is a resident of a Nassau County long-term residential care facility (a "nursing home"). He will remain in a nursing home on a permanent basis.

As of June 30, 2001, the assets of this Guardianship consist of $74,000, less known debts of $1,125, for an available sum of $72,900. No other assets remain to be marshaled. The IP's only income is his monthly social security of $1,378. The daily cost of the IP's care at the home is $355, ($10,650 or $11,005 for a 30- or 31-day month respectively). The average cost of nursing home care in Nassau County is a number provided by New York State Department of Health in the year 2001; that figure is $8,125 per month. These are the pertinent numbers.

The requested amount of the transfer, $24,375, generates a three-month period of ineligibility for Medicaid for the IP (3 x $8,125) for July 1, 2001, through September 30, 2001.

The funds remaining, after $24,375 is transferred, is $48,500 supplemented by three months' social security (1,378 x 3) or $4,134, which increases the funds remaining for the IP's care to $52,600. The cost of the IP's care at the home, which is $355 per day, costs $32,660 ($355 x 92 days) for the three-month period of ineligibility. This leaves almost $20,000 excess plus minimal interest earned on the funds retained. This realistic excess of $20,000 is adequate for costs of the final accounting, commissions, fees, a luxury fund and a burial fund.

Therefore, the transferred amount, if the request is granted, will not affect the IP's eligibility for Medicaid because the remaining funds are sufficient to pay for care for the period of ineligibility.

By application of the formula, it is clear, mathematically, that the IP's Medicaid eligibility will not be compromised by the transfer of assets and income to his distributees, thereby permitting such transfer to be made without harm to him.

III. Transfer of Assets from Incapacitated Parent to Disabled Child

In the proceeding which provides the format for this section, the 39-year-old disabled daughter was the sole heir and distributee of her mother, who was a permanent resident of a long-term residential care facility. The disability of the daughter was both physical and psychological and was established by the psychological evaluation of a psychiatrist; the daughter could not apply for social security disability (for which she was ineligible, not having worked 40 quarters). The daughter has not worked and never would work and she is totally unable to work; gainful employment for her is out of the question for both physical and psychological reasons.

As such, she fits the definition of a disabled person appearing in 42 U.S.C. § 1382a(3)(A), which states as follows:

> An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than twelve months . . .[17]

The daughter's disability is an essential component of a request to transfer her mother's assets and income to her and of her qualification for a supplemental needs trust (SNT). It is the necessary predicate of both the transfer and the SNT.

A request such as this to transfer assets is governed by 42 U.S.C. § 1396p(c)(2)(B)(iv), which states

(2) An individual [mother] shall not be ineligible for medical assistance for reason of paragraph (1) to the extent that

(B) the assets

(iv) were transferred to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1382c(a)(3) of this title.

New York law follows word for word the same transfer rules laid down by federal law under 42 U.S.C. § 1396p.[18]

Disability of the beneficiary is the necessary predicate for the creation of an SNT with the assets of the beneficiary. Such trusts, called "first-party" SNTs, are governed by 42 U.S.C. § 1396p(d)(4). First-party SNTs is a subject addressed in greater detail in the next section of this article.

It is quite clear that the mother's Medicaid eligibility will not be compromised by the transfer of her assets and income to her daughter; these transfers will cause her no harm. It should be noted, parenthetically, that "assets" is a defined term in 42 U.S.C. § 1396p(e)(1): "The term 'assets', with respect to an individual . . . includes all income and resources of the individual . . ." Therefore, arguably, assets includes "all income," including social security and pension income[19] which the mother receives.

IV. Creation of an SNT

This section addresses the requirements to create a judicially ordered SNT, the format for which may be found in EPTL 7-1.12 or *In re Morales*.[20] By way of background, if the beneficiary's funds were being used to create the SNT, it would be characterized as a "first-party" SNT, governed by 42 U.S.C. § 1396(d)(4)(A) and Social Services Law § 366(2)(b)(2). Since the mother's funds are being used, this is characterized as a "third-party" SNT for the benefit of the daughter, for which EPTL 7-1.12 provides the statutory structure and *Estate of Escher*,[21] provides the judicial foundation. EPTL 7-1.12 sets forth one form of an SNT and the Practice Commentaries in McKinney's note that the statute "creates a 'statutory supplemental needs trust' of the type that has been permitted [in] *Estate of Escher*."

Escher made clear that a third party could do with his or her money as he or she chose. If restrictions were imposed by the grantor to prohibit trust funds to replace or supplement government entitlements, those restrictions would be given force.

Until 1993, what a third party, a parent, for example, could do to protect a child, the child could not do for him or herself. With restrictions and limitations under 42 U.S.C. § 1396p(d)(4)(A), enacted as part of the Omnibus Budget and Reconciliation Act of 1993 (OBRA '93), trusts for disabled persons under the age of 65 are exempt from the usual Medicaid rules governing treatment of trusts, transfers of assets and availability of income and resources.[22] No penalty or period of ineligibility for institutional care is imposed due to the transfer of assets into the trust.[23] The trust is not considered as available income or resources for purposes of the beneficiary's Medicaid eligibility, if certain conditions are met.

The governing statutes for first-party SNTs are 42 U.S.C. § 1396p(d)(4)(A) and Social Services Law § 366(2)(b)(2).[24] They provide that local social services districts shall not consider as available income or resources the corpus or income of a trust containing the assets of a disabled person which meets the following requirements:

- the beneficiary of the trust must be disabled as defined in 42 U.S.C. § 1382c(a)(3)(A);
- the trust must be established for the benefit of the disabled person under the age of 65 by a parent, grandparent, legal guardian, or court of competent jurisdiction; and
- upon the death of the beneficiary, the state must receive "all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual."

To address these requirements:

A social security disability award or a psychiatric evaluation is ordinarily sufficient to establish that the beneficiary is disabled. Proving that the beneficiary is under the age of 65 should not be difficult. Lastly, the proposed trust agreement conforms with the new federal and New York State laws if it explicitly provides that, upon the death of the beneficiary, the state that grants Medicaid to the beneficiary will be reimbursed from moneys remaining in the trust for the medical assistance it has provided to him or her during his or her lifetime.

Of course, local DSS will request/require charges in the language, most of which can be accommodated without sacrificing principal or principle.

Conclusion

This article is not intended to be exhaustive. Rather, it was designed to point the reader in helpful directions. Other variants of Medicaid planning in guardianships will follow in a subsequent article.

I invite letters and comments from the bar and the judiciary. I can be reached at 225 Broadway, Suite 4200, New York, NY 10007, phone number (212) 732-5556, fax (212) 608-3785 and e-mail address: RobertKruger@aol.com.

Endnotes

1. 86 N.Y.2d47, 629 N.Y.S.2d 190 (1995).
2. 243 A.D.2d 45, 672 N.Y.S.2d 298 (1st Dep't 1998).
3. 90 N.Y.2d 296, 660 N.Y.S.2d 679 (1997).
4. 93 N.Y.2d 111, 688 N.Y.S.2d 479 (1999).
5. 95 N.Y.2d 683, 723 N.Y.S.2d 117 (2001).
6. 91 N.Y.2d 656, 674 N.Y.S.2d 600 (1998).
7. 244 A.D.2d 483, 665 N.Y.S.2d 904 (2d Dep't 1997).
8. 218 F.3d 197 (2d Cir. 2000).
9. 95 N.Y.2d 148, 711 N.Y.2d 824 (2000).
10. 226 A.D.2d 79, 652 N.Y.S.2d 329 (3d Dep't 1997).
11. N.Y.L.J., Aug. 9, 1994, p. 26, col. 1 (Sup. Ct. Kings Co.).
12. *Shah*, 95 N.Y.2d at 159-160.
13. 226 A.D.2d 79, 652 N.Y.S.2d 329 (3d Dep't 1997).
14. 652 N.Y.S.2d at 330.
15. N.Y.L.J., Aug. 9, 1994, p. 26, col. 1 (Sup. Ct. Kings Co.); 652 N.Y.S.2d at 332.
16. *See also* Social Services Law § 366(d)(4) and 18 N.Y.C.R.R. § 360-4.4(d)(2)(iii)(a) and (d)(2)(iv)(a).
17. *See also* 18 N.Y.C.R.R. § 360-5.2(b).
18. *See* Social Services Law § 366(d)(3)(ii) and the regulations appearing in 18 N.Y.C.R.R. § 360-4.4(c).
19. *See also* 96 ADM 8.
20. 156 Misc. 2d 654, 606 N.Y.S.2d 543 (Sup. Ct. Kings Co. 1995).
21. 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Sur. Ct. Bronx Co. 1978), *aff'd*, 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1st Dep't 1978), *aff'd*, 52 N.Y.2d 1006, 438 N.Y.S.2d 293 (1980).
22. 42 U.S.C. § 1396p.
23. 42 U.S.C. § 1396p(c)(2)(B)(iv); Social Services Law § 366(5)(d)(3)(ii)(D).
24. Virtually all other trusts, other than testamentary trusts, established by an individual, an individual's spouse or a person, court or agency acting on behalf of or at the request of the individual or the individual's spouse, are considered to be available assets and are subject to the transfer of assets rules for purposes of determining eligibility for Medicaid. *See* 42 U.S.C. § 1396p(d)(1), (2), (3); Social Services Law § 366(2).

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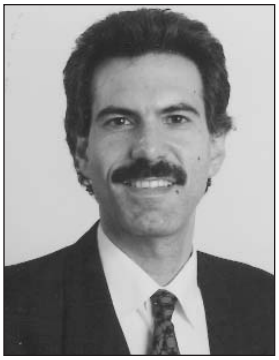
Public Policy News

Connecticut's Proposed Demonstration Project Seeks to Change Medicaid Eligibility Rules

By Ronald A. Fatoullah and Stacey Meshnick



Under the guise of a proposed "demonstration project" utilizing Section 1115 of the Social Security Act, the state of Connecticut seeks to circumvent existing federal Medicaid eligibility laws. Connecticut proposes to change a fundamental aspect of Medicaid eligibility law—calculation of penalty periods. Currently, Connecticut's Medicaid law provides that a penalty period will run from the date an asset is gifted. As part of its proposal, Connecticut wants the penalty to commence when an applicant applies for Medicaid nursing home benefits. Connecticut's recent moves to skirt the existing federal law can only be seen as lacking compassion, especially for its residents of more modest means.

In order to reduce the cost of the Medicaid program, the federal government established rules limiting Medicaid eligibility based on asset transfers made by an applicant. Medicaid will review an applicant's financial transactions for a period of 36 months (60 months in the case of certain trusts), also known as the "look-back period." If the applicant (or applicant's spouse) transfers assets for less than fair market value, i.e., makes gifts, within the look-back, a period of ineligibility commonly referred to as the "penalty period" will be imposed upon the applicant. The penalty period is calculated by dividing the amount transferred by the average monthly cost of nursing home care in the region. See the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993), which affects transfers made after August 10, 1993. OBRA 1993 also revised the rules governing the calculation of penalty periods.

In New York penalty periods currently begin the month *following* a transfer of assets. For example, if an applicant transfers assets any time in the month of May, the penalty period will begin on June 1. Connecticut law, however, imposes a penalty period beginning on the first of the month *in which* the transfer occurs. Thus, if a transfer of assets occurs in May, the penalty period begins on May 1.

In an effort to preempt Medicaid planning, Connecticut Department of Social Services (CDS) is attempting to change the date on which the penalty period will commence. However, because Connecticut's proposed rules are not consistent with current federal law, it must obtain a waiver pursuant to Title XIX of the Social Security Act. Section 1115(a)(1) of the Social Security Act permits the Secretary of the Department of Health and Human Services to waive compliance with state Medicaid plan requirements, as specified in Section 1902 of the Social Security Act.

If approved, this five-year "demonstration project," scheduled to begin on October 1, 2002, will compel Connecticut applicants to use resources to pay for long-term care. The CDS holds the position that such a demonstration project will encourage "personal responsibility . . . while also realizing substantial savings to the Medicaid program." In its draft proposal of December 19, 2001, CDS indicates that the objective of the demonstration project is to "discourage large transfers of wealth" that are made in order to qualify for Medicaid.

If Connecticut were to obtain a waiver of compliance with 42 U.S.C. §§ 1396p(c)(4) and 1396(c)(1)(D), the penalty period would begin on the date the applicant is otherwise Medicaid-eligible. In its proposal, CDS indicates that allowing a penalty period to expire prior to the application for Medicaid "contravenes the intent" of the imposition of a penalty period.

Connecticut would also increase the look-back period to 60 months for non-exempt transfers of real property, expanding the current limitation of 36 months found in 42 U.S.C. § 1396p(c)(1)(B)(i). In its Response to Public Comments (RPC), CDS asserts that precedent exists for using different look-back periods for different transfers, citing the 60-month look-back for certain trusts. CDS fails to recognize that federal law changed the look-back period for trusts in 1993.

Of major concern to New York elder law attorneys is that Connecticut intends to use this demonstration project as a model for other states. CDS intends to provide the results of the project to CMS in order for the federal government to "re-evaluate the transfer of asset rules . . . and effectuate the necessary policy changes to discourage estate planning to circumvent these rules." CDS rationalizes that imposing

limitations on transfers of assets would "alleviate the applicant's burden of documenting and substantiating every financial transaction during the look-back period."

In addition to changing the penalty calculations, Connecticut also proposes a set of threshold levels with a waiver of section 1396p(c)(1)(E)(i) and (ii). If transfers were made less than one year prior to a Medicaid application, the threshold is $0—therefore, all transfers would incur penalties; if the transfers were made between one and two years prior to the application, the amount is $2,500—therefore, only transfers greater than $2,500 will incur penalties; and the threshold of $5,000 for transfers made between two and five years prior to application.

To illustrate, consider the following example using Connecticut's regional rate of $6,779. If an applicant has three withdrawals of $400 each, made 18 months before application, no penalty would be assessed because they do not exceed the $2,500 level. However, if an individual makes a withdrawal of only $1,100 six months prior to application, a 5-day penalty ($1,100 ÷ $6,779 = .16 month) would be imposed because the amount is within the threshold ($0). In its proposal, CDS asserts that the threshold levels eliminate the burden on applicants of explaining "relatively modest transactions." In the RPC, CDS asserts that the use of the thresholds will result in less investigation of transfers and fewer hearings and undue hardship requests, simplifying the eligibility process.

CDS' proposal asserts that retaining exemptions for transfer to spouses and disabled children reflects that CDS does not wish to punish its citizens. Rather, the state wishes to "modify the behavior of its citizens . . ." We beg to differ.

In its response to public comments, CDS asserts that the rule of halves "shifts millions of dollars to third parties that could be used to pay for long-term care services" and that "the wealth of others could come at the expense of other important programs." In its attempt to appear benevolent, CDS further states that Connecticut disregards the first $183 of unearned income when determining the eligibility of community Medicaid applicants.

In our opinion, Connecticut's proposal is ill-conceived and mean-spirited. In our office, we jokingly refer to the state as "the United States of Connecticut," because its actions are consistent with that of an independent rogue state. A waiver is typically requested by a state to *expand* services to its residents. Connecticut is applying for this waiver in order to change federal Medicaid eligibility laws, reducing services. In fact, Connecticut has stated that federal asset transfer rules are "improper" and that longstanding federal law has created a "longstanding inequity."

Connecticut has rationalized its actions as an idea to save money for its taxpayer, which is a good concept, unless, of course, those taxpayers are the frail elderly. As elder law attorneys, we must use our best efforts to ensure that other states that may be facing budget deficits are not enticed into applying for similar waivers. Finally, as New York practitioners, we must do everything possible to prevent New York State from seeking the same waiver and balancing its books on the backs of its senior residents.

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PUBLIC ELDER LAW ATTORNEY NEWS

Medicare for People with Alzheimer's Disease and Other Chronic Conditions

Article reprinted with permission from the Web site of the Center for Medicare Advocacy, Inc., P.O. Box 350, Willimantic, Connecticut 06226, (860) 456-7790 <http://www.medicareadvocacy.org/Alzheimers.htm>*

As the *New York Times* reported on March 31, 2002 (p.1), Medicare advocates have been successful in convincing the Centers for Medicare and Medicaid Services (CMS) to loosen Medicare's denial practices for people with Alzheimer's disease and other cognitive impairments.

Unfortunately, Medicare has a decades-long policy of denying coverage to people who need services which are covered by the Medicare Act on the grounds that the individuals are "chronic and stable" and will not improve. These are not valid reasons for denial.

Of equal value to dispelling the myth that Alzheimer's patients cannot benefit from certain kinds of medical, mental health, and therapy services would be dispelling the myth that Medicare covers only services that are intended to result in improved functioning. This is not a requirement of Medicare law, but is a standard often applied in coverage determinations. In fact, Medicare covers services that are needed to attain or maintain functioning and so can be used to prevent or postpone the loss of physical and mental capabilities. Unfortunately, too few people, including Medicare service providers, are aware of this aspect of the law so that beneficiaries without well-informed advocates go without needed services if they are unable to pay for them privately.

Medicare's recognition of the impropriety of denying coverage for a host of services to people simply because they have Alzheimer's disease is appropriate and just. CMS should also insist upon ending such denial practices for beneficiaries with multiple sclerosis, Parkinson's disease, stroke-related deficits, and other long-term and chronic conditions.

Successful advocacy over the past twenty years has improved this situation, but greater visibility for this aspect of Medicare coverage would enhance the lives of millions of older people and people with disabilities.

The Medicare Program Memorandum Regarding Coverage for Persons with Dementia

Medicare will not pay for items, services or procedures covered by the Medicare program if it determines that the items, services or procedures are not "reasonable and necessary." For years, some Medicare carriers determined that medical services were not reasonable and necessary and automatically refused to pay for them solely because the claim was submitted on behalf of a beneficiary with a diagnosis of Alzheimer's disease or other dementia.

On September 25, 2001 the Centers for Medicare and Medicaid Services (CMS) issued a program memorandum, Program Memorandum AB 01-135, *Medical Review of Services for Patients with Dementia*, to address the problem. Effective September 1, 2001, Medicare will not use the dementia diagnostic codes alone as a basis for determining whether Medicare covered services are reasonable and necessary.

What the Program Memorandum Does

The new Program Memorandum explains that due to advances in diagnostic techniques, physicians and psychologists can diagnose individuals with certain dementias at the earliest stages of the disease. It makes clear that individuals with Alzheimer's disease may benefit from pharmacological, physical, occupational, speech and other therapies. Therefore, Medicare will cover evaluation and management visits and therapies if these therapies are reasonable and necessary for the beneficiary. Medicare will cover services that are reasonable or necessary for an illness or injury unrelated to the dementia diagnosis. If an individual with Alzheimer's disease has an unsteady gait and physical therapy is necessary, Medicare will pay for it.

As a result of the Program Memorandum, Medicare payment of covered medical services and procedures will be determined based on the individual assessment and needs of the beneficiary, rather than denied solely because of the dementia diagnosis.

What the Program Memorandum Does Not Do

The new Program Memorandum does not change Medicare coverage rules. It does not add Medicare coverage of additional items and services that would help a beneficiary with dementia, such as prescription drugs, adult day care, or custodial care. The Program Memorandum only affects how Medicare will determine whether a covered service is reasonable and necessary for an individual with a diagnosis of Alzheimer's disease or other dementia.

The Program Memorandum is available at <http://www.hcfa.gov/pubforms/transmit/AB01135.pdf>

Submitted by Valerie Bogart

Publication News

Losing My Mind: An Intimate Look at Life with Alzheimer's

(The Free Press, 2002, 207 pp.)

By Thomas DeBaggio

Reviewed by Daniel G. Fish

While it would not be fair to say that the humanities have just discovered the field of aging (*King Lear* by William Shakespeare certainly predates the current interest), there is evidence of a dramatic renewal of attention to this topic. There is a play on Broadway about the Collyer brothers, a movie about the dementia of the author Iris Murdoch and a seemingly endless series of nonfiction reports from family members witnessing the decline of Alzheimer's victims (*Hard to Forget: An Alzheimer's Story* by Charles Pierce, *The Forgetting: Alzheimer's: Portrait of an Epidemic* by David Shenk and *Another Name for Madness* by Marion Roach).

Losing My Mind: An Intimate Look at Life with Alzheimer's stands in a class by itself. It is a first-person account written by the Alzheimer's patient himself. This patient-centered account gives a fresh perspective on the attitude of the person most intimately affected by the illness. This book coincides with a movement to pay closer attention to the Alzheimer's patient. In December 2001 the New York City Chapter of the Alzheimer's Association sponsored a conference entitled "Speaking Out!: Sharing the Alzheimer's Experience," which prominently included early-stage patients themselves. The powerful message is that the patient is a person and not an object.

From the first moment in 1999 when 57-year-old Mr. DeBaggio, a commercial herb grower, had word-finding problems (he could not remember the names of plants he had grown his whole life) through the painful encounters with the medical community, his book chronicles the interior dialogue with the cruel illness in which the patient can watch his own steady step-by-step decline (getting lost/no longer able to drive/losing the ability to write a check) into an abyss.

There is no self-pity here. There is a frighteningly personal account of an attempt to maintain maximum dignity. It is a perspective which can too often be lost in the elder law practice. Mr. DeBaggio may be familiar to some because he has been interviewed on National Public Radio and has shared his journey with listeners. His relatively young age identifies his form of Alzheimer's as early onset, a more virulent manifestation of the illness. The book cleverly entwines three simultaneous stories—his present illness, his past from childhood to young adulthood, and the ongoing scientific research into the illness.

The practice of elder law is at its core recognition of the tension between independence and frailty. This book is a strong reminder of the human spirit present in every case which passes through our offices. It is an affirmation of the dignity to be found in the ordinary. Mr. DeBaggio does not claim to be extraordinary, and he is not famous, but in him we can recognize the extraordinary courage to know one's terrible fate and to be able to live in the here and now in its fullest sense.

Daniel G. Fish is a partner in the law firm of Freedman and Fish, whose practice is devoted to the representation of the interests of the elderly. Mr. Fish is a Past President, founding member and Fellow of the National Academy of Elder Law Attorneys. He was a member of the Board of Directors of Friends and Relatives of the Institutionalized Aged and a Fellow of the Brookdale Center on Aging. He was a delegate to the 1995 White House Conference on Aging. Prior to forming the firm, Mr. Fish was the Senior Staff Attorney of the Institute on Law and Rights of Older Adults of the Brookdale Center on Aging of Hunter College. He has taught as an adjunct professor at Cardozo Law School, and Hunter College School of Social Work. He has authored several articles on the legal issues of elder law. He has been quoted in the *New York Times*, *Business Week*, *Fortune* and *Lawyers Weekly USA*.

Grandparent Rights News

New York Legislators Propose Assistance for Grandparent Caregivers

By Gerard Wallace

In the current New York legislative session, a number of proposed bills address the legal issues faced by relatives caring for children. Some of these bills have been introduced numerous times, but this year, increased interest in relative caregiving has heightened the chances for passage of legislation. The World Trade Center attack left many children in the care of relatives, and so has contributed to the recognition that relative caregivers need assistance.

Generally, for children whose parents are deceased, incapacitated, incarcerated, missing or unfit, existing laws do not always afford relatives the opportunity to become caregivers. And for relatives who do become primary caregivers, current laws do not adequately address their need for authority to make medical/school decisions; their insecurity while caring for a child in their homes who may later be returned to a parent or given to a different caregiver; the financial burdens caused by unexpected additional household members; and other difficulties that require specialized resources and services.

Opportunity to Care

New York law already recognizes that grandparents play an important role in the lives of their grandchildren. The grandparent visitation statute, N.Y. Domestic Relations Law § 72 (DRL), permits grandparents to seek visitation. Proposed Assembly Bill A.1663 would extend the right to seek visitation to step-grandparents.

Proposed Senate S.6979/A.10232A would mandate notification to *all* grandparents when Child Protective Services has removed their grandchild from a parent's home and also mandate notification to them that they can become their grandchild's foster parent. N.Y. Family Court Act § 1017(1) and N.Y. Social Services Law § 384-a(1a) contain preferences for children that are removed from their parental homes to be placed with "suitable" relatives who can become foster parents. In practice, however, relatives are often not notified about removal of children from their parents or, if informed of removal, are not informed of their option to become foster parents.[1]

Authority

New York's General Obligations Law does not include a parental power of attorney. Proposed S.4643/A.9011 would permit parents to delegate, via a writing similar to a power of attorney, the authority to make medical and school-related decisions for their children to a person who is caring for them. Notarization is not required. This bill also states that such delegations are not proof of residency for the purpose of tuition-free school enrollment.[2]

> *"The World Trade Center attack left many children in the care of relatives, and so has contributed to the recognition that relative caregivers need assistance."*

Proposed S.4643/A.9011 would also permit the delegation of authority to make medical decisions for a child. Currently, except for immunizations, only parents and guardians can make medical decisions for a child.[3]

Proposed S.3640/A.958 would amend New York's Education Law to authorize school chancellors to permit grandparents who are providing direct care and control of a child, and who are authorized by a parent in writing, to participate in parents' or parent-teacher associations.

Security

Proposed S.6979/A.10232A[4] would add a new section, DRL § 72-a, to codify a definition of "extraordinary circumstances" in custody disputes between parents and grandparents. According *to Bennett v. Jeffreys*,[5] "extraordinary circumstances" are "surrender, abandonment, unfitness, persistent neglect or other extraordinary circumstance," such as "unfortunate or involuntary disruption of custody over an extended period of time" or "other equivalent but rare extraordinary circumstance which would drastically affect

the welfare of the child." Courts have narrowly construed the period of time and parental volition and have not defined any other rare circumstances. Since absent a threshold finding of "extraordinary circumstances," courts cannot inquire into the best interests of children, relative caregivers have been left with substantial insecurity regarding the continuance of their custodial arrangement for children in their care.

Under proposed S.6979/A.10232A, the definitions of abuse, neglect, and surrender in the Social Services Law would apply to private third-party custody disputes involving grandparents.[6] This proposed bill would also add a new extraordinary circumstance of "persistent estrangement" from a child, defined as when "a parent voluntarily relinquishes care and control of a child for a prolonged period" and fails to "maintain a continuing parental relationship." For this extraordinary circumstance, the best-interest test would retain a presumption that children's best interests are served by return to their parents. Based on the principle that grandparents are the natural substitute guardians for their grandchildren, this proposed bill offers another source of protection for children by enabling their grandparents to become their caregivers when they are in need of loving and stable homes.

Financial Assistance

Proposed S.4906/A.7261 would create a new legal status, kinship guardianship, for kinship foster parents who have provided care for a child for over eighteen months. The federal Adoption and Safe Families Act (ASFA)[7] emphasizes the importance of permanent homes for children. Consequently, children can no longer remain indefinitely in foster care. For relatives who are foster parents, local child welfare departments offer a permanency choice between adoption or legal custody/guardianship. If relatives adopt in New York State, they can usually continue to receive a subsidy, but for many grandparents who do not wish to terminate the parental rights of their child (the grandchild's parent) by adoption of their grandchild, their only option has been to become legal custodians or guardians—without any subsidization. Under this proposed bill, New York kinship guardians would become eligible for the same subsidies offered to adoptive parents of hard-to-place or handicapped children.[8]

Resources/Services

Proposed S.5664/A.3716 would authorize county Area Offices on Aging to create grandparent resource centers that provide technical assistance, counseling and other resources. Many counties already have some services for relative caregivers who are over 60 years old. In New York City, the Department for the Aging has a nationally known Grandparent Resource Center, and the New York State Office for the Aging has facilitated assistance to relative caregivers through various projects. This proposed bill does not authorize funding, but provides further recognition of the important role that a county's Area Office for the Aging can play in the provision of services.

World Trade Center Provision

Proposed A.9594 expedites guardianship proceedings for petitions brought by family members of children who were orphaned as a result of the September 11 World Trade Center attacks. The proposed bill provides for a monthly payment equal to the adoption subsidy rate for relatives who become guardians and establishes a state-administered fund for these orphaned children.

Grandparent Guardianship Act

Proposed A.2772, the Grandparent Guardianship Act, covers a fairly comprehensive range of issues and solutions relating to grandparents as caregivers. The Act would codify "extraordinary circumstances" and define a minimum period of time in the care of grandparents that would qualify as an "extended period of time"; would create favorable presumptions in custody and visitation proceedings involving grandparents who are, or have been, primary caregivers; would provide assigned counsel to indigent grandparents in such proceedings; would provide notification of the opportunity to become a foster parent; would provide for a stipend to grandparent custodians; and would authorize all county Area Offices on Aging to create grandparent resource centers.

Likelihood of Enactment

Chances that at least a few of the bills affecting grandparents and other relative caregivers will become law appear to be better than in previous years.

The parental delegation of power (S.4643/A. 9011) already passed the Assembly and faces no major opposition in the Senate. A previous version of this bill reached the Governor's desk two years ago. In his veto memorandum, the Governor outlined certain needed changes. The current bill incorporates those changes, which should prevent a gubernatorial veto.

Codification of "extraordinary circumstances" and mandatory notification to all grandparents (S.6979/A.10232A) has the backing of numerous advocacy organizations and is the focus of a grandparent statewide lobbying effort. The proposed bill has sparked a surprisingly favorable response from many legislators.

The proposed kinship guardianship bill (S.4906/A.7261) would add New York State to the approximately twenty other states that already offer a subsidized alternative to adoption for kinship foster parents. A feasibility study, completed in February 2002, that will probably play a decisive role in the passage of this bill, has yet to be released.

The other proposed bills, while worthwhile, do not appear to have drawn the same level of attention and therefore are less likely to become law.

Grandparent Visitation

Since the U.S. Supreme Court's 2000 *Troxel v. Granville* decision regarding grandparent visitation,[9] trial courts in New York have been unsure of the constitutionality of DRL § 72. Two appellate courts, using remarkably similar reasoning, recently declared that New York's grandparent visitation statute was constitutional under *Troxel*. In *Morgan v. Grzesik*[10] and *Hertz v. Hertz*,[11] the Fourth and Second Departments' Appellate Divisions found the *application* of the statute to be sufficiently deferential to parental autonomy. Rejecting facial challenges to the statute, both courts noted that the U.S. Supreme Court based its decision on the statute, *as applied*, and thus the lack of statutory language in DRL § 72 that expressly protects parental interests did not invalidate the statute.[12]

Endnotes

1. *See also* State of New York Office of the State Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report, 95-106 (Nov. 22, 1996).
2. N.Y. Education Law §§ 3203, 3212.
3. N.Y. Public Health Law §§ 2504, 2164.
4. S.6979/A.10232A also mandates notification to all grandparents when a grandchild is removed by Child Protective Services.
5. 40 N.Y.2d 543 (1976).
6. N.Y. Social Services Law §§ 384B(8), 384B(7), 383C(1), and 384(3).
7. U.S. Public Law § 105-89 (1997).
8. N.Y. Social Services Law §§ 453, 454.
9. 530 U.S. 57 (2000).
10. 732 N.Y.S.2d 773 (4th Dep't 2001).
11. 738 N.Y.S.2d 62 (2d Dep't 2002).
12. A discussion of how *Troxel* affects New York visitation and custody adjudication will be the subject of the next column.

Gerard Wallace is the Director of the Grandparent Caregiver Law Center at the Brookdale Center on Aging of Hunter College in New York City. He is a member of the New York City Kincare Task Force, the New York State Bar Elder and Family Law Sections and the Advisory Council to Catholic Charities Grandparent Caregiver Program in Albany and Generations United in Washington, D.C. He graduated from Albany Law School in 1997 where, as a Sandman fellow, he published a monograph on the legal issues of grandparent caregivers. In private practice, he continued to concentrate on this issue.

Persons with Disabilities News

The Proper Guardianship Forum and Disabled Minors—An Update

By Beth Polner

An earlier article published by this author[1] compared two guardianship proceedings, the Article 81 guardianship under the Mental Hygiene Law and the Article 17-A under the Surrogate's Court Procedure Act. Subsequent to its publication, two significant decisions were rendered by Supreme Court judges on the selection of the proper forum for guardianship for minors (children under age 18).

In *In re Forcella*[2] (and a related case, *In re Rooney*), Suffolk County Justice Howard Berler denied an application for an order to show cause which sought to commence an Article 81 proceeding for the appointment of a guardian of a six-year-old child. The child, who had been awarded a $2 million medical malpractice settlement, has traumatic brain injury which also resulted in blindness and developmental delay. The purpose of the guardianship petition was, *inter alia*, to establish a supplemental needs trust and appoint his parents as Article 81 guardians.

Judge Berler denied the order to show cause. In his decision, Judge Berler determined that Article 81 was not the appropriate forum for guardianship of a minor and directed the petitioners to seek the appointment of a guardian under Article 17-A of the SCPA. The court's decision also held that an Article 81 proceeding to establish and fund a supplemental needs trust was also not appropriate. The court determined that authorizing a supplemental needs trust under Article 81 would have allowed the guardians to invest the infant's funds in a manner not authorized by Article 12 of the CPLR[3] and that the funds could have been spent in a manner that might not be permitted under Article 12.[4] The court also did not sanction a parent's ability to receive a stipend for services rendered to her child. The court dismissed petitioners' arguments that the infant's primary diagnosis might not meet the statutory requirement under the SCPA.[5] Rather than appeal this decision, the petitioners' attorneys[6] decided it was in the best interests of their clients to file an Article 17-A petition.

Two months later, Justice Lebedeff rendered a decision in *In re Maryanne Cruz*[7] which distinguished *Forcella* and appointed a guardian for a minor under Article 81 of the Mental Hygiene Law.

That decision addresses in detail each of the arguments which had been raised in *Forcella* and other cases which barred the use of Article 81 for disabled minors. The court stated that the burden of establishing by clear and convincing evidence that the alleged incapacitated minor suffered from a severe and permanent mental incapacity which was expected to continue into adulthood would largely prevent nonmeritorious applications under Article 81 rather than Article 17-A.[8]

Further, examining Article 81 itself, the court found "sufficient, albeit slight, affirmative language in the statute which supports its applications to minors and no language which precludes such application." Looking to Mental Hygiene Law § 81.19, the court stated that this section permits any parent under 18 years of age to serve as a guardian, thereby leading to the conclusion that the ward of a minor guardian would also be under 18 years of age. The court also found support in section 81.22 which permits a guardian to make decisions regarding education, concluding that this issue would be more relevant to minors than to the elderly.

The decision also examined the legislative history of Article 17-A and Article 81. The court noted that there was nothing in the history of either statute which precluded its use for minors or "thwarted the will of the legislature." Instead, the court said that Article 17-A was intended as a simple guardianship device based upon principles of *in loco parentis*. Article 81 was designed for more complex situations and cited the examples of a ward with greater functional capacity than Article 17-A, or where assets required a greater range of choices for management and investment.

Further, the court expressed concern for the burden and costs of additional legal proceedings for the parent/guardian and protection of the minor's financial interests:

> Where it is clear that the child's functional limitations are permanent, there is good reason to pursue an Article 81 guardianship from the beginning rather than first utilizing

> S.C.P.A. Article 17 or 17-A during childhood and than commencing a M.H.L. Article 81 guardianship at adulthood. The two-step process can be harrowing . . . If the same guardians are appointed, they then will have to learn the procedures of a different court, with new requirements for record-keeping and reporting. It is simply less complicated, less expensive, and definitely kinder to allow a relative to start on, and continue on, a single guardianship path, assuming that the necessary legal showings can be made.

Judge Lebedeff's decision also examines in detail the statutory protections under Article 81 for an infant's funds in response to arguments that statutory restrictions under Article 17-A better protect those funds. The court pointed to similar bond requirements;[9] the application of the investment and management standards in the Prudent Investor Act[10] to all guardians; the oversight of both courts for disbursements from an infant's funds balanced against a parental duty of support; and annual accounts and reports for guardians in both statutes.[11]

The selection of the guardianship forum for a disabled minor has by no means been settled within the Article 81 statute itself. *In re Maryann Cruz* and *In re Forcella* provide significant guidelines and caution for the practitioner when selecting the appropriate guardianship proceeding based upon the diagnosis of the minor, his or her functional limitations and the possible future needs of the infant upon reaching majority age.

Endnotes

1. "The Right Guardianship Forum: Article 81 vs. 17-A," NYSBA *Elder Law Attorney*, Summer 2001, vol. 11, no. 3.
2. N.Y.L.J., May 30, 2001, p. 17, col. 2.
3. That section of the CPLR governs "infants, incompetents and conservatees." Article 12 covers representation of infants, appointments of guardians *ad litem* in civil proceedings, settlements of actions or claims by infants and miscellaneous related proceedings.
4. Citing section 1206, which sets forth the standards for the use of funds for the infant, incompetent or conservatee, depository guidelines and standards for withdrawal.
5. SCPA section 1750-a is limited to the appointment of a guardian for a person who is either mentally retarded or developmentally disabled. The statute requires medical certification that the person is incapable of managing himself or herself or their affairs; that the condition is permanent; and that the disability is attributable to either cerebral palsy, autism, traumatic head injury, epilepsy or neurological impairment. With the exception of TBI, the onset of developmental disability must be before age 22.
6. Joan Robert, of Kassoff, Robert, Lerner and Robert.
7. N.Y.L.J., July 30, 2001, p. 21, col. 2 (Sup. Ct., N.Y. Co.).
8. MHL §§ 81.02 and 81.15.
9. Bond requirements are set forth in MHL § 81.25 and SCPA 1708.
10. EPTL 11-2.3.
11. MHL § 81.31.

Beth L. Polner is the senior associate with Davidow, Davidow, Siegel & Stern and practices in the areas of estate planning and estate administration, Supreme Court Article 81 and Surrogate's Court 17-A guardianship litigation, and elder law. Ms. Polner, who has worked for Nassau/Suffolk Law Services Committee, Inc., L.I., Housing Services, and the FDIC during the past 19 years, devotes a significant amount of time pro bono representing disabled clients in the guardianship and SNT subject areas, and advising nonprofit advocacy and service providers who assist the disabled. Ms. Polner is the author of several articles on the subject of SNTS, guardianship, and Medicaid-related issues. She is a member of the local bar associations and the New York State Bar Association, is currently the Co-Chair of the Senior Umbrella Network of Nassau, and is a member of the Board of Trustees of North Shore Synagogue in Syosset, New York.

Practical Planning News

By Sholom Koplovitz

What follows is nothing more than observations that I have made in my 38 years of practice as an estate planner.

Mistake Number 1: Leaving Outright Gifts to Senior Citizens

Not a day goes by when I am not asked to: "Leave my estate to my sister, Alice." Or: "Give $10,000 to my nephew, Paul."

And both Alice and Paul are either 82, or sick, or both.

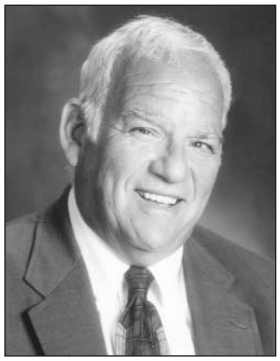
Leaving outright gifts to the Alices and Pauls of this world may not be a smart thing to do, particularly if Alice or Paul might be residing in a nursing home at the time of your death and are, or about to be, "on Medicaid." Because if that happens, the nursing home will end up getting all or a good portion of the money that you wanted to pass to your beloved relatives.

When dealing with senior citizens, I always suggest that their "inheritance" go to them, provided that they are not a permanent resident in a nursing home at the time of their death.[1] This way no money will end up going to the nursing home.

Sometimes, if the intended gift is to be large, we will create a trust for the beneficiary's benefit that will terminate if he or she becomes a "permanent resident" in a nursing home at the time of the testator's death. That testator's will or revocable trust would also provide that if that person was already in a nursing home at the time of the testator's death, the gift would fail and pass to alternative beneficiaries.

A typical will provision might read as follows:

> If my mother, KATHLEEN, survives me and is not at that time a permanent resident in a nursing home or other similar skilled care facility, I give and bequeath the sum of $100,000 to the trustee hereinafter named to be held in trust for the benefit of my said mother.
>
> The trustee shall pay her all the income of the trust for her life, and upon her death, the remainder of the trust shall be paid to my issue then living.



> In the event that my said mother becomes a permanent resident in a nursing home or other similar skilled care facility, this trust shall terminate and the remainder shall be paid to my issue then living.
>
> In the event my said mother is a permanent resident in a nursing home at the time of my death, this trust shall not be funded and my executor shall pay said $100,000 to my issue.

Mistake Number 2: Providing for Charitable Gifts in Wills That Have No Estate Tax Exposure

Not a week goes by where I don't review a will or revocable trust that provides for bequests to charities where the subject estate has no estate tax exposure.

Now, only taxable estates in excess of $1 million can be subject to federal and New York State estate taxes. And those taxable estates will represent less than 1-1.5 percent of all estates in this country. Yet draftspersons routinely honor a client's wishes by providing that $5,000 or $10,000 will become payable to a church, synagogue, hospital or university upon their demise. Although the charity will receive the bequest under that client's will or revocable trust, no estate tax savings will be generated, as that estate will most likely not be subject to estate taxes!

How about a provision in the client's estate planning documents that provides:

> It is my intent, without intending to create a legal obligation or trust thereby, that, as soon after my death as may be practicable, my son and daughter each make a gift to the Samaritan Hospital in the amount of $5,000.

Now a precatory gift such as this imposes no legal obligation on the part of that son and daughter, but in my 38 years of experience, I've yet to see a pre-

catory wish ignored. Everybody honors those expressed wishes because they are either honest or afraid of being cursed from the grave! Whatever the reason, your favorite charities will get their "dough" and your children will get income tax deductions that might be as high as 39 percent for federal income tax purposes alone. And if your gift were $10,000, the cost to your high-bracketed kids would be around $3,900.

Mistake Number 3: Cutting Out Grandchildren (Inadvertently)

If I interviewed 100 clients, all but one of them would tell me that if one of their children predeceased them but left surviving grandchildren, they would want that deceased child's share to pass to his or her children.

"Not to the daughter-in-law!" as I am almost always told.

But there isn't a three-day period that goes by where I don't see a will or living trust brought to me for review and comments that says, "I give, devise and bequeath what's left of my estate to my children or the survivor or survivors of them."

That phrase "or to the survivor or survivors of them" will produce the opposite result from most clients' wishes. Most of the time clients want their gifts to issue which, as you know, will pass a deceased's child's share to his or her wonderful and beloved grandchildren!

Mistake Number 4: Not Knowing That Wills and Living Trusts Do Not Always Behave the Same

The anti-lapse statute is designed to protect a gift to a child or to a brother and sister of a testator from failing if that child or sibling predeceases the testator. So, if a testator makes a will giving $50,000 to a brother, and that brother dies before the testator, that gift will not fail or lapse if that predeceased brother is survived by children. Unless, of course, a Will provides otherwise.

But this anti-lapse statute is unique to gifts made by wills. For some strange reason, the anti-lapse statute has no application to dispositions under living trusts. If you talked to 100 general practitioner lawyers, a good portion of them would not know this.

Endnote

1. One-half of gifts received by persons in nursing homes can usually be saved. If a person who is receiving Medicaid benefits receives an inheritance, approximately one-half of the gift can be saved. See the discussion in *The Book on Medicaid Planning*, by this author, Solomon Press 1997.

Sholom Koplovitz is a 60-year-old year former Editor of the Albany Law School *Law Review* who concentrates his practice in the areas of estates and trusts. He is a senior principal in the Albany, New York, law firm of Herzog, Engstrom and Koplovitz, PC. He is the author of *The Book on Estate Planning* and *The Book on Medicaid Planning*. He has hosted a radio talk show for 25 years and appears regularly on a local TV as their legal "eagle."

He conducts 100 or so estate planning seminars each year from which he acquires a substantial portion of his new business. He has a very, very large estate practice presently staffed with 12 paralegals and support staff and four attorneys. He expects his practice to grow in this area, reflecting a maturing of the "baby boomer" population.

Most people call him "Judge" not so much to reflect the fact that he was a criminal judge for four-plus years but because most people he meets prefer his former title to "Sholom" because they are confused over how to correctly pronounce his first name! Is it "Shalom," "Sholam," "Shaloom" or "Sholoam"? Being the salesman and marketing person we know him to be, he would prefer it if you would "just call him"!

Bonus News

What Is a CLTC?

By Lawrence J. Thaul

As attorneys practicing elder law, you have probably had occasion to recommend long-term care insurance (LTCI) to your clients. It is a complex area of insurance that requires a high level of expertise. LTCI is an important way for a senior with significant assets to provide for the escalating costs of personal assistance required when one ages. It can protect assets so that there is something left for the spouse, loved ones or favorite charities. Comprehensive policies cover a senior's needs at home, in the community or in a facility such as a nursing home or assisted living facility. With nursing home rates currently averaging nearly $250 a day in Westchester County, a senior could potentially face an annual expense of well over $90,000 or well over a quarter of a million dollars for a three-year stay at a New York metropolitan area facility.

The federal government is financially challenged and has announced its inability to provide meaningfully toward the accelerating cost of care. Medicare's coverage of the first 100 days of care following a hospitalization is restricted. Similarly, Medicaid has many limitations, especially outside of a nursing home. These realities render the placement of appropriate LTCI a more important component of comprehensive and prudent estate planning.

When choosing an LTC insurance professional, what does one look for? CLTC: What does it mean? "CLTC" is a professional designation earned by an insurance agent, a financial advisor or a professional in a related field who offers advice regarding long-term care services. The holder of the CLTC designation has successfully passed a rigorous, comprehensive certification exam given by the Corporation for Certification in Long-Term Care (CCLTC), the sole recognized entity to conduct certification in this specialty.

The CCLTC entity has offered this course since 1999. The curriculum is developed and updated by an editorial board comprised of experts from a variety of related fields such as elder law attorneys, insurance industry educators, professionals from disciplines such as geriatric and extended care management, the governmental liaison with the National Association of Insurance Commissioners, and others.

CCLTC is dedicated to providing the growing ranks of ultimate consumers of long-term care services with a professional cadre of advisors who dispense advice ethically based upon a state-of-the-art familiarity with the services, insurance coverage and financing alternatives available. An understanding of the regulatory environment must underpin their recommendations.

The CLTC designation must be renewed every two years for the stated purpose of updating holders as to new federal and state legislation, opinions and articles on prevailing long-term care issues, and LTCI products. The continuing education CLTC renewal requirement also encourages contact among specialists in the field.

"With nursing home rates currently averaging nearly $250 a day in Westchester County, a senior could potentially face an annual expense of well over $90,000 or well over a quarter of a million dollars for a three-year stay at a New York metropolitan area facility."

Specifically, the curriculum topics require a thorough familiarity with the changing demographics of the U.S. population, the services required as we age, and how to pay for them. Particular emphasis is given to several governmental programs, including Medicare and Medicaid and the practical and legal limitations placed upon obtaining funding from those sources. Particular emphasis is given to LTCI as a preferred funding method for its frequent suitability to individuals in a variety of situations.

As of January 2002, there were 3,461 CLTC designees in 49 states. In New York, there were 366 CLTCs, representing a small percentage of the total number of licensed insurance agents, financial planners, stockbrokers, licensed care coordinators and

other long-term care advisors. Long-term care is probably the fastest growing sub-specialty within the fields of insurance and financial advisory services.

Long-term care advisory services offered by a CLTC include counseling about funding the continuum of housing and services required as we age. There is considerable overlap with the fields of estate, retirement and tax planning. A CLTC is trained to make appropriate referrals to other professionals such as elder law attorneys, estate planning professionals and licensed care coordinators. CLTCs have considerable expertise in the resources and services available in their local communities, and are highly knowledgeable about LTCI options as a funding method. Most designees are independent and not affiliated with any single insurance carrier.

Applicants who qualify by passing the exam must also pass the scrutiny of producing character references from appropriate sources. For insurance agents, for example, a general agent and an insurance carrier with whom they conduct business must provide written affidavits as to their ethical conduct. Furthermore, there must be no civil actions against them in the five years preceding their application.

It may be of interest to note that CCLTC's Web site, <http://www.ltc-cltc.com>, lists CLTCs by geographic area throughout the United States. The Corporation welcomes visitors to the site to gain further insight into the value of this important accreditation.

Having a strong affiliation to outsource areas like insurance can be an invaluable enhancement to your elder law practice. Selecting a CLTC long-term care insurance professional as part of your team could bring a multifaceted approach to problem-solving on behalf of your clients.

Lawrence J. Thaul, CLU, ChFC, CLTC, is founding co-partner of Millenium Financial, Inc. in Rye Brook, Westchester County, New York. He is an insurance professional with a specialty in long-term care insurance. Mr. Thaul is a contributing writer to numerous publications as well as an instructor on the subject in a multitude of venues. He lives in Larchmont with his wife and two sons.

Scenes from the Elder Law Section

Annual Meeting

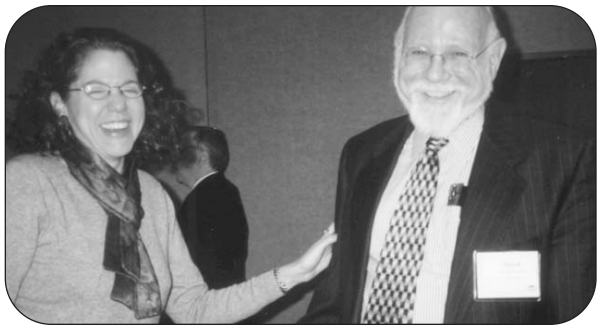
January 22, 2002 • New York Marriott Marquis

Vincent Russo and Stephen Silverberg.

Ellice Fatoullah and Ellen Makofsky.

Martin Petroff and Lawrence Davidow.

Robert Kruger and Judge Edwin Kasoff.

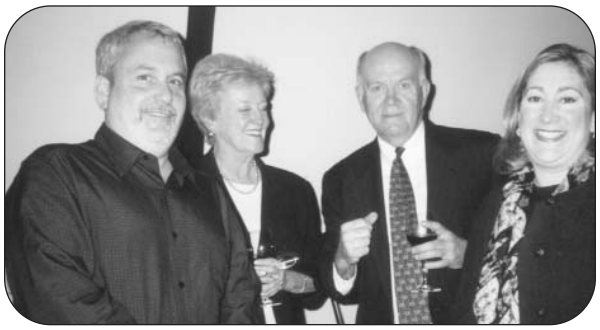


Valerie Bogart and David Goldfarb.

Louis Pierro and Ellyn Kravitz.

Jeffrey Abrandt, Kate Madigan and Michael Haggerty.

Steven Kass, Ronald Spirn and Vincent Russo.



Ira Miller, Judge Wells and his wife, and Cora Alsante.

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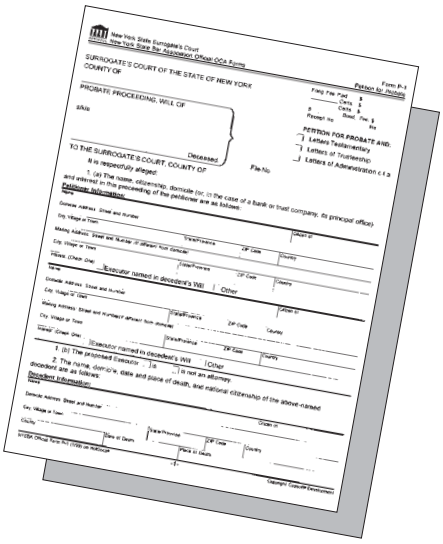
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COUNTY OF
PROBATE PROCEEDING, WILL OF
Deceased
File No.
PETITION FOR PROBATE AND:
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Letters of Trusteeship
Letters of Administration c.t.a.
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