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Elder Law Attorney

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

Message from the Chair

Sharon Kovacs Gruer

Support Our Section

Our dynamic Elder Law Section is continuing to serve the needs of the Section members as well as our clients.

We are updating our website to provide legislation tracking, so that our members may keep abreast of state legislative changes on a current basis.

The summer meeting, chaired by Judith Raskin and Patricia Shevy, was a great success and very well attended. Judith Raskin and Patricia Shevy did a wonderful job in organizing and running the meeting. The speakers were interesting and informative, and participants stayed late, well after the ending of the sessions, to hear more from the knowledgeable presenters. Kathy Heider and Lisa Bataille did a fabulous job in arranging the accommodations, dinners and outings, and the attendees had a terrific time.

Our Elder Law Section committees had breakfast meetings at the summer meeting, and are busy working for our members. Some highlights of ongoing projects are as follows:

- The legislative committee is closely monitoring relevant legislative and budget proposals and changes, and advising the Section.

Inside this Issue

Columns

- Our special needs planning committee is in the process of completing guidelines for trustees of special needs trusts, and updating the pooled trust list as a resource for our members.
- The Section's estate and trust administration committee has created a survey tracking the varying procedures of the Surrogate's Courts in our counties, so as to better advise our members of the differing policies and procedures between the counties.
- Our health care committee is keeping us advised of the health law changes, and is working on a proposal to modify the law with regard to the health care proxy in response to the *Stein* case.
- The Section's practice management and technology committee is providing information on e-filing in the Surrogate's Court and other practice issues to our members.
- The Veterans benefits committee is preparing a checklist for our members to use when interviewing clients, and is also preparing a survey for our members regarding the incorporation of Veterans benefits practice into our members' work.
- The financial planning committee is putting together a seminar package on financial literacy for older New Yorkers.
- The diversity committee is working on a brochure describing the practice of elder law, and is reaching out to law students and practicing attorneys to increase the diversity of the membership of the Elder Law Section.
- Our other committees are also working to provide timely information to our members.

The committees are looking for volunteers to assist with their projects. Some of the projects can be done collaboratively, and others can be done independently, so that you can participate regardless of the amount of time you have to devote.

We have started a database of the various languages spoken by our Section members, so that we may better serve our culturally diverse communities. We would like all of our members who fluently speak more than one language to provide that information for our database.

Our fall meeting in Westchester on October 28–30, chaired by Tammy R. Lawlor and Miles P. Zatkowsky, will have a new, innovative format. Attendees will be able to participate in four practical skills sessions on the first day, with a beginning track for new attorneys and an advanced track for experienced attorneys. The basic track includes fundamentals of Medicaid planning, how to prepare and conduct a fair hearing, distinguishing guardianships and how to draft a special needs trust. In response to a new member's request, we have provided that the new attorneys will be able to receive transitional credit for this first day.

The advanced track includes how to file SSD and SSI applications and appeals, an overview of special education law, how to initiate a Kendra's Law proceeding and conduct a Rivers v. Katz hearing, and the Attorney General's position with regard to supplemental needs trusts. This first day is also sponsored by the Committee on Issues Affecting People With Disabilities.

On the second day of the fall meeting there will be an interactive DSS Medicaid panel, a health care reform panel, and a health care issues panel. We will also have presentations on estate and income tax updates, Medicaid, Fair Hearings, Medicare nuts and bolts, litigation in elder law, rules of evidence and objections, and the administration of supplemental needs trusts.

The final day of the program will have three roundtable discussion sessions. The attendees can choose among the following topics: Veterans benefits; community care options; Medicaid planning issues involving residences; guardianships; mental health issues and services; and practice management/time management issues. Michael Ross, an attorney who represents attorneys before disciplinary and grievance committees, will present an ethics program.

We ask each of you to become more involved and active within our Section. Bring the issues that affect your clients, or that impact on your practice of law, to the attention of the Section, and join a committee and actively participate in the committee's projects. If you have an idea for an article, you can write an article for the *Elder Law Attorney*. You can also attend our Section meetings and participate in one of the many pro bono clinics run by the Section.

I look forward to seeing you at our fall meeting in Westchester.

Sharon Kovacs Gruer

Message from the Co-Editors in Chief

We are striving to make the *Elder Law Attorney* a publication that both addresses critical issues affecting the complicated planning and drafting decisions we must make as attorneys, and the community and care issues pertinent to the problems our clients and their families face.

Among her initiatives as our new Section Chair, Sharon Kovacs Gruer has introduced the practice of having this publication include regular contributions from the Elder Law Section Executive Committees, which articles will include updates and analysis pertaining to their areas of concern. In addition, with this issue we are now including columns for both Ethics, by Marion Rice, and Veterans issues, by Felicia Pasculli, the new Veterans Benefits Committee chair. These columns are in addition to those from stalwart contributors Adrienne Arkontaky, Robert Kruger, Ellen Makofsky, and Judith Raskin.

We have continued our outreach for authors among those in our Elder Law Section and among those who serve our clients and their families, directly or otherwise. We formally welcome Patricia Shevy and Claudia Salazar to our Editorial Board, and we thank Joan Robert and Brian Tully, formerly long-serving on the Editorial Board, for their past contribution to this publication.

We always welcome new ideas, new authors and your help. We ask that you, our readers, keep the *Elder Law Attorney* in mind in your day-to-day interaction with other attorneys, social workers, physicians, public health professionals and others whose contribution to the community of the elderly can be reflected in these pages for the benefit of our Section.

The publication of the *Elder Law Attorney* relies on the considerable production efforts of the Editorial Board and now also the services of a number of committed students: Elizabeth Briand (third year New York Law School), a member of the NAELA Student Chapter and of the NYSBA's Elder Law Section Law School Task Force; Marrisa Trachtenberg (second year SUNY Buffalo); Gennady Zilberman (third year Brooklyn Law School); and Lauren Palmer (third year Albany Law School). Liz and Lauren are members of the NYSBA Elder Law Section Law School Task Force. Continuing with us are Kim Trigoboff, a recent graduate of New York Law School, and formerly of the Law School Task Force for our Section, is now our Production Editor, and Gabrielle Floen (of David Okrent's office), who provides invaluable assistance by coordinating articles and the production process.

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The Court of Appeals Holds That Estate Planners Can Be Sued for Malpractice by Estate Fiduciaries

By Ira Salzman

On June 17, 2010, the Court of Appeals held that personal representatives of estates may maintain legal malpractice claims against attorneys for negligent representation in estate tax planning that causes enhanced estate tax liability. *Estate of Schneider v. Finmann*, No. 104, slip op. 5281 (N.Y.). This holding is a departure from prior lower court case law, which held that estate fiduciaries and beneficiaries are generally barred from bringing malpractice actions against estate planners because they both lack privity with the estate planner.

The key holding of *Schneider* is that only the personal representative of a decedent can bring a malpractice claim against an estate planner. Beneficiaries are still barred from bringing such litigation absent fraud, collusion, malicious acts or other special circumstances. The *Schneider* Court was concerned that allowing beneficiaries to sue would lead to "uncertainty and limitless liability."

In its decision, the *Schneider* Court made specific reference to E.P.T.L. § 11-3.2(b), which states, in part, "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed." It therefore appears that a malpractice claim against an estate planner should be treated the same way as any other claim possessed by a decedent at death for estate litigation purposes. This presumably includes all relevant rules concerning the statute of limitations.

The statute of limitations for malpractice by an attorney is three years.[1] Based on the reference by the Court of Appeals to E.P.T.L. § 11-3.2(b), it would appear that the three year period starts during the lifetime of the decedent when the estate planning malpractice occurs.[2] That three year period could be extended pursuant to C.P.L.R. § 210(6). Under CPLR §210 (6), the limitations period would be one year after the death of the decedent or whatever remains of the three year limitations period, whichever is longer.[3]

The statute of limitations could also be extended by the doctrine of continuous representation. This principle tolls the running of the statute of limitations for legal malpractice until the "ongoing representation" is completed.[4] In *Shumsky v. Eisenstein*, the court stated:

> Application of the continuous representation or treatment doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter or of treatment of a specific ailment or complaint; "the concern, of course, is whether there has been continuous treatment, and not merely a continuing relation between physician and patient" (McDermott v Torre, 56 NY2d 399, 405). Thus, the doctrine is not applicable to a client's or patient's continuing general relationship with a lawyer or physician involving only routine contact for miscellaneous legal representation or medical care, unrelated to the matter upon which the allegations of malpractice are predicated (see, Young v New York City Health & Hosps. Corp., 91 NY2d 291, 296; Nykorchuck v Henriques, 78 NY2d 255; Glamm v Allen, supra, 57 NY2d, at 94). Instead, in the context of a legal malpractice action, the continuous representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice (see, Glamm, supra, at 94; see also, Weiss v Manfredi, 83 NY2d 974, 977).[5]

Considering the holding of the *Schneider* Court in the context of the doctrine of continuous representation, it may be appropriate for attorneys to review the procedures that they use in some cases to close files. The *Schneider* decision is quite short. There are many questions that it leaves unanswered. However, in reaching its decision the court relied primarily on a rather comprehensive decision of the Supreme Court of Texas, *Belt v. Oppenheimer*, 192 S.W.3d 780 (2006).[6] A review of this decision is useful both because it anticipates issues that will undoubtedly arise in the future and it determines how those issues should be resolved.

In *Belt*, the Texas court held that personal representatives but not beneficiaries can sue estate planners

because of negligence which causes enhanced estate tax liability to the estate. In reaching its conclusion, the Texas court made the following points:

1. A malpractice claim against an estate planner is a damages claim that accrues when the decedent is still alive. While alive, a decedent can sue to recover fees paid to the estate planner and the costs of further restructuring the estate.[7]

2. If the court permitted cases to be brought by beneficiaries, the court would be required to decide how a decedent intended to apportion his or her estate. The Texas court characterized this as a "near impossible" task.[8]

3. If a personal representative brings a claim with regard to negligent tax planning, the personal representative only needs to demonstrate that the decedent intended to minimize tax liability for the estate as a whole.[9]

4. The Texas court specifically recognized that a testator may intentionally structure an estate in a way that does not minimize taxes. The Texas court specifically stated that the complaining party has the burden of proving that the testator did intend to minimize taxes.[10]

5. The Texas court recognized that its holding gives an estate fiduciary who is also an estate beneficiary the opportunity to recast what is essentially a personal claim as a claim on behalf of the whole estate. In a footnote, the court gave, as a possible example of this, a spouse who is both the personal representative and a beneficiary who argues that she should have received more money in order to take advantage of the marital deduction. The Texas court made it clear that to be successful, the complaining party would have to establish that the estate planning attorney failed to structure the estate in accordance with the wishes of the decedent and that the estate incurred damages as a result.[11]

6. The Texas court held that any recovery that is obtained as a result of a malpractice action goes to the estate as a whole and is then distributed in accordance with the decedent's existing estate plan. Thus, if the spouse/fiduciary brought a claim for failure to maximize the marital deduction, any recovery would go to the spouse/fiduciary only if the existing estate plan provided for such a distribution.[12]

7. The Texas court opined that the temptation of an estate fiduciary to bring improper claims would be "tempered" by the knowledge that an estate fiduciary can be removed for mismanagement.[13]

We obviously do not know to what extent the New York Court of Appeals will follow the Supreme Court of Texas with regard to all or some of these issues. What is clear is that there is much we will not know until future cases are decided.

Endnotes

1. C.P.L.R. § 214(6).
2. *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166 (2001).
3. *See* Siegel, New York Practice section 55.
4. *Glamm v. Allen*, 57 N.Y.2d 87, 94 (1982).
5. 96 N.Y.2d 164 at 168.
6. This decision can be viewed at http://www.supreme.courts.state.tx.us/historical/2006/may/040681.htm.
7. 192 S.W.3d at 786.
8. *Id*. at 787.
9. *Id*. at 787.
10. *Id*. at 787 (citing fn. 7).
11. *Id*. at 788 (citing fn. 8).
12. *Id*. at 788.
13. *Id*. at 788.

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Nursing Home Collection Cases—Who Is Liable for the Cost of Care?

By Matthew J. Nolfo and Vincent P. Mancino

A. Introduction

Matthew J. Nolfo

Vincent P. Mancino

Perhaps it is a reaction to the ongoing financial crisis in our country and the related debate over spiraling health care costs and coverage; or perhaps it is a function of budgetary cutbacks and reductions in reimbursement rates to health care providers. Whatever the case may be, it seems that there is an increase of litigation cases being brought for collection of unpaid nursing home bills. While collection cases filed by nursing homes against individual residents can be relatively straight-forward in terms of potential basis for liability, the more complicated cases are those filed by nursing homes against the resident's spouse or third parties. This article explores some of the important factual distinctions arising in those kinds of cases, including the potential effect of a signed Admission Agreement and/or Power of Attorney on the liability for cost of care. The article also addresses the resident's own liability, the liability of the resident's spouse and the liability of the donees of any gift that is made by the resident or resident's agent rendering the resident unable to pay the nursing home bill.

B. Admission Agreements—Some General Considerations

Not every nursing home collection case involves a signed Admission Agreement. However, when there is a signed Admission Agreement at issue, it is first important to understand the statutory authority that controls the use of these agreements. Generally, when a non-resident party signs an Admission Agreement on behalf of a resident, there is no contractual personal liability for the non-resident party (but there can be personal liability for the spouse of the resident as discussed within this article) for unpaid service bills; nor could a nursing home facility legally require such a guaranty as a condition of the resident's admission.[1]

The requirements for nursing home reimbursement pursuant to the Medicaid program are set forth in certain provisions of the Federal Social Security Act, 42 U.S.C. § 1396r, and otherwise known as the Nursing Home Reform Act, which provides as follows:

> (5) Admissions policy;
> (A) Admission: With respect to admissions practices, a nursing facility must … (ii) not require a third party guaranty of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility; and…
> (B) Construction…
> (ii) Contracts with legal representatives
> Subparagraph (A) (ii) shall not be construed as preventing a facility from requiring an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care.[2]

The regulations of the New York State Department of Health contain a provision reflecting the federal statutory and regulatory requirements:

> (b) Admission rights. The nursing home shall protect and promote the rights of residents and potential residents by establishing and implementing policies which ensure that the facility:
> (1) shall not require a third-party guaranty of payment to the facility as a condition of admission, or expedited admission, or continued stay in the facility;…(but the statute goes on to provide)
> (6) (The facility) may require an individual who has legal access to a resident's income or resources available to pay for facility care, to sign a contract, without incurring personal financial liability, to provide the facility payment form the resident's income or resources;….[3]

Accordingly, a nursing home may not require a non-resident to sign a guaranty of payment as a condition of admission to, or continued residency at, a nursing home. However, a non-resident may, at least theoretically, voluntarily and knowingly sign a guaranty of payment which would be enforceable absent a claim of fraud or other wrongful act.[4]

In this regard, personal liability of the third party signing an Admission Agreement will turn on the context in which the Admission Agreement was signed by a "responsible party" and whether there was a voluntary and knowing intent to contract in this manner.[5]

An Admission Agreement could require a "Legally Authorized Representative" such as a spouse who has access and control over the resident's income and resources, without incurring personal financial liability, to provide the nursing facility with payment from the resident's income or resources for any amounts due from the resident under the terms of the Agreement.

As explained above, the federal and state statutes permit the nursing home to legally require the authorized representative, or an individual having access and control over the resident's assets and income, to provide the facility with payment using his or her access to the resident's available income or resources, without incurring any personal financial liability. Here, the signor may be liable for a failure to preserve and/or use the resident's income or assets for the nursing home but only to the extent that such assets would, in fact, be sufficient to cover the unpaid nursing home bill and causes of action could, among other things, lie in breach of contract, fraud, conversion.[6]

As will be set forth below, if the party against whom the nursing home attempts to recover payment for services rendered to the resident is someone other than the resident or the resident's spouse (in some instances), then the existence of a signed Admission Agreement is an important element in establishing the liability of such a third party.

C. Liability of Nursing Home Resident Who Signs an Admission Agreement

Perhaps the clearest case in terms of liability for cost of care is that involving a suit filed by a nursing home against an individual resident with full mental capacity who signs an Admission Agreement which includes a promise on the part of the resident to privately pay for his or her own care, or to apply for governmental (e.g., Medicaid) benefits to cover the cost of care in cases where the resident has insufficient funds to privately pay. In such cases, the nursing home can seek to hold the resident liable under the contract for failing to fulfill these promises of the Admission Agreement. Of course, the nursing home would need to establish a factual basis for the alleged breach of contract, and the resident might be in a position to assert any number of defenses that are often seen in a breach of contract case. However, aside from issues of straight contract law, there is very little dispute that a properly executed Admission Agreement can serve as a basis for liability against the nursing home resident.

One of the most important issues in this type of straightforward case is whether the resident voluntarily signed the Admission Agreement and understood the consequences of doing so. In *Baptist Home of Brooklyn vs. Schott*,[7] the Court denied the nursing home's motion for summary judgment because there was a triable issue of fact as to whether the resident voluntarily signed the Admission Agreement.[8]

D. Resident's Liability without Admission Agreement

This scenario assumes a resident was admitted to a nursing home for long term care and has mental capacity. In this case, the nursing home staff may not have had the opportunity to have either the resident or any family member execute an Admission Agreement and several months later may find that the resident's bill is unpaid. Assuming that there is some source of payment from the resident's funds, there are at least a few causes of action that could be pursued against the resident himself or herself.

1. Quantum Meruit

First, there is the implied contractual/quantum meruit claim, where the Court can find that even though there is no express enforceable contract between the nursing home and the resident, there is one implied from the conduct of the parties. Generally, the elements of a quantum meruit claim are as follows: 1) performance of services in good faith; 2) acceptance of services by the defendant; 3) expectation of compensation exists and 4) reasonable value should be awarded for services rendered.[9] Certainly, a quantum meruit case may be the strongest argument against a resident who has not signed an Admission Agreement.

2. Account Stated

The second cause of action to be pursued under this scenario is known as "Account Stated." Generally, in order to have a valid cause of action for under the Account Stated claim, the nursing home must be able to establish the following:

1. An account and/or bill is made up and rendered and/or delivered to the recipient of the services;
2. Recipient is bound to examine the account that is being charged;

3. If a reasonable time passes where no objection is made by the recipient of the account or bill, that person's silence will be construed as an acceptance.[10]

Under the Account Stated cause of action, an *essential* element is an agreement on the amount actually due. In *Erdman Anthony & Associates vs. Barkstrom*,[11] the Court held that even oral objections raised by the recipient of services to the Account Stated as billed will rebut an inference of an implied contract to actually pay the account. Moreover, in order for this Account Stated cause of action to work, the nursing home would have to prove that it actually had billed the resident directly and that there was no question or objection raised in any way over a reasonable period of time in order for this cause of action to prevail.

3. Unjust Enrichment

The third claim that could be made is under the theory of Unjust Enrichment. This is essentially an equitable claim. The elements of this cause of action are that the plaintiff, which in this case would be the nursing home, conferred a benefit to the defendant, here being the resident, and that the defendant/resident will obtain a benefit without having tendered adequate consideration for same. Finally, the claim will prevail if it is shown that it is against equity and good conscience to allow the defendant to retain the funds that are sought to be recovered.[12]

E. Liability of Incapacitated Resident Where There Is No Signed Admission Agreement

With respect to the foregoing section regarding the liability of a resident who has capacity but has not signed an Admission Agreement, it is unclear whether all the causes of action that would apply in that matter, those being "quantum meruit/implied contract," "Account Stated" and "Unjust Enrichment" would equally apply to an incapacitated resident.

Certainly, with respect to the essential elements of the quantum meruit cause of action which is found in implied contract, the element of "acceptance of services" by the resident may be questionable if the resident has no capacity to decide whether or not to accept services and whose presence in the nursing home is likely involuntary. While it seems that asserting a cause of action of quantum meruit in a case where there is an incapacitated resident may make sense, it is not clear whether a judgment against the resident could be secured on that theory alone. The argument under Account Stated would not work as it is essential that the party that is being billed have an opportunity to examine the account or bill being submitted to him or her before any inference may be made that such party has acquiesced to the amount stated in the bill after a reasonable period of time.

The more general equitable plan of Unjust Enrichment would seem to be the most effective cause of action against an incapacitated resident. Moreover, as is usually the case, a nursing home will bring a guardianship to have a Property Management Guardian appointed to secure some level of payment and to ensure that Medicaid eligibility is secured for the resident so that the bill does not remain unpaid to any great extent. As is set forth in this article, some guardianship judges are not always inclined to grant this type of application as they view these types of guardianship proceedings more as collection cases than an Article 81 Guardianship for the benefit of the actual incapacitated resident.

F. Liability of Resident's Spouse

There is an assumption by many that a spouse of a nursing home resident is entirely liable for the cost of that resident-spouse's care regardless of whether or not there is an Admission Agreement signed by that spouse. This is not necessarily the case. There is also a general assumption that liability of the spouse of the resident results from statutory liability, which is also not necessarily the case.

With respect to a spouse who signed an Admission Agreement, it does not seem that the spouse would have any more liability than any other non-resident party who signs the same type of agreement on behalf of the resident. However, the fact that a spouse signed an Admission Agreement may serve to enhance a claim asserted by a nursing home under the two theories of liability that may be made against a spouse that are discussed below.

1. Spouse's Liability Under Common Law

The common law doctrine of the "law of necessaries" is often cited as a cause of action by nursing homes against the spouses of residents. The basic element under this cause of action would be a reciprocal duty upon each spouse to furnish the other with reasonable necessaries, including medical care.[13]

However, liability under this doctrine is not automatic or unrestricted.[14]

The elements of this common law cause of action are as follows:

> a) Application of the necessaries doctrine requires proof that the services rendered to each spouse were furnished in reliance on the credit of the other spouse (although a presumption on that point does exist);
> b) proof as to each spouse's financial status; and
> c) proof as to each spouse's ability to pay the bill of the other.[15]

Ordinarily, under this reciprocal standard, husband and wife would be jointly and severally liable for the necessary expenses of either spouse. However, this rule has been modified to protect the creditor and the non-debtor spouse by requiring that the spouse who has incurred a debt for necessary goods, or medical treatment, is primarily liable for that debt. Debt collection must be first pursued against that debtor spouse, and, absent sufficient resources or funds to satisfy the debt, the non-debtor spouse is then secondarily liable.

As such, it appears that this common law theory of necessaries may be applied against a spouse of a resident as long as that non-resident spouse has the ability to pay for the debt and that an attempt was made to secure payment from the debtor spouse first. Moreover, it appears that this common law doctrine is not dependent on the non-resident spouse signing an actual Admission Agreement, although that would seem to enhance a cause of action under this law of necessaries providing that the aforementioned elements of this doctrine are also satisfied.

2. Spouse's Liability Under Statute

The Family Court Act at Section 412 provides, in pertinent part:

> A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, *may* be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the to the circumstances of the respective parties. (Emphasis added).

Unlike the Family Court Act 413, which imposes absolute parental liability—"shall be required"—spousal support "may be required" and is, therefore, not absolute. However, Section 412 is cited as support for its reciprocal language, i.e., a "married person" as applied to the common law doctrine of necessaries.[16]

However, section 422 of the Family Court Act sets forth that the parties who have standing to assert this claim under statute are not third parties such as creditors. Moreover, the Family Court has exclusive jurisdiction over spousal claims that arise from section 412. But note that there exist a few cases where third party medical providers have been able to collect for services rendered under the absolute duty to support a child under section 413 of the Family Court Act[17] in which the Courts conferred third party liability to medical providers under Section 413. Hence, there arguably may be some basis for a third party such as a nursing home to pursue a support order under Section 412 for services rendered to a debtor spouse. However, it seems clear that the preferable claim that is exclusive to a spouse is under the common law doctrine of necessaries.

G. Liability of Third Party (Non-Spouse)

As is set forth above, while federal and state law are clear that the facility shall not require a third party guaranty of payment as a condition of admission, or expedited admission, or continued stay in the facility,[18] the facility may require an individual who has legal access to a resident's income or resources available to pay for care, to sign a contract, *without incurring personal liability* (emphasis added), to provide the facility payment from the resident's income or resources.[19]

1. Signed Admission Agreement Not Enough?

In *Prospect Park Nursing Home, Inc. v. Goutier*,[20] the Court held that even though defendant, Saul Bethay (a friend of the nursing home resident, Mr. Goutier), signed the Admission Agreement, he was not liable for the resident's unpaid nursing home charges. The Court noted that "neither at the time he signed the Admission Agreement, nor at any time during Mr. Goutier's stay at Prospect Park, did Mr. Bethay possess power of attorney from Mr. Goutier." In fact, the power of attorney given to Mr. Bethay was not even executed until after Mr. Goutier had been discharged from Prospect Park, and after the collection case had been filed by the facility. As such, Mr. Bethay did not have legal access to the resident's funds at the time that he signed the Admission Agreement and the debt was incurred. The Court also noted that it "is not enough, moreover, that there be 'legal access' or 'control' for the contract to be breached. There must also be a 'resident's income or resources available to pay for care in the facility.'" In this case, there was not any evidence of ability to pay (e.g., resident's bank statements) at any time after the power of attorney was signed. This additional element of proof will certainly make it more difficult to recover from a non-spouse.

2. Legal Access to Resident's Funds Is Crucial

In the case of *Amsterdam Nursing Home Corp. v. Lang*,[21] the nursing home sought to have the resident's grandson, Ronald Lang, held liable for certain unpaid Net Available Monthly Income ("NAMI"), representing the resident's required monthly income contribution towards her cost of care as budgeted by the local department of social services. The Court noted that while the defendant Lang (resident's grandson) did not sign the last page of the Admission Agreement (which contained the promise to provide payment to the nursing home from the resident's income and resources without incurring any personal liability), even "if Lang had signed the above provision of the Admission Agreement, Amsterdam could only legally require him

to provide the facility with payment for his grandmother's NAMI, using his access to *her* available income or resources, without incurring any personal financial liability." However, Amsterdam did not present any evidence that the defendant had any legal access (i.e., power of attorney, joint account or other) to his grandmother's income or assets.

The *Goutier* and *Lang* cases seem to clearly support the proposition that a third party who signs a proper Admission Agreement can be held liable for a resident's nursing home bill, but only where the third party has legal access to, or control over, the resident's income or assets. However, in one recent Civil Court case, *Hillside Manor Rehabilitation and Extended Care Center, LLC. v. Barnes*,[22] the Court interpreted the above-cited federal and state regulations differently. In *Barnes*, the Court found insufficient evidence of intent to defraud, hinder or delay payment to the nursing home, where the defendant (resident's daughter) used funds in an account held jointly with the resident to pay household bills and expenses other than the resident's budgeting NAMI. In addition, the Court deemed the "plaintiff's allegation of intent to defraud or hinder payment to presume defendant's responsibility to pay" (although there was not any evidence that the defendant signed any contract or agreement to pay the nursing home from the joint account or any other resident assets). The Court noted that "based upon DOH and CMS regulations, there could be no personal financial liability to defendant, even if such a contract or agreement existed." In fact, in support of this conclusion, the Court cited the *Goutier* and *Lang* cases. It appears, however, that in *Barnes*, the Court's reliance upon *Goutier* and *Lang* may be misplaced. As discussed above, the *Goutier* and *Lang* holdings were based primarily upon the fact that in each case the third party lacked sufficient access and control over the resident's funds to be held liable under the Admission Agreement for the resident's cost of care (*not* upon the broader proposition that third parties could not incur any personal liability in any event). This interpretation is consistent with the out-of-state cases cited in the *Lang* decision, including *Sunrise Healthcare Corp. v. Azargian*,[23] where the Connecticut Appellate court "concluded that a nursing home could hold a daughter liable for breach of contract, where the daughter had signed her mother's contract as the 'legal representative' and had power of attorney over her mother's financial assets."

In *Azargia*, the Court found that the contract in question "unambiguously" complied with statutory requirements by specifically prohibiting personal liability on the part of the third party for the resident's care costs. However, the Court also distinguished between a contractual agreement imposing personal liability on a third party (prohibited) and one requiring a third party to use a resident's assets to pay for nursing home services (permissible). The Court found the latter permissible provision to be "analogous to a trustee's liability for an unauthorized use of trust property." The Court noted that "a trustee must act in accordance with the terms of the trust instrument." The trustee "cannot deviate from the terms of the trust merely because the beneficiary would derive greater benefit from a failure to abide by the directive of the trust instrument." Similarly, the Court opined that a third party who signs a contract "cannot avoid liability for the unauthorized use of" the resident's funds. Thus, by the reasoning of the Connecticut Court in *Azargian* (as cited by the New York Court in *Lang*), a third party who signs an Admission Agreement promising to use resident funds to pay for care can be held liable for such care costs where the third party had legal access to the resident's funds but failed to use the funds to pay for the resident's care. This kind of provision does not violate the prohibition against third party liability for cost of care.

3. Designated Representative

The case of *New York Congregational Nursing Center v. Gilchrist*[24] illustrates another very important point regarding the language of the Admission Agreement as it pertains to potential liability of third parties for cost of care. In defining the term "designated representative," the Admission Agreement specifically gave the resident the authority "to appoint" a relative or other person to act as his/her designated representative; the agreement also included a blank line for the resident's signature. However, in *Gilchrist*, the resident did not sign the agreement. Therefore, the Court held that the defendant was not actually appointed as designated representative and, thus, could not be held liable for cost of care under the agreement.

Even without a signed Admission Agreement, there are some who argue that it is possible for a third party (non-spouse) to be held liable for a nursing home resident's cost of care in certain cases. For example, in the *Barnes* case discussed above, plaintiff's counsel argued that the daughter's intent was that the nursing home be "defrauded, hindered, delayed and otherwise prevented from collecting" payment of her mother's NAMI, to which the daughter had legal access via joint account. The Court ultimately dismissed the action based upon plaintiff's failure to establish such intent. However, the Court also noted that plaintiff's argument (intent to defraud) "presumed defendant's responsibility" to pay; and without a signed contract (which the Court felt would be unenforceable anyway as against federal and state regulations), the daughter could not be held personally liable for her mother's nursing home bill.

4. Liability of Attorney-in-Fact Pursuant to a Power of Attorney

Another interesting (yet unresolved) issue is whether a third party attorney-in-fact can be held liable (absent a signed Admission Agreement) for the resident's cost of care in cases where the attorney-in-fact fails to use the resident's income and assets to pay the resident's nursing home care costs. One could argue that the attorney-in-fact owes a fiduciary duty to the nursing home resident (principal), which arguably could include properly marshaling the resident's income and assets in payment towards the resident's cost of care. Of course, such an argument would likely be extremely fact sensitive, including inquiry into whether the attorney-in-fact used the resident's funds for his or her own purposes (clearly improper) versus paying some other legal obligation of the resident (e.g., expenses of a home in the community or other outstanding health-related expenses). In either case, there would be the issue of whether the nursing home has standing to bring an action against an attorney-in-fact, since the attorney-in-fact owes a duty to the resident, not the nursing home (i.e., no privity of contract between the nursing home and the attorney-in-fact). This is why these kinds of cases involving alleged wrongdoing by an attorney-in-fact often end up before the Court in guardianship proceedings filed by the nursing home administrator (who has standing to bring such an action under Article 81 of the Mental Hygiene Law), although some judges take the position that such matters are not appropriate for Article 81, notwithstanding the alleged financial abuse (or misuse of funds) by the attorney-in-fact.

H. Transfer of Resident's Assets That Deem Resident Unable to Pay

Another scenario which can be an issue is a resident's transfer of funds to a donee or donees making the resident unable to pay for the resident's private bill and creating a penalty period wherein the resident will not be eligible for nursing home Medicaid. Here, the cause of action that is normally asserted is fraudulent conveyance. The law that supports this type of claim is statutory and is found at the New York State Debtor and Creditor Law sections 273, 275 and 276. In these type of claims, the existence of a signed Admission Agreement by the donee of the resident's funds is not essential. However, the existence of such an agreement signed by the donee will enhance a fraudulent conveyance claim, especially where there is language in the Admission Agreement whereby the donee avers that no gifts of the resident's funds have been made.

1. Debtor and Creditor Law Section 273

Under this provision, any conveyance by a nursing home resident who is thereby rendered insolvent is fraudulent as to creditors *without regard* to the actual intent if the conveyance is made without fair consideration. Under this provision, actual intent is not an issue.[25] Moreover, a determination of fair consideration and insolvency are questions of fact to be determined upon the circumstances of each particular case.[26] Generally, the party challenging the conveyance bears the burden of proving each element by a preponderance of the evidence. The element of fair consideration has been interpreted not to include transfers made out of family affection or promises for future support.

Moreover, under Debtor and Creditor Law section 273, the defendant will only have liability to the creditor if the defendant was a debtor to the creditor at the time of the actual conveyance. In *Grace Plaza of Great Neck, Inc v. Heitzler*,[27] the Court found no fraudulent conveyance where the resident of a nursing facility had no outstanding debt to the nursing home at the time of the conveyance. Also, in *Manor v. Vidal*,[28] the Court found there was no fraudulent conveyance where the resident had gratuitously conveyed property at issue 6 weeks prior to moving into the nursing home. This is particularly difficult for a nursing home where a resident may have made the transfer at a time when the resident was fairly healthy that caused a penalty period if the nursing home admission and the need for Medicaid occurs within the look back period for the gift and if Medicaid does not find that the gift was made for purposes other than to qualify for Medicaid.

Furthermore, under Debtor and Creditor Law section 273, the conveyance must have made the donor insolvent. In *Grace Plaza*, *supra* p. 8, after the conveyance the resident was found not to be insolvent as he had retained cash assets of over $300,000 and continued to receive pension and Social Security benefits. However, in *Staten Island Care Center LLC*, *supra*, it was held that the transfer of a resident's real property by operation of law upon his death rendered his estate insolvent as there were no other assets from which to satisfy the debt. The primary remedy under section 273 of the Debtor and Creditor Law is to set aside the transfer and to bring the asset back into the name of the resident or the estate of the resident so that the nursing home will have an opportunity to bring an appropriate cause of action and secure payment.

2. Debtor and Creditor Law Section 275

The next statute that involves fraudulent conveyance is Debtor and Creditor Law section 275. Under this section, a conveyance is made without fair consideration when a transferor "intends or believes that he will incur debts beyond his ability to pay" and is fraudulent as to *both* present and future creditors. This part of the statute requires showing of intent or belief that the transferor will incur debts beyond his or her means. The party seeking to set aside the transfer bears the burden of proof.

The question of whether a transfer was made for fair consideration contains the same elements as under section 273 of the Debtor and Creditor Law as set forth above, except that it must be shown that the transferor must have had a "good indication" of the oncoming insolvency for the transfer to be fraudulent. As to the element of contemplation of indebtedness, the Court in *Grace Plaza* ruled that after taking into account the rates charged by the nursing home at that time, "it cannot be said that (the resident) had a "good indication" that the funds she retained would be insufficient to pay for her nursing home care during the three-year period she would be required to wait in order to become eligible for Medicaid assistance." But this is due to the fact that she retained over $300,000 in various bank accounts and continued to receive significant fixed income.[29]

3. Debtor and Creditor Law Section 276

The final element of Debtor and Creditor Law to be considered for fraudulent conveyance claims is section 276, requiring that the conveyance must have been made with "actual intent" to hinder, delay or defraud either present or future creditors. If this is done, the transfer was fraudulent as to both those sets of creditors. Again, the burden of proof is on the litigant seeking to have the conveyance set aside. However, under this section, the standard of proof is clear and convincing.

The courts have indicated that it is difficult to establish the actual intent to defraud. In *Heimbinder v. Berkovitz*,[30] a defendant was found to have made transfers with an intent to defraud the plaintiff. The Court emphasized the fact that after being sued, defendant withdrew nearly $40,000, a sum much greater than taken in any prior month, and made payments in other obligations that seemed abnormally high. Moreover, the actual complaint must specify the particulars of the alleged fraud—including, for example, the time, place, and particular individuals involved.[31]

The next question is who are the parties that can be sued under section 273, 275, 276 of the Debtor and Creditor Law? In addition to having the ability to set aside a transfer, money damages are also recoverable, but only against the parties who participate in the fraudulent transfer and are either transferees of the assets or beneficiaries of the conveyance.[32]

In *Leonard Nursing Home v. Kay*,[33] the resident's daughter executed an Admission Agreement as an attorney-in-fact. The plaintiff was able to establish a case with various evidence that the attorney-in-fact wrongfully transferred assets to herself and other family members, which rendered the resident insolvent and unable to pay for the nursing home. The Court entered a judgment against the daughter for the amount of services provided.

The statute of limitations for a claim of actual fraud under section 276 of the Debtor and Creditor Law is 6 years from the date of the alleged fraud or 2 years from the date of discovery, whichever is later.[34] Where there are constructive fraud claims (Debtor and Creditor Law section 273 and 275), there is a statute of limitations of 6 years pursuant to CPLR 213, subdivision 1. Finally, with regard to section 276, a claim for legal fees may be made and awarded on behalf of the creditor if the creditor is able to prove the intentional element of the transfer under that section.

I. Conclusion

The purpose of this article is to assist colleagues in advising clients when there is an assertion of a liability claim for an unpaid nursing home bill. We attempted to address the different scenarios that most often arise in these situations. While the advice rendered to clients must involve a careful analysis of the individual facts of each case, there are certainly some fairly well-defined doctrines that may either invite or preclude liability within this specialized area of law which still seems to be evolving.

Endnotes

1. *See* 42 U.S.C. § 1396r(c)(5)(A)(ii); 42 U.S.C. § 1396r(c)(B)(ii); 10 NYCRR § 415.3(b)(1); 10 NYCRR § 415.3(b)(6).
2. 42 U.S.C. § 1396r(c)(5)(A)(ii); 42 U.S.C. § 1396r(c)(5)(B)(ii).
3. 10 NYCRR § 415.3(b)(1); 10 NYCRR § 415.3(b)(6).
4. *See Prospect Park Nursing Home v. Goutier*, 12 Misc. 3d 1192(A), 824 N.Y.S.2d 770, 2006 WL 2251908 (N.Y. City Civ. Ct. 2006) N.Y. Slip Op. 51536(U); *Samaritan Hospital v. Chodikoff*, 97 A.D.2d 937 (3d Dept. 1983). *See also*, NY Jur. 2d Guaranty & Suretyship § 170, Ignorance or Mistake (201) HN: 1 (N.Y.S.2d) and NY Jur. 2d Hosp. & Related Hlth. Care Facil. § 201, Liability of one other than patient—One guaranteeing payment (201) HN: 1 (N.Y.S.2d).
5. For a review of "Responsible Party" language in nursing home agreements *compare Daughters of Sarah Nursing Home Co. v. Lipkin,* 145 A.D.2d 808 (3d Dept. 1988) (third party signed as a responsible party, where term "and/or" in contract was unambiguous and became guarantor; but note, this case predates Social Security Act prohibiting nursing homes from requiring third party guarantees as a condition of admission); *Daughters of Sarah v. Frisch,* 170 A.D.2d 752 (3d Dept. 1991) (triable issue of fact as to whether intent to contract arose given possibly misleading statements from nursing home personnel). *See also Amsterdam Nursing Home Corp. v. Lang*, 16 Misc. 3d 1138(A), 851 N.Y.S.2d 56 (Sup. Ct., New York Co. 2007) (third party had no personal liability where he signed as legally authorized representative and had no actual authority as such) (this case is referred to in NURSING HOMES, Adv. Elderly & Disabled Client P 15.01, P 15.01 (2010)); *Putnam Nursing & Rehabilitation Center v. Bowles*, 239 A.D.2d 479 (2d Dept. 1997); *see also Eden Park Health Services, Inc. v. Estes,* 2 A.D.3d 1186 (3d Dept. 2003); *Leonard Nursing Home, Inc. v. Kay*, 2003 WL 1571579 (Sup. Ct., Saratoga Co. 2003), 2003 N.Y. Slip Op. 50623(U); *New York Congregational Nursing Center v. Gilchrist,* 21 Misc. 3d 1136(A), 875 N.Y.S.2d 821 (Table) (Sup. Ct., Kings Co. 2008) (signature of personal representative did not confer agreement to be held personally liable absent express language to this effect).

6. *Wedgewood Care Center Inc. v. McGloin*, 2002 WL 31956103 (App. Term, 2002), 2002 N.Y. Slip Op. 40545(U) (widow was not guarantor of her husband's nursing home outstanding bill, but question of fact remained as to whether widow acted as trustee to receive benefits on behalf of her husband); *Prospect Park Nursing Home v. Goutier,* 12 Misc.3d 1192(A), 824 N.Y.S.2d 770 (Table) (Civ. Ct., Kings Co. 2006); *Hillside Manor Rehabilitation and Extended Care Center, LLC. v. Barnes*, 27 Misc. 3d 1229(a), 2010 WL 2197737 (Civ. Ct., Queens Co. 2001), 2010 N.Y. Slip Op. 50966(U); *Putnam Nursing & Rehabilitation Center v. Bowles*, 239 A.D.2d 479 (2d Dept. 1997).
7. 902 N.Y.S.2d 368 (2d Dept. June 8, 2010).
8. *See also Daughters of Sarah Nursing Home v. Frisch*, 170 A.D.2d. 752 (2d Dept. 1991) (same issue arose but with respect to a nonresident family member's execution of an Admission Agreement).
9. *See generally Wehrum v. Illmensee*, 2010 WL 2197668 (2d Dept. 2010).
10. *See generally Rodkinson v. Haecker*, 248 NY 480 (1928).
11. 298 A.D.2d 981 (4th Dept. 2002).
12. *See Cruz v. McAneney*, 31 A.D.3d 54 (2d Dept. 2006); *Smith v. Chase Manhattan Bank USA*, 293 A.D.2d 598 (2d Dept. 2002); *Manor v. Vidal*, 18 Misc. 3d. 1115(A) (Sup. Ct., Kings Co. 2008).
13. *Medical Business Associates, Inc. v. Steiner,* 183 A.D.2d 588 (2d Dept. 1992); *Lourdes Mem. Hosp. v. Frey,* 152 A.D.2d 73 (3d Dept. 1989); *see generally* Corpus Juris Secondum, Husband and Wife, Liablity for Necessaries, in general, Doctrine of Necessaries). *See also Lichtman v. Grossbard,* 73 N.Y.2d 792 (1988).
14. *See Ellenville Regional Hosp. v. Mendez*, 21 Misc. 3d 1131(A), 873 N.Y.S.2d 511 (N.Y.C. Civ. Ct. 2008) (spouse liable for medical services rendered to debtor spouse) (*citing* the public policy that the necessaries doctrine encourages "health-care providers and facilities to provide needed medical attention to married persons and the recognition that the marriage involves shared wealth, expenses, rights and duties…a recognition that of a personal duty of each spouse to support the other"); *Promenade Nursing Home, Inc. v. Lacey*, 10 Misc.3d 1066(A) (N.Y.C. Civ. Ct. 2005).
15. *See Lourdes Mem. Hosp. v. Frey,* 152 A.D.2d 73, 75 (3d Dept. 1989).
16. *See Medical Business Associates, Inc.*, supra note 13.
17. *See and compare Mt. Sinai Hospital v. Burns*, 138 Misc. 2d 381 (Sup. Ct., N.Y. Co. 1988) (holding absolute duty to support child under Family Court Act 413 rendered parent liable for medical expenses of the hospital); *See also Clifton Springs Sanitarium Co. v. Watkins*, 130 A.D.2d 944 (4th Dept. 1987) and *Aurelia Osborn Fox Memorial Hospital v. Osorio*, 11/7/2002 N.Y.L.J. 21, (col. 5), Vol. 228 (City Court, Westchester Co.).
18. *See* 42 U.S.C. § 1396r(c)(5)(A)(ii); 10 NYCRR § 415.3(b)(1).
19. *See* 42 CFR § 483.12(d)(2); 10 NYCRR § 415.3(b)(6).
20. 12 Misc. 3d 1192(A), 824 N.Y.S.2d 770 (N.Y. City Civ. Ct. 2006).
21. 16 Misc. 3d 1138(A), 851 N.Y.S.2d 56 (N.Y. Sup. 2007).
22. 27 Misc. 3d 1229(A) (N.Y. City Civ. Ct. 2010).
23. 76 Conn App 800, 821 A.2d 835 (2003).
24. 21 Misc. 3d 1136(A) (N.Y. Sup. 2008).
25. *See St. Teresa's Nursing Home v. Vuksanovich*, 268 A.D.2d. 421 (2d Dept. 2000).
26. *See Staten Island Care Center, LLC v. Wilkinson,* 2001 WL 1358150 (Sup. Ct. 2001).
27. 2 A.D.3d 780 (2d Dept. 2003).
28. 18 Misc. 3d 1115(A) (Sup. Ct., Kings Co. 2008).
29. *See also Shelly v. Doe*, 249 A.D.2d 756 (3d Dept. 1998).
30. 18 Misc. 3d 1115(A) (Sup. Ct., Kings Co. 2008).
31. *Sullivan v. Kodsi*, 373 F. Supp. 302 (S.D.N.Y. 2007).
32. *Id.*
33. 2003 WL 1571579 (Sup. Ct., Saratoga Co. 2003).
34. See CPLR 213, subdivision 8.

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POMS Changes Effective October 1, 2010

By Robert P. Mascali and Amy C. O'Hara

Robert P. Mascali

The Social Security Administration ("SSA") uses the Program Operations Manual System ("POMS") as its primary source of information to process claims for Social Security benefits.[1] Special needs planning practitioners frequently refer to the POMS for guidance on the SSA's policy dealing with first party special needs trusts and pooled trusts issues.

The SSA has issued new regulations noted in the POMS at SI 01120.199 regarding early trust termination provisions which go into effect on October 1, 2010. These instructions apply to both first party and pooled trusts established on or after January 1, 2000 that contain early termination provisions.[2] This article reviews the new POMS section as it relates to both first party and pooled trusts.

SI 01120.199 provides that an early termination provision allows a trust to terminate before the death of the beneficiary. A trustee, for example, may want to terminate the trust if the beneficiary is no longer disabled or eligible to receive means-tested government benefits, including Supplemental Security Income ("SSI") and Medicaid; and/or the trust no longer has sufficient assets to warrant its continued existence.[3]

A. First Party Special Needs Trusts

OBRA '93[4] permits the income and resources of a trust to be disregarded for the purposes of determining Medicaid eligibility if it meets the following requirements:

1. The beneficiary must be under the age of 65 at the time the trust is funded;
2. The beneficiary must be disabled as defined in the Social Security Act;[5]
3. The trust must be established for the benefit of the beneficiary by the beneficiary's parent, grandparent, legal guardian, or the court; and
4. The trust agreement must provide a Medicaid "payback" provision requiring the state Medicaid agency to be reimbursed upon the death of the beneficiary up to an amount equal to the total Medicaid paid on behalf of the beneficiary.

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These trusts, commonly referred to as "first party," "self settled" or "(d)(4)(A)" special needs trusts, have been widely used by special needs planning practitioners as a way to shelter a person's assets to protect current or future means-tested government benefits. The types of assets often transferred to first party trusts include settlements from personal injury actions, inheritances, and child support.

If a first party trust created on or after January 1, 2000 contains an early termination provision, the new POMS section provides that in order for the assets of the trust to be excluded for purposes of SSI eligibility, **all** of the following conditions must be met:[6]

1. If the trust is terminated early, the state(s) must receive all amounts remaining in the trust at the time of the termination up to an amount equal to the total Medicaid paid on behalf of the beneficiary.
2. Other than payment of taxes and allowable administrative expenses, as defined in SI 01120.199D.3 (and SI 01120.203B.3), only the beneficiary can benefit from the early trust termination. Meaning, that after reimbursement for Medicaid paid, taxes and allowable administration expenses, all of the remaining trust assets must be distributed to the beneficiary and not the remainder beneficiaries.
3. The beneficiary cannot have the power to terminate the trust. The power to terminate must be given to someone else, such as a trustee, or perhaps a trust protector or trust advisory committee.

B. Pooled Trusts in New York State

OBRA 93 also permits a second type of a first party trust often referred to as a "pooled trust" which, similar to the individualized trust, can be established by a parent, grandparent, guardian or court but can also be established by the disabled beneficiary of any age.[7] The other requirements for a qualifying pooled trust are:

1. The trust must be established and managed by a non-profit organization,

2. There must be separate sub-accounts for each participant although the organization may organize the accounts into a pool for purposes of investment and management,

3. The sub-account must be maintained for the sole benefit of the disabled individual, and

4. Upon the death of a beneficiary any balance remaining in the sub-account for that person that is not retained by the trust must be repaid to the State Medicaid program up to the amount of benefits paid on behalf of the beneficiary.

A pooled supplemental needs trust is an alternative to a privately established first party trust and affords certain benefits that are not available to the individualized trust. As mentioned above, the pooled trust can be established by the disabled beneficiary him/herself which can be quite advantageous where the disabled beneficiary is over the age of 65 years (although there may be a transfer penalty if the disabled beneficiary is thereafter required to go into a nursing home)[8] or where there is no parent, grandparent or guardian and the only alternative is to seek a court order which can be costly and time consuming. Additionally, since pooled trusts generally utilize a single Master Trust and a standard Joinder or Participation Agreement, there is no need to draft and execute a trust document.

For the most part, as with the individualized first party trust, a pooled trust is generally utilized where a disabled beneficiary receives a sizeable asset (usually cash money) and needs to somehow transfer the asset so as not to be "over-resourced" and consequently determined at some point to be ineligible for certain governmental benefits, usually Medicaid or Supplemental Security Income (SSI).[9]

Many of the pooled trusts have different administrative provisions dealing with items such as enrollment fees, minimum deposits, costs, administrative expenses, early termination and the disposition of the balance on hand upon the death of a beneficiary. Prior to joining a pooled trust a prospective beneficiary and/or those assisting the beneficiary should investigate the various available alternatives.[10]

C. POMS Provisions Applicable to Pooled Trusts

Most practitioners in the field of elder and disability planning law are aware that along with applicable state law and legal principles, a number of different sections of the POMS must also be consulted when evaluating a pooled trust to ensure that deposits into such a trust will not negatively impact eligibility for various governmental programs.[11] In those pooled trusts that do not contain an early termination provision, the balance remaining in the disabled beneficiary's account at death must be used to pay back the state for medical assistance provided to the beneficiary during his/her lifetime. However, notwithstanding this requirement, it has always been and continues to be permissible for a pooled trust to provide that rather than being used for such a "Medicaid payback" the remaining funds, or a portion thereof, may be retained by the trust to further the purposes of the trust.

Whether or not a particular pooled trust will have an early termination provision is, of course, dependent upon the decision of the non-profit organization that has established the trust. However, in those instances where there has been such a determination and there is to be an early termination provision, for whatever reason and however implicated, these newly issued instructions now require the trust to contain certain specific provisions in order to be certain that transfers to such a trust will continue to be permissible and not negatively impact beneficiary eligibility.[12]

Initially, it should be noted that the pooled trust will continue to be considered as a non-countable resource if the trust simply provides that in the event of an early termination the assets of the terminating beneficiary are thereafter transferred to another qualifying pooled trust. However, in lieu of such a provision the assets of the disabled beneficiary transferred to a pooled trust containing an early termination provision will still not be a countable resource provided the following criteria are met and contained in the trust document:

1. Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the state Medicaid plan(s); and

2. Other than payment for certain enumerated expenses such as taxes due from the trust and reasonable fees and administration expenses associated with the termination of the trust,[13] no entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), all remaining funds are disbursed to the trust beneficiary); and

3. The early termination clause gives the power to terminate to someone other than the trust beneficiary.

D. Conclusion

Now that the SSA has issued these instructions clarifying that an early termination provision is permissible as long as the guidance is followed, practitioners may want to consider to what extent they want to insert such a provision in their trust documents. If an early termination provision is included in a first party

or pooled trust, practitioners must take care in drafting the agreement to include the SI 01120.199.D requirements to ensure that the trust beneficiary maintains eligibility for means-tested government benefits.

Endnotes

1. https://secure.ssa.gov/apps10/poms.nsf/aboutpoms.
2. SI 01120.199.
3. SI 01120.199.B.
4. Social Security Act 42 U.S.C. § 1396p(d)(4)(A); see also Social Security Law § 366 (2)(b)(2)(iii) and 18 NYCRR § 360-4.5(b)(5).
5. 42 U.S.C. § 1382c(a)(3).
6. SI 01120.199.D.
7. 42 U.S.C. § 1396p(d)(4)(C).
8. See GIS 08 MA/020 issued July 24, 2008.
9. In New York there are generally two different types of pooled trusts: those designed for deposits of single or multiple lump sums such as inheritances and tort awards and those that are designed to accept regular monthly deposits of income to avoid a Medicaid spend-down. For more information see Robert P. Mascali, *The Benefit of a Pooled Trust for Individuals in the Community*, NYSBA Elder Law Attorney, vol. 20, no. 2, at 33 (Spring 2010).
10. *Directory of Pooled Trusts*, Special Needs Answers: a community resource provided by the Academy of Special Needs Planners, http://www.specialneedsanswers.com/resources/directory_of_pooled_trusts.asp.
11. See for reference SI 01120.200, SI 00120.201, SI 01120.202, SI 01120.203, SI 01150.100, SI 01150.121, SI 01730.048.
12. SI 01120.199.
13. 01120.199.D.3.

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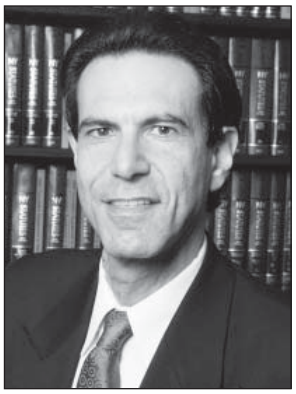
Queens County Surrogate's Court Electronic Filing Through the NYS Court E-Filing System ("NYSCEF")

By Ronald A. Fatoullah and Robert J. Kurre



Ronald A. Fatoullah

As of June 7, 2010, Queen's County Surrogate's Court is accepting electronic filing through the New York State Court E-Filing system (NYSCEF). This is a pilot program in which documents may be filed or served electronically in probate or administration proceedings, miscellaneous proceedings related thereto or such other types of proceedings as the court may permit. The program only applies in the Surrogate's Court in Chautauqua, Erie, Monroe, Queens, and Suffolk Counties.[1] The first Surrogate's Courts to use NYSCEF were in Chautauqua and Erie counties. Electronic filing permits practitioners to file documents 24 hours a day / 7 days a week. It is a user friendly web-based system.

In order to file documents electronically, an e-filer must register with the Office of Court Administration of the New York State Unified Court System.[2] In order to register, go to www.nycourts.gov/efile and select "Forms" at the top of the page. Next, click the EF-1 Form ("E-Filing User Registration Form to Access the E-Filing System") which is the very first form indicated. The application form should now appear on the screen. On step 1, choose the capacity in which you are applying among the following: (i) as a member in good standing of the NYS bar (fill in your NYS Attorney Registration Number); or (ii) as a member in good standing of the bar of another jurisdiction who is admitted *pro hac vice* in a case (fill in Index/File/Claim Number and Court); or (iii) as a party in a case (fill in Index/File/Claim Number and Court); or (iv) as a person seeking to use E-filing as an authorized agent for attorneys of record in an action(s). On step 2, provide name, address, telephone numbers, etc. to register as a user of NYSCEF. Upon completion of registration, a user ID and password will be issued to the e-filer by NYSCEF. On step 3, after reading the NYSCEF system regulations, click the "Submit/Print" tab.

An attorney can designate an authorized agent to act on his behalf. An "a*uthorized agent"* is defined in the regulations as a person or filing service company designated by an attorney to file and serve documents on the attorney's behalf in an estate proceeding, pursuant to a form promulgated by the Chief Administrator of the Courts and filed with the court.[3] If, during the course of the proceeding, a pro se party who registered as an e-filer retains an attorney, the attorney shall register, if not already registered as an e-filer, and inform the Chief Clerk of his or her appearance on behalf of the pro se party.[4]

Robert J. Kurre

The mere fact that an e-filer registers does not constitute consent to participate in any particular estate proceeding.[5] Consent to do so is only done upon the voluntary agreement by an attorney or party to participate in that estate proceeding through NYSCEF.[6]

"Electronic filing permits practitioners to file documents 24 hours a day / 7 days a week."

E-filing is voluntary and a party may file and serve documents in hard copy.[7] For the most part, once a party initiates a proceeding by e-filing, and any other party who chooses to participate as an e-filer, must thereafter file, serve, and accept service of all documents electronically unless notice is given to the court and all other parties that the party no longer wishes to participate electronically.[8]

An eligible proceeding may be commenced by filing the initial documents electronically, or may become an e-filed proceeding after commencement upon filing the documents electronically pursuant to the rules. Upon commencing the proceeding electronically, or the party first filing electronically, shall serve all of the parties with a notice regarding the use of e-filing and the procedure for participating in the e-filing program. The notice, which may be obtained through NYSCEF, must be in a form approved by the Chief Administrator of the Courts. The notice must be served in person or by regular mail, prior to the return date of the citation.[9]

Documents may be transmitted at any time to NYSCEF and will be deemed to be filed when the transmission to NYSCEF is complete and payment of any court filing fee has been received.[10] The court filing fee can be paid through NYSCEF, by mail, or in person.[11] If a document is due to be filed by a certain date, it will be considered to have been timely filed if it is filed through NYSCEF by midnight of that day.[12] Upon completing a transmission of an e-filed document, an electronic filing receipt shall be issued through NYSCEF to the e-filer.[13]

If the court determines that there is any defect as to the form, or omission, in an e-filed document, the court may direct that the e-filer resubmit it in proper form or amend or supplement the document as appropriate.[14]

If a document cannot be e-filed because of its size, contents, format, or for any other reason satisfactory to the court, the document must be filed in hard copy directly with the court together with an affidavit of service upon all parties to the proceeding.[15]

Each document which is e-filed shall be signed as required by Part 130 of the Uniform Rules of the Chief Administrator and shall state the signatory's name, address, e-mail address of record and telephone number.[16] In lieu of an actual signature on an e-filed document, a document will be deemed to have been signed where the person identified as the signatory is the e-filer, the document is being e-filed under the e-filer's user ID and password, and a "/s/" is used in the space where the signature would otherwise appear.[17]

An attorney or party seeking to obtain jurisdiction over a party to a proceeding shall serve that party by any of the methods set forth in the SCPA.[18] In all other instances where service of documents is required, e-service may be made upon any party who is an e-filer in the proceeding. Upon e-filing of any such document, NYSCEF shall provide notice of the filing of the document to all e-mail service addresses of record. The party receiving the notice shall be responsible for accessing NYSCEF to obtain a copy of the filed document.[19]

Decrees, judgments, orders, and decisions in proceedings governed by the rules shall be electronically filed by the court and such e-filing shall constitute filing of the decree, judgment or order. At the time of the filing of the decree, judgment, order, or decision, NYSCEF shall transmit by e-mail to the e-mail service addresses of record notice that the decree, judgment, order, or decision has been filed and is accessible through NYSCEF.[20]

If the e-filing or e-service does not occur because of certain specified reasons, the court may, upon adequate proof, enter an order permitting the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically or extending the date for service of the paper. Such specified reasons are an error in the transmission of the document to NYSCEF or served party which was unknown to the sending party; the party was erroneously excluded from the service list; or other technical problems were experienced by the e-filer.[21]

A party or that party's attorney or representative who participates as an e-filer consents to be bound by the provisions of the rules of NYSCEF (section 207.4a of the Uniform Rules for the Surrogate's Court) (22 N.Y.C.R.R. § 207.4a) and participates at the discretion of the court.[22] The court may terminate, modify, or suspend the use of e-filing in a proceeding at any time and may, in its discretion, excuse an e-filer from compliance with any provision of these rules.[23]

If an e-filer submits a petition for probate for which the court does not already have in its possession the original purported last will and testament and any codicils thereto, the e-filer must file directly with the court the paper original last will and testament and any codicils thereto and a hard copy of a certified death certificate within two business days of the date of e-filing.[24] If an e-filer submits a petition for administration, the e-filer shall file a hard copy of a certified death certificate directly with the court within two business days of the e-filing.[25]

Training is available for use of the NYSCEF system. A user manual is available on the NYSCEF website.[26] For training sessions, contact the staff of the Surrogate's Court in question or the NYSCEF Resource Center. The Resource Center presents a two-hour training course in New York City weekly and elsewhere from time to time. The course provides attorneys, at no charge, with two CLE credits. The NYSCEF Resource Center is planning to make this CLE course available on video disk so that attorneys can view the course whenever convenient and can receive credit for doing so at no charge.[27] The NYSCEF resource center can be reached by telephone at 646-386-3033 or by e-mail at efile@nycourts.gov.

Endnotes

1. 22 N.Y.C.R.R. § 207.4a (a).
2. 22 N.Y.C.R.R. § 207.4a (d)(1).
3. 22 N.Y.C.R.R. § 207.4a (b)(9).
4. 22 N.Y.C.R.R. § 207.4a (d)(1).
5. 22 N.Y.C.R.R. § 207.4a (d)(2).
6. 22 N.Y.C.R.R. § 207.4a (b)(2).
7. 22 N.Y.C.R.R. § 207.4a (c)(1).
8. 22 N.Y.C.R.R. § 207.4a (c)(1).

9. 22 N.Y.C.R.R. § 207.4a (e)(1).
10. 22 N.Y.C.R.R.§ 207.4a (e)(3).
11. 22 N.Y.C.R.R. § 207.4a (e)(2).
12. 22 N.Y.C.R.R. § 207.4a (e)(3).
13. 22 N.Y.C.R.R. § 207.4a (e)(4).
14. 22 N.Y.C.R.R. § 207.4a (e)(5).
15. 22 N.Y.C.R.R. § 207.4a (e)(9).
16. 22 N.Y.C.R.R. § 207.4a (f)(1).
17. 22 N.Y.C.R.R. § 207.4a (f)(2).
18. 22 N.Y.C.R.R. § 207.4a (g)(1).
19. 22 N.Y.C.R.R. § 207.4a (g)(2).
20. 22 N.Y.C.R.R. § 207.4a (h).
21. 22 N.Y.C.R.R. § 207.4a (i)(2).
22. 22 N.Y.C.R.R. § 207.4a (c)(3).
23. 22 N.Y.C.R.R. § 207.4a (c)(2).
24. 22 N.Y.C.R.R. § 207.4a (e)(6).
25. 22 N.Y.C.R.R. § 207.4a (e)(7).
26. *Available at* www.nycourts.gov/efile (click "User Manual and FAQ" located at the top of the page).
27. For more information see the frequently asked questions PDF on the User Manual and FAQ page.

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Education Law and the Role of the Grandparents

By Brad H. Rosken

As society learns more about learning and developmental disabilities and how to properly educate the children who have them, the role of the extended family is expanding in order to provide support for the parents of these special children. More and more in my practice I am either meeting with the grandparents of the students that I represent or the grandparents are the ones providing the financial support for the additional services designed to address the child's disability-related needs.

The most important thing for any parent or grandparent of a child with special needs is to have a good support system in place so that they can receive recommendations and suggestions on how to appropriately educate their child. This is only obtained by meeting with and being treated by physicians and experts in the relevant field of study. Families are encouraged to use their health insurance benefits to gain access to these professionals. The most important thing is to be able to ask an independent professional, "My school district would like to provide Johnny/Sally with this service, what do you think? Oh, that is not the proper service; what would you recommend for them?" The answer to that question is the key to obtaining the appropriate education for your grandchild.

The law governing special education is covered under Individuals with Disabilities Education Act of 2004 (IDEA) which was re-authorized by Congress in August of 2006. Students with disabilities are entitled to Free and Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE). The law governing this area dates back many years. The Supreme Court of United States stated back in the late 1970s that a special education student is not entitled to a "Cadillac Education" but is entitled to a "Chevy Education." The car analogy might be a bit outdated but the point is that a school district need only supply an education that has a meaningful benefit to the student and not one that maximizes their potential. Another law that governs in this area is the "No Child Left Behind Act" (NCLB). The NCLB's purpose is "to ensure that all children have a fair, equal and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging academic achievement standards." However, NCLB fails to make any distinction between the academic standards of all children and those children with disabilities.

The facts of a specific matter are analyzed in the context of the IDEA and the federal and New York State regulations that implement that statute. Under the IDEA, states receiving federal funds are required to provide "all children with disabilities a free appropriate public education (FAPE)."[1] "To meet these requirements, a school district's program must provide special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits."[2] These related services must be administered as stated in the Individualized Education Plan (IEP), which school districts must review annually. The IEP is "[t]he centerpiece of the IDEA'S educational delivery system."[3] The IEP must provide "special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits."[4] The IEP must be "likely to produce progress, not regression, and must afford the student with an opportunity greater than mere trivial advancement."[5] In New York the responsibility for developing an appropriate IEP falls to the local Committee on Special Education (CSE), the members of which are defined by the New York State Regulations. Once a child is classified and found entitled to receive special education services, the CSE must then develop an IEP for the child that contains: 1) A description of the child's present levels of educational performance and how the disability impacts the child's academic and non-academic performance; 2) A list of annual goals that the child will be expected to accomplish in the upcoming twelve-month special education period; 3) A statement of the specific special education and related services which will be provided to the child; 4) Any accommodations which will be provided to the child such as testing modifications or assistive technology devices; 5) The projected start dates for all services; and 6) If the child is age 15 or older, a list of transition goals and services as to what pursuits the student will attempt after high school is complete. The IDEA provides for a free appropriate public education (FAPE) that "emphasizes special education and related services designed to meet [the] unique needs [of the student] and prepare them for further education, employment, and independent living."[6]

When a CSE meets to develop a specific child's IEP, it is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4)

managerial or behavioral needs.[7] "[T]he CSE must also be mindful of the IDEA'S strong preference for 'mainstreaming,' or educating children with disabilities to the maximum extent appropriate alongside their nondisabled peers."[8]

In certain situations the school district will be obligated to conduct a functional behavior assessment (FBA). An FBA is an assessment that determines how a child's behavior is affecting or impeding the child's learning. There is a statutory duty under the IDEA and its New York state regulations to conduct one when such behaviors have an effect on a student's learning. The IDEA requires that "in the case of a child whose behavior impedes the child's learning or that of others, [the CSE team shall] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."[9] The New York State regulations implementing this provision define a functional behavior assessment as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment."[10] The CSE must initiate an FBA if a student's "behavior impedes his or her learning or that of others."[11] A FBA will then lead to the district developing a specific Behavior Intervention Plan (BIP) that will define for the educators how to deal with the behaviors of the child that impede the child's learning.

The parents can disagree with their school district's recommendations on the IEP and have the appropriateness of such IEP reviewed. The first level of review is a hearing conducted by an Impartial Hearing Officer (IHO) who is not employed by the school district. The school district will present witnesses to support its position that it is able to provide an appropriate education for the child. The parents are then required to present evidence which supports their position that the school district's recommended program is inappropriate for their child. This often includes the presentation of testimony from expert witnesses and written reports. Parents themselves may also testify. The IHO will then issue a decision. If the school district or the parents disagree with such decision, either may appeal the decision to the State Review Officer (SRO). If the parents or the school district are not satisfied with the results of the SRO's decision, the parents or the school district may then appeal such decision by the SRO to either Federal or State Court. Cases are usually brought in Federal Court. The federal district court may "receive the records of the administrative proceedings" and also "hear additional evidence."[12] The court hearing the appeal of the SRO's decision will conduct a "modified de novo" review of the administrative proceedings,[13] and then must base its determination "on the preponderance of the evidence."[14] The court has "broad authority to grant 'appropriate' relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE."[15]

The IDEA provides for two specific types of violations, procedural violations which refer to the statutes and regulations that govern this area, such as five (5) days written notice of a CSE meeting is necessary or who must be present at a properly constituted CSE meeting. There are also substantive violations, which are the meat and potatoes of the matter as to whether or not the district has provided an appropriate education for the student. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies (1) impeded the child's right to a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (3) caused a deprivation of educational benefits.[16] "Only procedural inadequacies that cause substantive harm to the child or his parents—meaning that they individually or cumulatively result in the loss of educational opportunity or seriously infringe on a parent's participation in the creation or formulation of the IEP—constitute a denial of a FAPE."[17] Therefore, it is best to file for a hearing when you have substantive violations that lead to a denial of FAPE as opposed to merely procedural ones. Moreover, when parents feel that their child cannot be educated appropriately within their school district the law allows for them to unilaterally place their child in a private school of their choosing and then seek tuition reimbursement from their school district by filing for an Impartial Hearing.

"New York parents who believe that the state has failed to offer [their child] FAPE act 'at their own financial risk' when they choose to enroll their child in a private school."[18] Their unilateral placement does not have to 'meet the IDEA definition of a free appropriate public education.'[19] It need not meet state education standards or requirements need not provide certified special education teachers or an IEP [and it] may not be subject to the same mainstreaming requirements as a school board.… Ultimately, the issue turns on whether a placement—public or private—is reasonably calculated to enable the child to receive educational benefits. A child's progress, however, does not itself demonstrate that a private placement was appropriate.[20] Unfortunately, even where there is evidence of success, courts will not disturb a state's denial of IDEA reimbursement when the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not. A unilateral private placement can only be found to be an appropriate one if it provides education instruction specifically designed to meet the unique needs of a handicapped child.[21]

Therefore, the most important thing for legal guardians of a child with special needs is to have a good support system in place so that they can receive recommendations and suggestions on how to appropriately educate their child. This is only obtained by meeting with and being treated by physicians and experts in the relevant field of study. Raising any child in New York State can be an expensive and time consuming process but is definitely a labor of love. This is ever more so in the raising of a special needs child. It is vitally important to both the special needs child and the child's parents that the grandparents are involved in this process. One should never underestimate how important it is to parents to be able to leave the child's siblings at home with Grandma and Grandpa while they attend the doctor's appointment, the CSE Meeting, or make their fourth trip to the school this week for their special needs child. Thus grandparents can provide vital guidance, assistance and support to assist in securing the necessary and appropriate services for their grandchildren. Hillary Clinton told us it "takes a village," but at the very least it takes an involved set of grandparents to help raise the special needs child.

Endnotes

1. 20 U.S.C. §1414(a)(1)(A).
2. Walczak v. Florida Union Free Sch. Dist., 142 F. 3d 119, 122 (2d Cir. 1998).
3. D.D. ex rel. V.D. v. N.Y. City Bd. of Ed., 465 F. 3d 503, 507 (2d Cir. 2006).
4. A.D. & M.D. ex rel. E.D. v. Bd of Ed., 2010 Lexis U.S. Dist. LEXIS 11260 (S.D. N.Y. 2010).
5. T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist., 554 F. 3d 247, 254 (2d Cir. 2009).
6. 20 U.S.C. §1400(d)(1)(A).
7. Gagliardo v. Arlington Cent. Sch. Dist., 489 F. 3d 105, 107 (2d Cir. 2007).
8. Id. at 108.
9. 20 U.S.C. §1414(d)(3)(B)(i).
10. N.Y. Comp. Codes R. & Regs. tit. 8, § 200.1(r) (2010).
11. N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(b)(v) (2010).
12. 20 U.S.C. §1415(i)(2)(C).
13. M.N. v. N.Y. City Dep't of Educ., 2010 U.S. Dist. LEXIS 33239 (S.D.N.Y. 2010).
14. 20 U.S.C. §1415(i)(2)(C).
15. Forest Grove Sch. Dist. V. T.A. 129 S. Ct. 2484, 174 L. Ed. 2d 168 (2009).
16. 20 U.S.C. §1415(f)(3)(E)(ii).
17. Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 (S.D.N.Y. 2007).
18. A.D. & M.D., 2010 U.S. Dist. LEXIS 11260 (S.D.N.Y. 2010).
19. Frank G. v. Bd. of Educ., 459 F. 3d 356, 364 (2d Cir. 2006).
20. M.H. & E.K. v. New York City Dep't of Educ., 2010 U.S. Dist. LEXIS 45400 (S.D.N.Y. 2010).
21. Id.

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Family Health Care Decisions Act and Article 17-A: Decision Making for Individuals with Developmental Disabilities or Mental Retardation

By Lauren I. Mechaly

The father of a developmentally disabled child approached me recently, convinced that he did not need to petition the Surrogate's Court for 17-A guardianship of his 18-year-old daughter, and that the need for advance directives was eliminated because the Family Health Care Decisions Act would permit him to make any necessary health care decisions on her behalf. That is, unfortunately, a common misperception of this new law.

As many New Yorkers now know, the Family Health Care Decisions Act ("FHCDA"), signed into law by Governor David Paterson on March 16, 2010 and effective as of June 1, 2010, permits a surrogate to make health care decisions on behalf of an incapacitated patient, including decisions regarding the withdrawal or withholding of life sustaining treatment. The surrogate is selected from a list of individuals provided for in the statute. First on the list of individuals is a court-appointed guardian pursuant to Article 81 of the Mental Hygiene Law ("MHL").[1] However, the FHCDA does not apply to all incapacitated individuals.

In 2002, Governor George Pataki signed the Health Care Decisions Act for Persons with Mental Retardation.[2] Amending Section 1750 of the Surrogate's Court Procedure Act ("SCPA"), and codified as Section 1750-b,[3] this legislation permits 17-A guardians to make health care decisions, including end of life decisions, for individuals with mental retardation who did not have capacity to execute advance directives or to otherwise leave clear and convincing evidence of their end of life wishes. Section 1750-b of the SCPA governs the legal process for health care decision making for mentally retarded individuals.

Pursuant to the FHCDA, if a guardian has been appointed under Article 17-A of the SCPA, health care decisions for the patient will be governed by Section 1750-b of the SCPA.[4] The FHCDA, therefore, does not pertain to individuals with mental retardation or developmental disabilities if a guardian has been appointed.[5]

The 17-A guardian is permitted "to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law…such decisions may include decisions to withhold or withdraw life-sustaining treatment."[6] As defined under the statute, life sustaining treatment includes "cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment …without which…the patient will die within a relatively short time period,"[7] a definition and standard strikingly similar to that under the FHCDA.[8]

"[P]arents of children with special needs should always consider petitioning the Surrogate's Court for guardianship in order to protect their ability to make important health care decisions on behalf of their children."

Further, if a 17-A guardian has not been appointed by the court for an individual with mental retardation or a developmental disability, a family member is permitted to act as guardian for purposes of making a decision to withhold or withdraw life sustaining treatment.[9] Bearing another striking similarity to the FHCDA, the family member must maintain contact with the individual sufficient to have knowledge of the individual's religious and moral beliefs.[10] Decisions should be made in the best interests of the individual.[11]

It should be noted that if consent for a health care decision for a person with mental retardation or a developmental disability may be provided under MHL or Office of Mental Retardation and Developmental Disabilities ("OMRDD") regulations, the FHCDA will not govern, and either the MHL or OMRDD regulations will.[12]

Under the FHCDA, the only circumstance in which the FHCDA will govern health care decision making for a person with mental retardation or a developmental disability is when, "after reasonable efforts it is determined"[13] that the individual does not have a court-appointed guardian, or when the individual does not fall within the class of individuals who should.[14]

Thus, parents of children with special needs should always consider petitioning the Surrogate's Court for guardianship in order to protect their ability to make important health care decisions on behalf of their children. The FHCDA does not replace the need for or importance of guardianship. Appointing a guardian under Article 17-A eliminates unnecessary confusion when it comes to making important medical decisions, and allows parents to continue acting in their child's best interests.

I explained to the father that although he is correct that the FHCDA permits parents to make health care decisions on behalf of their children, his daughter unfortunately would not be covered by this Act. As a child with a developmental disability, the FHCDA does not apply to his daughter and, instead, health care decisions made on her behalf are governed by Article 17-A.

Endnotes

1. N.Y. Pub. Health Law § 2994-d.
2. *See* Press Release, NYS Office of Mental Retardation and Developmental Disabilities, *Governor Pataki Signs Health Care Decisions Act* (Sept. 29, 2002), *available at* http://www.omr.state.ny.us/wt/wt_health_care.jsp.
3. S.C.P.A. § 1750-b.
4. S.C.P.A. § 1750-b; N.Y. Pub. Health Law § 2994-b(3)(a).
5. N.Y. Pub. Health Law § 2994-b(3)(a).
6. § 1750-b(1). Health care decisions are defined by the New York Public Health Law as "any decision to consent or refuse to consent to health care." N.Y. Pub. Health Law § 2980(6). The definition is now provided for in § 2980(9-a).
7. S.C.P.A. § 1750-b(1).
8. N.Y. Pub. Health Law § 2994-d(5). Under the FHCDA, decisions to withhold or withdraw life sustaining treatment are permitted so long as "(i) (t)reatment would be an extraordinary burden to the patient and…(A) the patient has an illness or injury which can be expected to cause death within six months.…" While Article 17-A requires reasonable medical judgment, the FHCDA requires reasonable medical certainty.
9. S.C.P.A. § 1750-b(1)(a); *see also* N.Y. Pub. Health Law § 2994-b(3)(b).
10. *Id.*
11. § 1750-b(2)(a).
12. N.Y. Pub. Health Law § 2994-b(3).
13. § 2994-b(4).
14. § 2994-b(3)(a)-(c).

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Protecting the Elderly and/or Mentally Impaired Nursing Home Patient from Tardive Dyskinesia

By Sandra M. Radna

A 47-year-old woman who was being treated for Depression and Obsessive Compulsive Disorder at Brookdale Hospital in Brooklyn was noted by her doctor, a 4th year medical resident, to have involuntary movements of her face including grimacing, eye squinting, rabbit like movements of her nose and finger tapping. The resident misdiagnosed the patient as having Tourette syndrome,[1] a genetic disorder. The patient was later correctly diagnosed as having Tardive Dyskinesia, a chronic disorder of the nervous system characterized by involuntary jerky movements of the face, tongue, jaws, trunk and limbs usually developing as a late side effect of prolonged treatment with antipsychotic drugs.[2]

If the patient had been correctly diagnosed when the involuntary movements first appeared, and prior to the development of the Tardive Dyskinesia, there is a high likelihood that the symptoms would have completely abated with the discontinuance of the medication. "If the individual with Tardive Dyskinesia remains off neuroleptic medication, the dyskinesia remits within 3 months in one-third of the cases and remits by 12-18 months in more than 50% of cases, although percentages are lower in older persons."[3]

Unfortunately, in the case of *Mills v. Roque et al.*, the medication was not discontinued in time to allow the symptoms to abate and the misdiagnosed patient/plaintiff has permanent, irreversible Tardive Dyskinesia, which has left her disfigured and disabled from employment. The medical malpractice lawsuit against Brookdale Hospital, the resident who treated Ms. Mills and the resident's supervisors resulted in a $7.9 million verdict for the plaintiff in the year 2008.[4]

Antipsychotic medications, also known as neuroleptics, are found in virtually every nursing home. They are prescribed to the elderly to sedate agitated patients and are also utilized as sleep aids. The names of the medications are familiar to those with family members in nursing homes: Seroquel, Haldol, Thorazine, Stelazine, Mellaril, Respiridol and others.

In 2007, it was estimated by the Centers for Medicaid and Medicare Services (CMS)[5] that approximately 30% of nursing home patients are on antipsychotic medications. According to CMS, approximately 21% of the patients who are on antipsychotic medication have not been diagnosed with a psychosis. A 2005 CMS study found that in nursing homes, antipsychotics were being prescribed for depression, memory loss, confusion and feelings of isolation.[6]

In the nursing home population, where patients are kept on medications for extended time periods, where illnesses such as Parkinson's Disease can cause some of the movements that are seen in Tardive Dyskinesia and when the blinking and grimacing associated with Tardive Dyskinesia may be instead attributed to dementia, patients suffering from medication-induced movement disorders are largely undiagnosed.

To protect the elderly or mentally impaired patient who is residing either temporarily or permanently in a skilled nursing facility, this author suggests that it is important that someone, either a family member, health care proxy or guardian, remain aware of any new medications on which the patient is placed. Note should be taken of any new symptoms such as anxiety, also known as akathisia, which is one of the earliest signs of sensitivity to a neuroleptic and may be a precursor to the later development of Tardive Dyskinesia. With the symptom of akathisia, the patient develops an irresistible urge to move about. Patients may repeatedly cross and uncross their legs, sway, change posture, rock or pace.[7]

As most of the early symptoms of Tardive Dyskinesia are involuntary, and the patient is often unaware of the occurrence of the involuntary facial movements, it is important for the patient's family member, health care proxy or guardian to report any new grimacing, twitching, rapid eye blinking, tongue protrusion, lip smacking, pursing or puckering, rapid movement of the arms or legs or other involuntary movements of the head, face, neck and tongue muscles that were not previously present.

The elderly, as well as patients suffering from mental disabilities, are among the most vulnerable patients since they are often ignored or not believed when they complain of bothersome symptoms. Advising clients in your elder care practice to have someone appointed or in charge of watching over their loved one in a nursing home may save the family and the patient a great deal of heartache and suffering.

Endnotes

1. Tourette Syndrome is a complex disorder characterized by repetitive, sudden and involuntary movements or noises called tics. Almost all cases of Tourette Syndrome derive from a variety of the genetic and environmental factors. National Institutes of Health, *www.ghr.nlm.nih.gov/condition/tourette-syndrome.*
2. *The American Heritage Medical Dictionary* (Houghton Mifflin Company, 2004).
3. *Diagnostic and Statistical Manual of Mental Disorders*, Appendix B Criteria Sets and Axes Provided for Further Study, 333.82 Neuroleptic Induced Tardive Dyskinesia (4th ed.).
4. *Mills v. Roque, et al.,* Index #: 19187/04, Kings County, Plaintiff's attorney: Sandra M. Radna of Radna & Androsiglio, LLP.
5. CMS is a U.S. Federal Agency which administers Medicare, Medicaid and the Children's Health Insurance Program.
6. Wall St. J., Dec. 4, 2007.
7. Jeffrey Avorn and Jerry Gurwitz, *Diagnosis and Treatment, Drug Use in the Nursing Home*, Annals of Internal Medicine Aug. 1995, cited in *Escalating Polypharmacy* by D.A. Gorard Nov. 1, 2006.

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Grantor Retained Annuity Trusts: An Estate Planning Golden Opportunity

By Patricia Galteri, Nathaniel L. Corwin and Carmela T. Montesano

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For the first time since its original enactment in 1916 there is, at least as of the date of this writing, no Federal estate tax. Pursuant to the provisions of EGTRRA, adopted in 2001, the tax has been repealed for a one year period commencing January 1, 2010.[1] In light of current economic conditions and the growing Federal budget deficit, permanent repeal of the Federal estate tax is unlikely and the tax will, if not addressed by the President and Congress this year, return with a vengeance on January 1, 2011 with a $1 million exemption amount and graduated rates topping out at 55%. The Federal gift tax, however, remains in place for 2010 with a $1 million exemption amount and graduated rates maxing out at 35%, the lowest gift tax rate in many years. As of January 1, 2011, the top gift tax rate is scheduled to rise to 55%.

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This article addresses one of several estate planning vehicles appropriate for the current low interest rate environment: the inter vivos trust commonly known as a "grantor retained annuity trust" ("GRAT"). Use of a GRAT is specifically authorized under the Internal Revenue Code and the regulations thereunder.[2] Despite the current legislative uncertainty, GRATs continue to provide a golden opportunity for taxpayers to transfer wealth to their beneficiaries with potentially minimal transfer tax consequences and should be considered by taxpayers as a potential part of their estate plans.

A. What Is a GRAT?

A GRAT is a trust to which a taxpayer irrevocably transfers assets in exchange for an annuity payable to the taxpayer for a fixed term of years selected by the taxpayer ("Fixed Term"). The annuity payments received by the taxpayer may be expressed either as a specific dollar amount or as a percentage of the initial fair market value of the trust. If the taxpayer survives the Fixed Term, any remaining trust assets will pass to the taxpayer's selected beneficiaries free of gift tax. The taxpayer receives back through the annuity payments the initial property he or she transferred to the GRAT and thus retains control and enjoyment of the assets.

The transfer of property to a GRAT is a taxable transfer for gift tax purposes. The value of the gift is equal to the fair market value of the property transferred to the GRAT minus the value of the annuity retained by the taxpayer. To value the annuity interest, the IRS uses the interest rate determined under §7520 of the Internal Revenue Code in effect for the month of the transfer of the property to the GRAT.[3] The §7520 rate for July 2010 is 2.8%, historically a *very* low rate. The IRS assumes the assets in the GRAT will grow at a rate equal to the §7520 rate. The §7520 rate is known as the "hurdle rate" because the assets contributed to the GRAT must appreciate in value above that key rate to pass wealth to the taxpayer's selected beneficiaries.

As of this writing, a GRAT may be structured so that the value of the annuity interest equals the original contribution, thereby causing the value of the gift to be minimal (if not zero) with no gift tax due on the transfer to the GRAT. Such a GRAT is often referred to as a "zeroed-out GRAT."[4]

B. Objectives

The primary objective of a GRAT is to transfer to the taxpayer's beneficiaries any appreciation in the GRAT property over the applicable §7520 interest rate, with minimal or no gift tax cost. In a near zero GRAT,

if the property grows faster than the applicable §7520 interest rate (2.8% in July 2010), any appreciation in the GRAT assets over the applicable §7520 interest rate passes to the taxpayer's beneficiaries gift tax free, provided the taxpayer survives the Fixed Term of the GRAT. With applicable interest rates near historic lows, the chances of a successful GRAT are substantially increased.

C. Estate Tax Consequences

If the taxpayer does not survive the Fixed Term, the property transferred to the GRAT is includible in the taxpayer's gross estate, which is the same result as if the property had not been transferred to the GRAT. Accordingly, other than legal, accounting and possibly appraisal costs, there is essentially no estate planning risk, as a taxpayer who does not survive the Fixed Term is in the same position as if he or she had not created the GRAT. If the taxpayer does survive the Fixed Term, any appreciation in the GRAT property over the hurdle rate is removed from the taxpayer's gross estate. A GRAT can thus achieve an estate tax freeze with potentially nominal or no gift tax cost.

D. Income Tax Consequences

A GRAT is a grantor trust for income tax purposes, meaning that the taxpayer is responsible for the payment of income taxes incurred by the GRAT.[5] While grantor trust status may not initially appear to be advantageous or desirable, the GRAT assets grow income tax-free. Payment of the income taxes by the taxpayer is thus essentially an additional tax-free gift to the GRAT beneficiaries. Because the income and capital-gains tax rates are historically lower than the gift and estate tax rates, grantor trust status allows the taxpayer to pass on more wealth to his or her beneficiaries.

E. Does the 2010 Repeal Period Provide Special Planning Opportunities for GRATS?

The absence of a Federal estate tax would impact taxpayers who have created a GRAT and do not survive the Fixed Term, dying during the year 2010 and causing the GRAT assets to be includible in the taxpayer's gross estate. While no Federal estate tax would result (at least as of the date this article goes to publication), such a GRAT will not have achieved its purpose of transferring to the taxpayer's beneficiaries any appreciation in the GRAT property.

Most appealing in 2010 are the low Federal gift tax rates (topping out at 35%). For those taxpayers who are considering creating a non-zeroed-out GRAT in excess of the $1 million gift tax exclusion or who have made previous gifts which have used up their exemption, the lower gift tax rates in effect in 2010 afford an opportunity to make gifts at a substantially reduced gift tax cost. The low gift tax rates will not impact those taxpayers creating zeroed-out GRATs or taxpayers creating GRATs within their $1 million gift tax exemption.

Taxpayers should weigh their 2010 planning opportunities against the possibility that Congress may enact legislation for calendar year 2010 restoring the Federal estate tax and the 2009 transfer tax rates, which legislation may be retroactive to January 1, 2010.[6]

F. Proposed Legislation

Federal legislation is pending that would limit the use of certain types of GRATs.[7] The legislation would: (i) require that GRATs have a minimum term of ten years; (ii) require that GRATs have some minimum remainder interest; and (iii) preclude the use of GRATs where the annuity amounts decrease during the first ten years of the trust term. The legislation would apply to transfers made after the date of enactment.

G. Viability of GRATS if Proposed Legislation Is Passed

Unless and until the proposed legislation limiting the use of GRATs is enacted into law, zeroed-out GRATs remain a viable planning opportunity. Even if the legislation is enacted, utilization of GRATs within the confines of the proposed legislation will continue to offer substantial transfer tax savings opportunities, especially in the current low interest environment. For taxpayers who may be considering creating one or a series of zeroed-out GRATs, the possibility of enactment of the proposed legislation is an incentive to act now.

H. When Should a Taxpayer Consider Using a GRAT?

A GRAT may be particularly appropriate for taxpayers with assets in excess of the applicable exemption amount (which under current law is scheduled to be $1 million as of January 1, 2011) and who wish to make lifetime gifts in excess of the $13,000 annual per donee exclusion. GRATs may be structured in a variety of ways, but should be used only when the taxpayer is expected to survive the Fixed Term and are most effective when funded with assets that may be expected to outperform the applicable §7520 rate (either because the asset is an income-producing asset, an appreciating asset or both). Assets that are entitled to valuation discounts such as that for lack of marketability or minority interests, or that are temporarily depressed immediately prior to the transfer to the GRAT, are also excellent candidates for a GRAT. GRATs may be structured in many different ways, depending upon the taxpayer's age, health, personal and long term objectives, income tax considerations and assets.

Endnotes

1. Economic Growth and Tax Relief Reconciliation Act of 2001. Pub. L. No. 107-16, 115 Stat. 38 (2001).
2. 26 U.S.C. §2702(b) and C.F.R. §25.2702-3. GRATs are a statutory exception to the general rule of Internal Revenue Code §2702(a), which ascribes a zero value to the retained interest for transfers in trust to or for the benefit of specified members of a taxpayer's family. 26 U.S.C §2702(a) and C.F.R. §25.2702-1. Valuation of the retained interest at zero results in the full amount of the property transferred in trust (the remainder interest) to be valued at full value.
3. The §7520 rate is published monthly by the IRS pursuant to Internal Revenue Code §7520 and is used to calculate the present value of term interests, life interests, annuities and remainders. 26 U.S.C. §7520. It is 120% (rounded to the nearest 2/3 of 1%) of the applicable federal rate for mid-term obligations with semi-annual compounding ("AFR"). AFRs are calculated and published by the IRS monthly for use in the following month, based on the previous month's weighted average market yield for marketable Treasury obligations of the same duration and with semi-annual compounding of interest. 26 U.S.C. §1274(d).
4. *See Walton v. Comm'r*, 115 T.C. 589 (2000).
5. 26 U.S.C. §677.
6. *See* CCH Tax Briefing, *Federal Estate Tax (H.R. 4254)*, (CCH), December 28, 2009; David Kocieniewski, *Legacy for One Billionaire: Death, but No Taxes*, N.Y. Times, June 8 at A1.
7. Passed by the House of Representatives on March 24, 2010, H.R. 4849, 111th Cong. (2010), but not acted upon by the Senate, the legislation was reintroduced in the House as part of the Small Business Jobs Tax Relief Act of 2010, H.R. 5297, 111th Cong. (2010), passed on June 15, 2010.

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The Infant's Compromise: From Settlement to Hearing

By Jeffrey M. Donato

As a personal injury attorney, I frequently represent clients that are governed by Article 12 of the New York State CPLR. Article 12 specifically deals with the legal requirements for representation and settlement of claims when the client is under some type of disability. In my practice, most often I deal with the disability of infancy, however, the elder law attorney must be equally aware that the law applies to clients that are incompetent and/or require the appointment of a guardian under Article 81 of the New York State Mental Hygiene Law (MHL). This article is intended to help explain some basic issues associated with representing an infant/incompetent person. Further, it is meant to touch upon some of the nuances of settling claims, and the actual Infant's/Incompetent's Compromise Hearing (collectively hereinafter referred to as an Infant's Compromise Hearing).

"[T]hings are different when you try to settle a bodily injury claim for an infant/incompetent. The infant/incompetent needs protection from many people, including greedy lawyers, friends, family members, and society at-large."

Section 1201 of the CPLR[1] states that unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property, a parent having legal custody, or if no such parent, by another person having legal custody, or if married, by an adult spouse residing with the infant. With regard to a person judicially declared to be incompetent, this person shall appear by "the committee of his property." A conservatee[2] shall appear "by the conservator of his property." If a guardian ad litem is appointed because of a conflict of interest or for other causes, the court may allow the guardian ad litem to appear.[3] Regardless of who appears on behalf of the person under a disability, the intent of the law is clear. The court must give special attention to protect the rights of the infant/incompetent/conservatee.

In a typical personal injury matter, settlement of the underlying bodily injury claim is a fairly simple process. The injured party signs a general release in favor of the alleged tortfeasor and the insurance company. The insurance company pays the agreed upon settlement, and the parties go their separate ways. However, things are different when you try to settle a bodily injury claim for an infant/incompetent. The infant/incompetent needs protection from many people, including greedy lawyers, friends, family members, and society at-large. Representation of the client who suffers the disability becomes more challenging. In short, the court must become involved, and any time the court is involved, matters become more complex.

Representing a client suffering from a legal disability requires some extra leg-work. If the case is already in suit, one must file a petition (typically by order to show cause/notice of motion) to have the court set an Infant's Compromise Hearing. If a lawsuit has not been commenced, a special proceeding must be initiated. This authority to settle the claim in these matters is governed by NYS CPLR Section 1207.[4]

In order to move forward with the settlement of a personal injury claim brought by or on behalf of a person suffering a legal disability, the court charged with protecting the disabled person is usually looking for full disclosure of all relevant information prior to allowing settlement of the claim. NYS CPLR Section 1208 sets forth the proper procedure and papers required in presenting the Infant's Compromise petition and appearance at the Infant's Compromise Hearing. Specifically, CPLR 1208 requires the following:

A. The affidavit of the infant or incompetent's representative which shall state:

1. the infant's name, residence and relationship to the infant or incompetent;
2. the name, age and residence of the infant or incompetent;
3. the circumstances giving rise to the action or claim;
4. the nature and extent of the damages sustained by the infant or incompetent; and if the action or claim is for damages for personal injuries to the infant or incompetent, the name of each physician who attended or treated the infant or incompetent or who was consulted; the medical expenses, the period of disability, the amount of wages lost, and the present physical condition of the infant or incompetent;

5. the terms and proposed distribution of the settlement and his (the infant's/incompetent's) approval of both;

6. the facts surrounding any other motion or petition for settlement of the claim, of an action to recover on the same claim of the same action;

7. whether reimbursement for medical or other expenses has been received from any source; and whether the infant's or incompetent's representative or any member of the infant's or incompetent's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's or incompetent's claim,

8. and if so, the amount paid or to be paid in settlement of such claim or if such claim has not been settled the reasons therefore.

B. Affidavit of attorney: If the infant or incompetent or his representative is represented by an attorney, an Affidavit of the Attorney shall be included in the supporting papers and shall state:

1. his reasons for recommending the settlement; and

2. that directly or indirectly he has neither become concerned in the settlement at the instance of a party or person opposing, or with interests adverse to, the infant or incompetent, nor received nor will receive any compensation from such party, and whether or not he has represented or now represents any other person asserting a claim arising from the same occurrence.

3. the services rendered by him.

C. Medical or hospital report: If the action or claim is for damages for personal injuries to the infant or incompetent, one or more medical or hospital reports, which need not be verified, shall be included in the supporting papers.

D. Appearance before court: On the hearing, the moving party or petitioner, the infant or incompetent, and his attorney shall attend before the court unless attendance is excused for good cause.

E. Representation: No attorney having or representing any interest conflicting with that of an infant or incompetent may represent the infant or incompetent.

F. Preparation of papers by attorney for adverse party: If the infant or incompetent is not represented by an attorney, the papers may be prepared by the attorney for an adverse party or person and shall state that fact.

The Affidavit of the Infant or the Incompetent's representative is the key document the court will review in determining whether or not a proposed settlement is acceptable. Usually, the representative is in the best position to know the needs, wants, and desires of the infant/incompetent person. Frequently, the representative knows the injured party very well, and is a close family member or friend. The representative has often helped the injured party with his or her daily needs and may have even attended appointments with the needed treatment providers. Many times the representative can best speak for the injured party. However, it should be noted that the court may (when it deems necessary) also ask for an Affidavit of the infant or incompetent person (usually when the infant is over the age of 14). Finally, it should be noted that this representative may also be best suited to tell the court of the existence of any other claimants and the status of those claims.[5]

The attorney, on the other hand, is in the best position to explain to the court why the proposed settlement is acceptable, in the best interests of the injured party, and should be accepted by the court. The attorney has already judged the situation based on his/her experience, and based on the particular facts of this claim. The Affidavit of the Attorney must explain the availability of additional insurance or assets against which the infant/incompetent plaintiff might collect, or concerns about liability if the case is tried.[6] The attorney must list and explain the expenses/disbursements and any liens on the matter. Just as the client looks to the attorney for advice, the judge will look to the Affidavit of the Attorney[7] for guidance.

The Affidavit of the Attorney is also required so that the court can approve the legal fee being requested. The Affidavit of the Attorney is the place to give a detailed list of all work performed. In my experience, usually the more-detailed the list, the less likely the court will scrutinize the legal fee. Typically, the legal fee as outlined in the retainer agreement is acceptable to the court, assuming that the attorney has done an adequate job at legal representation.

The Medical or Hospital Report is where the court will look for an evaluation of the seriousness and permanency of the injuries sustained. Although most courts will accept a simple, non-verified, signed medical or hospital report, timeliness of such report and of the treatment itself is of great concern.[8] The court wants to ensure that the injuries claimed are explained thoroughly and more importantly that the report is done recently. In *Guerra v. Fernandez*, the court stated that

"only by recent medicals can the court properly assess the severity of the injuries in relation to the proposed settlement, consistent with the court's obligation and duty to such infants who sustain personal injuries."[9]

In practice, it is usually best to submit an Affidavit of the Physician/Health Care Provider where possible. To be sure that it is current, check with the Clerk of the Court for timeliness of medical reports. In my experience, the court usually will approve the claim where the treatment provider's Affidavit/report is less than 90 days old. Further, the court wants to ensure that the medical bills have been or will be paid, and to know the source of such payment.

It is also important to note that the court will set a date for a mandatory appearance. The conversation that is had between the Infant/Incompetent and the Judge is more important than all of the above documents. I have appeared on Infant's Compromise Hearings both in open court and in chambers. The location does not matter. Typically, the format is the same (although checking with local court rules is always the best practice). The court is looking to get a real sense of what happened. Almost always, the Infant's Compromise Hearing is conducted on the record, with a court reporter. The opposing party must be put on written notice of the hearing; however, usually they will send a written notification waiving appearance. Depending on the circumstances of the matter, a lienholder may also need to be notified. With all necessary parties appearing, the hearing begins.

The court is brought to order and almost always the judge tries to put the Infant/Incompetent and the representative at ease, knowing their unfamiliarity with the process. After a brief recitation of facts (either by the court or the attorney), in most cases the court simply asks questions of the injured party and/or his/her representative. It is in this exchange that the court usually makes its decision. Although the court has had the opportunity to review the written submissions, the court is looking to see that the representative and/or the injured party is not being pushed into a settlement, but also finds the settlement acceptable for themselves. The court wants to make sure that the injured party/representative understands the scope of the settlement and that no further legal action will be allowed. There must be an understanding that any settlement proceeds being held in escrow for the injured party will be made available to the injured party as determined by the court. Usually any funds are to be made available immediately upon the conclusion of any disability. In the case of infancy this is usually upon reaching age 18. However, the court can make its own decision in all cases, including what to do with the funds until and even after the period of disability ends.

Many attorneys are surprised to learn that in almost all cases in which an attorney handles an Infant's Compromise Hearing, things go smoothly, and the court will approve the settlement that day. Less frequently (but sometimes) the court will take matters under further advisement. Nevertheless, in my opinion, unless there are major issues, court approval usually comes within 30 days.

"While the court is there to protect the disabled person, you still must be an advocate."

As counsel for the Infant/Incompetent, you would be wise to fully discuss the claim, the settlement, and the Infant's Compromise Hearing itself with the Infant/Incompetent and the representative prior to the appearance. Just as in any situation in representing a client, failure to plan, discuss and communicate with the client is a disservice to everyone involved. You will make the client feel better about the unknown Infant's Compromise Hearing, and simultaneously prepare the client for the court's inquiry. While the court is there to protect the disabled person, you still must be an advocate. If you believe that the settlement is sound, explain your reasoning to everyone. Most times, the court and the client will listen.

Endnotes

1. N.Y. CPLR 1201: Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property. A person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent, or other person or agency having legal custody, or adult spouse with whom he resides, or if he is an infant, person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the mental hygiene law and the court so directs because of a conflict of interest or for other cause, or if he is an adult incapable of adequately prosecuting or defending his rights.
2. Although most guardianships today are governed by Article 81 of the MHL, Article 12 of the CPLR still uses the terms "conservator" and "conservatee" of the property.
3. "It is well settled that a guardian ad litem may be appointed by a court at any stage of an action in which an adult is incapable of adequately prosecuting or defending his or her rights." *Tudarov v. Collazo*, 215 AD 2d 750, NY Supreme Court, Appellate Div., 2d Dept. 1995, see also *Hughes v. Physician's Hospital*, 149 Misc.2d 661.
4. CPLR 1207 Settlement of action or claim by infant, judicially declared incompetent or conservatee, by whom motion made; special proceeding; notice; order of settlement. Upon motion of a guardian of the property or guardian ad litem of an infant

or, if there is no such guardian, then of a parent having legal custody of an infant, or if there is no such parent, by another person having legal custody, or if the infant is married, by an adult spouse residing with the infant, or of the committee of the property of a person judicially declared to be incompetent, or of the conservator of the property of a conservatee, the court may order settlement of any action commenced by or on behalf of the infant, incompetent or conservatee. If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the infant, incompetent or conservatee in any court where an action for the amount of the proposed settlement could have been commenced. Unless otherwise provided by rule of the chief administrator of the courts, if no motion term is being held and there is no justice of the supreme court available in a county where the action or an action on the claim is triable, such a motion may be made, or special proceeding may be commenced, in a county court and the county judge shall act with the same power as a justice of the supreme court even though the amount of the settlement may exceed the jurisdictional limits of the county court. Notice of the motion or petition shall be given as directed by the court. An order on such a motion shall have the effect of a judgment. Such order, or the judgment in a special proceeding, shall be entered without costs and shall approve the fee for the infant's, incompetent's or conservatee's attorney, if any.

5. The court will usually want a complete picture of the accident or injury producing event, and as in the case of motor vehicle accidents, will want the names and status of each passenger. This is typically to ensure that there is no collusion, and also to ensure that the infant/incompetent claimant is receiving the best possible recovery under the circumstances.
6. *Edionwe v. Hussain*, 7 A.D.3d 751 (2d Dept. 2004).
7. CPRL 2106. *Affirmation of truth of statement by attorney, physician, osteopath or dentist*. The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.
8. In *Edionwe v. Hussain*, 7 A.D.3d 751 (2d Dept. 2004), the court stated that "Although the record indicates that timely medical treatment is needed to assure the proper formation and growth of the infant plaintiff's face, there is no evidence that such treatment has been rendered or scheduled in the almost five years that this case has been pending, or that there has been any precise inquiry into the type, timing, and cost of the medical treatment that will be required."
9. 149 Misc.2d 25, NY Sup. Ct., Queens Co. 1990.

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State Veterans Homes: The Best Option for Veterans Requiring Skilled Nursing Care

By Fred S. Sganga

Following the Civil War, a large number of indigent and disabled veterans were no longer able to earn their own livelihood and needed care. While the Federal government operated national homes for disabled Union soldiers, the total number of veterans needing care was overwhelming. During President Lincoln's second inaugural address, Lincoln called upon Congress "to care for him who shall have borne the battle…." In recognition of this, a number of states independently established State Veterans Homes to help care for these soldiers. The first State Veterans Home was established in Rocky Hill, Connecticut in 1864.

Today, State Veterans Homes are one of the largest long-term care providers in the United States, providing nearly seven million days of nursing home care each year. There are 137 State Veterans Homes throughout the United States and Puerto Rico totaling more than 30,000 nursing home beds. Each State has at least one State Veterans Home facility. The State Veterans Home Program is a partnership between the U.S. Department of Veterans Affairs and the various States. A State Veterans Home is owned and operated independently by the State. However, the U.S. Department of Veterans Affairs oversees the State Veterans Home Program through the Office of Geriatrics and Extended Care, assuring Congress that State Veterans Homes are providing quality care through various inspections and audits.[1]

A. New York State Veterans Homes

There are over one million veterans living in New York State.[2] To care for these aging veterans, New York is fortunate to have five State Veterans Homes. The New York State Department of Health operates four State Veterans homes: a 242 bed nursing home in Oxford, Chenango County; a 250 bed nursing home located in St. Albans, Queens; a 126 bed nursing home in Batavia, Genesee County; and a 250 bed nursing home in Montrose, Westchester County. The Long Island State Veterans at Stony Brook University, located in Suffolk County, is a 350 bed nursing home on the campus of Stony Brook University and is operated by the Health Sciences Center of Stony Brook University.

B. Eligibility Requirements of New York State Veterans Homes

To be eligible for care at New York State Veterans Homes, the individual must require skilled nursing care and be a qualified honorably discharged veteran of the armed forces of the United States who is a current or past resident of New York State. Admission is open to all honorably discharged veterans regardless of the period of service (war or peace time service), service connected disability or geographical location in which the veteran served in the military. New York State Veterans Homes will also accept admission for the spouse or un-remarried surviving spouse of a qualified honorably discharged military veteran or a Gold Star parent (a parent who has lost a son or daughter during military service). Priority is given to "wartime" veterans whose skilled nursing needs are most critical.[3]

C. State Veterans Homes—The "Caring" Advantage

Caring for veterans is a responsibility and duty for all Americans, and the employees at State Veterans Homes are those who are charged with repaying "that debt of honor." State Veterans Homes are not your typical community nursing homes; they are special places that have a distinct mission to serve those who have served our country. The mission, vision, and values of caring for "America's Heroes" are often reflected in the culture of the employees. Due to the complexities of the aging process, it is difficult to create a system to accurately quantify what "quality care" is; however we can all clearly determine what it is not. We believe the culture of an organization has a profound impact on the care being provided to the residents. A positive culture in an organization often translates into high employee morale, lower turnover and fewer job vacancies. Lower employee turnover and consistency in staffing allows caregivers to develop a better relationship with their residents. These relationships help caregivers "know their residents" and better understand their needs. Among the six hundred nursing homes in New York State, all five New York State Veterans Home have consistently exceeded the State average and ranked exceptionally high in nursing care hours per resident per day.[4] Research studies have shown that there is a positive relationship between increased nursing staff levels and the quality of care delivered to nursing home residents.[5] In addition, a review of customer satisfaction data from Pinnacle Quality Insight reveals that State Veterans Homes across the country consistently receive

higher satisfaction scores from nursing home residents and their families. Measurements include nursing care, dining, cleanliness, individual needs, communication, dignity, activities, therapy and safety.[6]

While all long term care facilities focus on providing outstanding quality of care, State Veterans Homes place equal focus on providing outstanding quality of life. It should be noted that the average nursing home in the United State has a 75% female to 25% male ratio. Typically, State Veterans Homes have a 90% male to 10% female ratio. This variance in the population ratio makes State Veterans Homes a different kind of facility with a different emphasis on dining, therapeutic recreation activities and maintaining strong relationships with the community. Understanding our predominantly male population and generation that we serve, we appreciate how food has become an important aspect in their quality of life in a nursing home. To enhance the residents' quality of life, State Veterans Homes often offer enhanced dining programs that include hearty meals with more selections, additional meal alternatives and more evening snacks. Therapeutic recreation activities are designed around more male-related interests to provide the social, creative and intellectual stimulation that is vital to our residents' emotional and physical well-being. Our diverse array of programs include cooking programs, Snoezelen multisensory stimulation therapy, photography, pet therapy, computer workshops, Nintendo Wii and touch screen video games, adult education seminars, sports and fitness, table games and so much more. With frequent live entertainment, holiday and birthday celebrations, intergenerational programs with elementary, high school and college students, visits from many community groups and Veterans Service Organizations, our programs are always exciting and our residents remain to be active participants in the community.

State Veterans Homes also receive tremendous support from various veteran service organizations in their local community, including the American Legion, Veterans of Foreign Wars, AMVETS, etc. These groups sponsor activities and events that are meaningful to the veteran population as well as their families. In addition, many of the veterans service organizations provide funding for the purchase of state-of-the-art technology that is used both clinically and therapeutically to enhance the long-term care experience of those who we serve.

As mission driven organizations, State Veterans Homes are able to meet the care needs of a variety of veterans. Whether it's short term sub-acute rehabilitation, Alzheimer's or dementia care in a safe and secure environment or the pain management of "end of life"-palliative care, all State Veterans Homes take pride in providing a place any veteran can call home. Recognizing that military service is the foundation for the freedoms we enjoy today as Americans, caregivers at State Veterans Homes pride themselves in providing a safe, comfortable, homelike environment that offers a full array of services.

D. State Veterans Home—The Economic Advantage

Long term care in New York State can be very expensive. According to the latest Cost of Long Term Care survey performed by Genworth Financial Inc.,[7] the average annual cost for skilled nursing care in New York State ranges from $98,000 per year in the Syracuse area to $159,000 per year in New York City. Choosing a New York State Veterans Home for skilled nursing care can provide a veteran with significant economic savings. The daily rate for skilled nursing care at a New York State Veterans Home is considerably less than the regional average, providing the consumer the best value based on cost and level of services provided.

Figure 1
Average Cost of Skilled Nursing Care
New York State (by Region)

1.	New York City	$159,790/yr.
2.	Long Island	$149,088/yr.
3.	Rochester Region	$111,325/yr.
4.	Buffalo Region	$109,865/yr.
5.	Syracuse Region	$98,550/yr.

National Average: $75,190/yr.
2010 Cost of LTC Survey, Genwoth Financial Inc.

1. There Are a Number of Financial Benefits and Incentives Available for Veterans Utilizing New York State Veterans Homes for the Provision of Skilled Nursing Care:

Federal Per Diem Payment—A Benefit for Veterans Paying Privately (out-of-pocket) at NYS Veterans Homes

The Federal Per Diem Payment program will assist any honorably discharged veteran who is paying privately (out-of-pocket) for their skilled nursing care if they utilize a New York State Veterans Home. The Veterans Administration will pay each State Veterans Homes a per diem rate for every honorably discharged veteran requiring skilled nursing care in the State Veterans Home (38 U.S.C. § 1741). For the Federal fiscal year 2009/10, the federal per diem rate is $77.53 per veteran and for FY 2010/11 the rate will be $94.59. New York State Veterans Homes will apply the Federal Per Diem payment as a credit to the veteran's monthly statement. This per diem payment will reduce the daily rate for any veteran who is paying privately (out-of-pocket) for skilled nursing care and significantly lower his or her monthly bill. The veteran will save over $28,000 per year utilizing this per diem benefit. For example, the private pay rate at the Long Island

State Veterans Home at Stony Brook is $372.53 per day minus the Federal per diem of $77.53 for an actual cost of $295 per day. Spouses, surviving spouses and Gold Star parents are not entitled to the Federal Per Diem payment.

Figure 2
Estimated FY 2010 Private Pay Daily Rates for Veterans at NYS Veterans Homes
Veterans Receive $77/day Federal Per Diem Credit (FPDC)

	Private Pay Rate – FPDC = Daily Rate for a Veteran
Stony Brook	$372 – $77 = $295 or $107,675/yr.
St. Albans	$300 – $77 = $253 or $92,345/yr.
Montrose	$300 – $77 = $223 or $81,395/yr.
Oxford	$285 – $77 = $208 or $75,920/yr.
Batavia	$270 – $77 = $193 or $70,445/yr.

NYS Veterans Homes have lower daily rates than the average cost of skilled nursing care in the region.

2. Non-Service Connected Disability Pension Benefit—Aid and Attendance: A Special Exemption for Single Veterans on Medicaid in State Veterans Homes

For this discussion, we will focus on the special Aid and Attendance pension exemption for single veterans participating in the Medicaid system who reside in State Veterans Homes for the provision of their skilled nursing care. Aid and Attendance (A&A) is a needs-based pension benefit for low-income veterans who are disabled and require the regular attendance of another person to assist in bathing, dressing, meal preparation, medication monitoring or other various activities of daily living (U.S.C. 38 § 1521). Aid and Attendance is a non-service connected disability pension; therefore the disability is not related to an injury or illness sustained during or a result of military service and a VA disability rating is not required. The individual is deemed disabled if he or she is a resident of a nursing home because of mental or physical incapacity (38 CFR § 3.351(c)(2)). The purpose of this benefit is to provide supplemental income to disabled or older veterans who have a low income.

To qualify for this benefit, the veteran needs to be an honorably discharged veteran (discharged under conditions other than dishonorable) who served at least ninety days of "wartime service" as designated by the VA (38 CFR § 3.3(a)(3)) (38 U.S.C. § 1521(j)). The veteran needs to be sixty-five years old or older, or permanently and totally disabled, not due to willful misconduct. Financially, the veteran needs to have countable income below a yearly limit set by law. If the veteran's income exceeds the applicable maximum annual pension amount, then there is no award. However, income can be adjusted for unreimbursed medical expenses (i.e., nursing home expenses, Medicare premiums), and this allows veterans with household incomes larger than the pension amount to qualify for a monthly benefit.

Figure 3
Qualifying Dates of "Wartime Service"

World War II—	December 7, 1941 through December 31, 1946
Korean Conflict—	June 27, 1950 through January 31, 1955
Vietnam Era—	August 5, 1964 through May 7, 1975 (February 28, 1961 through August 5, 1964 if served in Republic of Vietnam)
Persian Gulf War, Iraq, Afghanistan	August 2, 1990 through a future date to be set by law

A single veteran who qualifies for Medicaid and is entitled to Aid and Attendance pension benefits will receive a greatly enhanced award amount. Veterans residing in community nursing homes (a non-State Veterans Home) are entitled to a pension award of $90 per month. Beneficiaries who are living in a State Veterans Home are exempt from this pension reduction. Legislation (P.L. 102-40) was enacted to grant an exemption from the $90 pension limitation to Medicaid-eligible veterans residing in State Veterans Homes. This exemption allowed qualifying veterans to receive their full pension award (38 U.S.C. § 5503(d)(1)). In addition, the Aid and Attendance pension award is disregarded as a resource for Medicaid purposes (NYS Medicaid Resource Guide, 317, March 2000). This disregard allows the veteran to keep the additional monthly income for his or her own personal use. Single veterans on Medicaid who reside at a State Veterans Home for their skilled nursing care will receive up to $658 per month for their own personal use. It is important that the veterans and/or family be aware that the additional income must not exceed the allowable assets limit of $13,800 set by Medicaid. This may disqualify the beneficiary from Medicaid benefits.

3. VA Pays Full Cost of Nursing Home Care at State Veterans Homes for Veterans with 70% or Greater Service Connected Disability

The Department of Veterans Affairs has established a rating schedule to aid in the evaluation of disabilities resulting from disease or injury during or as a result of military service. The disability rating percentage is an estimate of the reduction in earning capacity resulting from the disability. The disability rating can range from 0% to 100%. The Department of Veterans Affairs

will pay State Veterans Homes the full cost to provide skilled nursing care to a veteran with a service connected disability rated at 70% or greater. There are no out-of-pocket costs charged to the veteran. The veteran's skilled nursing care is completely paid for by the VA if the 70% or greater service connected disabled veteran resides at a State Veterans Home for his or her long term care (38 U.S.C. § 1745). There is no means test or income limitation associated with this benefit. In addition, the veteran is entitled to keep all social security, pensions or other income that would normally be used to offset his or her costs in a long term care facility.

When working with a client who is an honorably discharged veteran of the United States Armed Forces and requires long-term care, strong consideration of the State Veterans Home program should be your first priority. Our veterans certainly protected the freedoms we all enjoy today and we should be sure that they access all their entitlements when seeking out long term care services.

Endnotes

1. *See* National Association of State Veterans Homes, www.nasvh.org (last visited July 27, 2010).
2. TABLE 508. VETERANS BY SEX, SELECTED PERIOD OF SERVICE, AND STATE: 2008 (2008), http://www.census.gov/compendia/statab/2010/tables/10s0508.pdf .
3. N.Y. PUB. HEALTH LAW § 2632 (McKinney 2007).
4. Http://www.medicare.gov/NHCompare/Include/DataSection/Questions/ProximitySearch.asp (follow step one: "Find a Nursing Home within a State); then choose "New York;" then compare "Nursing Home Staffing."
5. Xinzhi Zhang, MD & David Grabowski, *Nursing Home Staffing and Quality Under the Nursing Home Reform Act*, 44 THE GERONTOLOGIST 13, 13-23 (2004) *abstract available at* http://gerontologist.oxfordjournals.org/content/44/1/13.abstract.
6. Pinnacle Quality Insight ("Pinnacle") conducts independent consumer surveys for over 1,100 healthcare facilities nationwide. Pinnacle Quality Insight, *Company*, http://www.pinnacleqi.com/company/. Pinnacle provides statistical comparisons within the industry, monthly and annual trending, and data benchmarking studies that compares the performance of State Veterans Homes with other skilled nursing homes across the country. Pinnacle Quality Insight, *Customer Satisfaction*, http://www.pinnacleqi.com/products/customer_satisfaction/.
7. NEW YORK STATE SPECIFIC DATA FROM THE GENWORTH 2010 COST OF CARE SURVEY (2010), http://www.genworth.com/content/etc/medialib/genworth_v2/pdf/ltc_cost_of_care.Par.3361.File.dat/New%20York_gnw.pdf.

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FOREIGN LANGUAGE DATABASE

Are you fluent in another language (both reading and writing)? If so, please let us know. Your colleagues may have referrals for you. Many of our members have potential clients who speak languages other than English. These potential clients need attorneys who speak their language.

The Elder Law Section is starting a database of the foreign languages spoken by our members. If you can READ, WRITE and SPEAK another language, please let us know, so that we can include you in that database.

Please send your name, address, email, phone, and fax, as well as the languages other than English in which you are fluent, to Sharon Kovacs Gruer's assistant, Melinda, at MelindaY@SharonKovacsGruer.com.

Limited Partnerships and Limited Liability Companies: Holding Company Valuation Observations for Practitioners

By Hugh Lambert

Limited partnerships ("LPs"), including Family Limited Partnerships, and Limited Liability Companies ("LLCs") are popular entity choices because of: (1) the flexibility their ownership structures allow; (2) the many operational benefits they provide, including centralized management, creditor protection and expense efficiencies, among others; and (3) the leverage obtained through valuation discounts. LPs and LLCs are widely used in private equity and hedge funds, real estate investments and family wealth planning. Ownership structures for these entities allow flexibility to set up preferred returns, nonvoting ownership and limit ownership transfer. This article will discuss the valuation subtleties regarding LPs and LLCs that are used as asset holding companies.

The valuation of LP and LLC interests requires appraisers to consider many variables, to assess the value of assets held *within* the entity, as well as to determine the discounts to apply to the entity. Discounts that typically apply to LP and LLC equity interests include a lack of control discount and a lack of marketability discount.

Valuation discounts can vary widely depending on the nature of the assets within the LP or LLC, the market conditions at the specific valuation date and the specific terms of the LP or LLC agreement. Attorneys, accountants and other financial planners often assume that the discounts that were applicable for one LP or LLC on one valuation date apply to every situation but this is incorrect. Discounts can be different depending on the asset class that is put into a LP or LLC as well as the market conditions that prevail at different valuation dates.

A. Valuation Process

LP or LLC valuation begins with an analysis of the assets held in the entity. Assets that are commonly placed into LPs and LLCs include cash, treasury securities, auction rate securities, notes receivable, real estate, marketable securities, restricted stock in publicly traded securities, hedge funds, private equity funds and privately held securities (also called closely held stock), as well as stock options and warrants.

The first question that an appraiser asks is: are these assets stated at their fair market values? For certain assets the fair market value is readily attainable. Examples include cash, U.S. treasuries and marketable securities. The appraiser will need account statements for cash, treasuries, and stocks and these statements should be dated as close to the valuation date as possible (on the exact valuation date is best). These documents will provide the appraiser with evidence of the fair market value of these assets. However, there are other assets, including fractional interests in real estate, restricted stock in publicly traded companies and interests in hedge funds or private equity funds that require further analysis. The appraiser will often conduct further analysis on these assets to determine their fair market values. These special situations are discussed in more detail below.

B. Fractional Interests in Real Property

An LP or LLC may be funded with a fractional interest in real estate, which will require a real estate appraisal for the entire property. Fractional interests in real estate are worth less than the pro rata value of the property value, because the fractional interest holder cannot sell its interest readily. In contrast, a 100% owner of a property can freely sell the property through normal real estate sales channels. If a fractional interest holder in real estate desires to sell the interest, it must attempt to convince the other fractional interest holder(s) to sell in a cooperative effort, attempt to sell the fractional interest itself or bring a partition action in the courts. There is no ready market for fractional interests in real property and as such; they are subject to discounts to reflect this amount. The cost to bring a partition action can be another way of quantifying this discount.

Practitioners should be aware that the discounts on fractional interest in real property will vary based on the facts and circumstances associated with the specific property (e.g., whether it generates income).

C. Restricted Stock in Publicly Traded Securities

Publicly traded securities have a ready market and a transparent quotation system, so valuation of *unre-*

stricted stock is fairly easy. However, corporate insiders at publicly traded companies often hold stock that has resale restrictions. Appraisers valuing this restricted stock will look to the length of time that the stock must be held, as well as the volatility on that stock, in determining the appropriate discount from the quoted market price.

D. Private Equity and Hedge Funds

Over the last few years, there has been an explosion in the growth of private equity and hedge funds. Of course, since the economic meltdown and recession of the past few years the number of these funds has retreated somewhat. Nevertheless, planners are still funding LPs and LLCs with both private equity and hedge fund interests. Private equity and hedge funds can be subject to valuation discounts on an owner's capital account balance because the fund often "locks up" an investor for a certain period of time. Of the two types of investments, private equity funds tend to have a more restrictive lock-up period (again, every fund is a facts and circumstances situation and there will be exceptions to these general rules). Hedge funds can be less restrictive in that they may allow periodic withdrawals of capital. In the case of a private equity or hedge fund, the specific facts and circumstances of the fund's operating agreement are studied and evaluated in determining the appropriate discounts.

E. Lack of Control Discount/Investment Company Discount

After all of the assets held in an LP or LLC are marked to their market values, the appraiser will assess the appropriate discount for lack of control, which is sometimes called an investment company discount or ICD. (Note that the terms lack of control discount and ICD will be used interchangeably for the rest of this article.) This discount is appropriate when the equity interest in the LP or LLC lacks the ability to unilaterally control the entity. Over time, this discount will vary depending on the asset composition of the LP or LLC, as well as the market conditions that exist for a specific valuation date.

Appraisers look to many sources for the underlying data about ICDs, including mergers and acquisitions data and data on privately held partnerships that trade on a secondary market, among others. When multiple asset classes are held in an LP or LLC, the appraiser should calculate a weighted average ICD. For example, an LLC holds assets with a fair market value of $10 million and of these assets, $6 million or 60% were blue chip stocks and $4 million or 40% were municipal bonds. Let's assume that a specific valuation date, the appropriate ICD for stocks is 10% and for muni bonds it is 5%. [Note that these are fictitious ICDs assumed only for the purpose of illustrating the weighted average ICD calculation.] The weighted average ICD would be calculated as follows:

Asset	ICD for asset class	Asset weight in total portfolio	Weighted Average ICD
Stocks	10%	60%	6%
Muni Bonds	5%	40%	2%
TOTAL WEIGHTED AVERAGE ICD			**8%**

In this case the appropriate weighted-average ICD for the portfolio would be 8%.

F. Lack of Marketability

Next, the appraiser should determine the appropriate lack of marketability discount. This discount takes into account the fact that the LP or LLC interest lacks the liquidity of publicly traded securities, which can be sold and converted to cash in three days. The appraiser will also determine the lack of marketability discount by examining the terms and conditions of the LP or LLC agreement. Key provisions of these agreements include dividend policy, restrictions on transfer and withdrawal and the potential for the liquidation of the entity. All of these items will help the appraiser determine the degree of difficulty of generating cash from the interest (either through dividends or a potential sale and liquidation). Appraisers will also assess an equity owner's access to information about the LP or LLC. Recall that publicly traded securities provide quarterly unaudited financial statements, annual audited financial statements, proxy statements and other information as necessary. These disclosures provide an investor with information to analyze the investment, while the holders of a closely held LP or LLC often have little financial information other than that required to prepare their income tax returns. All of these factors bear on the lack of marketability discount applicable to an equity interest in an LP or LLC.

When assessing the dividends paid by an LP or LLC, the appraiser will carefully examine dividends paid and pre-tax income earned. Because LPs and LLCs are pass through entities, "dividends" paid by the entity may be merely the first step in a two-step process for paying the income taxes due to the IRS. That is, step one is payment of cash to the owner, and step two is payment of the cash by the owner to the IRS. The appraiser must carefully discern whether there are true dividends (i.e., money that the owner could use for purposes other than paying the income taxes due).

G. Document Summary and Closing Thoughts

For LP and LLC valuations, the appraiser will request the formation documents, five years of income tax returns (if available) and the operating or partnership agreement of the LLC or LP. Other documents for specific situations are noted below:

Real estate: A copy of a real estate appraisal and any agreements among the real estate owners regarding the disposition of such real estate.

Private equity and hedge funds: Capital account balances for each fund (provided by the funds to investors on a monthly, quarterly, semiannual or annual basis), and a copy of the operating agreement or partnership agreement and offering memorandum for each fund.

Other securities with a discernable market value: Investments in securities such as floating rate notes, stocks, bonds, mutual funds and others will require a copy of the most current brokerage account and, ideally, a summary of assets and their values on the specific valuation date.

Practitioners recognize that LPs and LLCs are tools for planning in sophisticated estates and they should make sure that they work with a qualified appraiser who has experience with these entities. This will ensure that both the practitioner and client have the best experience possible.

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Ethical Considerations for the Elder Law Attorney Under the Rules of Professional Conduct

By Nancy Burner

Ethically speaking, it is a challenge to practice elder law, where the clientele often suffers from diminished capacity at some point in the representation. While the client may have full capacity at the first representation, over time the client's capacity is likely to change. Even so, it is not uncommon for an elderly client to come to the initial consultation with one or more family members. To further complicate the situation, the client frequently depends upon a family member to gather and deliver information to the attorney's office. As a result, there may be additional interaction between the attorney's office and the non-client family member.

It is axiomatic that an elder law attorney should be familiar with the ethical standards in the legal profession. Recognizing who the client is is critical where the line between client and non-client is often blurred. Preserving the attorney/client privilege and protecting confidentiality require careful thought when there are multiple individuals involved in a client's case. The first question is "Whom do you represent?" Once you establish who your client is, the New York Rules of Professional Conduct[1] (hereinafter "the Rules") will "provide a framework for the ethical practice of law."[2]

A. Informed Consent

Many of the Rules require a lawyer to obtain ***informed consent*** from the client.

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.[3]

While a lawyer may adequately explain the legal and practical solutions, the client may not fully understand the lawyer's explanation or may not have the desire to understand, preferring to shift the responsibility to a non-client family member. It is imperative that the attorney establish a relationship with the client in the first instance.

Nevertheless, over time the client may suffer from diminished capacity and there is likely to come a time when the lawyer is asked to reveal confidential information to the client's agent or to another family member. If the client is unable to give informed consent, the ethical consideration for the lawyer is to determine what constitutes confidential information and to whom that information may be given. The Rules will assist the lawyer in solving this ethical conundrum.

There are essentially two broad areas where informed consent plays an important role in the elder law attorney/client relationship. The first is in the area of Confidentiality of Information under Rule 1.6. The second is with respect to Conflict of Interest with current and former clients which is addressed under Rules 1.7, 1.8 and 1.9.

"It is axiomatic that an elder law attorney should be familiar with the ethical standards in the legal profession. Recognizing who the client is is critical where the line between client and non-client is often blurred."

B. Confidentiality of Information

Confidentiality is the hallmark of the attorney/client relationship. This duty to keep the client's confidence is sacrosanct. Rule 1.6 states that a lawyer shall not knowingly reveal ***confidential information***[4] or use such information to the disadvantage of the client or for the advantage of a third person. If the client cannot give informed consent, look at Rule 1.6(a)(2). The disclosure of confidential information without informed consent is permitted if it will advance the best interests of the client and is ***reasonable***[5] under the circumstances or customary in the professional community. The attorney may also reveal or use confidential information if the attorney reasonably believes it is necessary to prevent reasonably certain death or substantial bodily harm.[6]

Consider the following scenario:

You have Represented Mrs. A for several years and have prepared her estate planning documents. She has

two children, Bill and Mary. Originally, Mrs. A shared with you a deep distrust for her daughter Mary. She said that Mary owed her a large sum of money, but her son was not aware of the loan. She expects Mary to repay her. She asked you to draft documents to ensure that Mary would never be in a position to make health care decisions or control her money. Bill is named as Mrs. A's agent on both documents. In the letter of engagement, Mrs. A gave you the authority to speak with Bill in his capacity as her agent at any time. Several years later, Mrs. A. is suffering from dementia and her son Bill contacts you. He advises that Mary has moved in with Mrs. A and he suspects that Mary is stealing money and using Mrs. A's credit cards. Bill claims that Mrs. A's dementia is advanced and Mrs. A is unaware that Mary is financially exploiting Mrs. A.

The first issue to consider is whether you can speak to Bill. Clearly, the engagement letter allows you to do so. However, ascertain the client's ability to participate first; don't take Bill's statements as fact. The rules require you to seek your client's informed consent before you release confidential information. If you cannot get the client's informed consent then you must determine if the revelation of confidential information is in the client's best interests and is reasonable under the circumstances or customary in the professional community. In the alternative, if you reasonably believe it is necessary to prevent reasonably certain death or substantial bodily harm, then you may reveal that information. However, these are conclusions that the lawyer must reach on his or her own, not based upon assertions made by the agent alone. It would be prudent for the lawyer to meet with the client first in order to perform an independent assessment.

When you meet with the client, discuss the information given to you by the client's agent. Ascertain the client's ability to give ***informed consent*** to reveal confidential information. If the client cannot give informed consent, then you must consider if the disclosure of confidential information is in the client's best interests and reasonable under the circumstances[7] or necessary to "prevent reasonably certain death or substantial harm."[8]

Clearly, if the client does not have the capacity to give informed consent, but action is required by the client's agent under power of attorney, as long as the client expresses no objection to the agent's action and absent any information to the contrary, you may assist the agent to protect the client's interests. However, if the client disagrees, then there is a conflict of interest and you need to reconsider your ethical obligation to the client.

C. Conflict of Interest

Suppose some additional facts to the above scenario. Mrs. A shows clear deficits but at the same time, she has enough cognitive ability to express wishes contrary to what Bill has advised. Mrs. A professes her pleasure with Mary. Mrs. A likes that Mary lives with her. Mrs. A is shocked that Mary is accused or stealing. Fearful that Mary will leave her, Mrs. A does not want Bill to know anything that she has said about Mary and she does not want Bill to take any action. The question is whether you can represent Bill in this instance as agent for Mrs. A.

The more difficult problem is presented when you meet with the client and the client expresses intentions contrary to the agent. When the client's interests and the interests of the agent differ,[9] you cannot represent the agent. You must advise the agent that you are unable to take a position that is adverse to your client.[10]

D. Diminished Capacity

Contrary to the above, there are situations where the lawyer believes that the client is likely to suffer harm unless the lawyer takes some protective action. If there is a family member or agent that can remedy the situation, then the lawyer may speak to that person.[11] If the client is unable to protect himself or herself then it may fall upon the lawyer to take action.

Now assume the facts where neither the agent nor the other family members are acting in your client's best interests. If you choose to do nothing you may be abandoning a duty to the client. The Rules allow the lawyer to act in instances where the client suffers from diminished capacity. First, the lawyer must ***reasonably believe*** that the client has diminished capacity. Furthermore, the lawyer must ***reasonably believe*** that the client is at risk of substantial physical, financial or other harm unless action is taken.[12] Thus, the attorney cannot interfere if the attorney simply disagrees with the agent or family member. The consideration is whether or not the client may suffer substantial harm. This will be the extreme exception rather than the norm.

However, in situations where there is reason to believe that no one is protecting the client and they are likely to suffer harm, the lawyer may commence an action to have a guardian appointed.[13] In the context of a Guardianship matter, the Court will make findings of fact and order whatever relief is appropriate for the alleged incapacitated person. Nevertheless, even in that instance, the lawyer may reveal information about the client only to the "extent reasonably necessary to protect the client's interest."[14]

Thus, the Rules require the lawyer to consider what is **reasonable** or **customary** and to exercise the lawyer's best judgment in protecting confidentiality, even when the client has suffered diminished capacity. As the Preamble to the Rules state:

> The Rules of Professional Conduct are rules of reason. They should be inter-

preted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These Rules define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.[15]

"The duty we owe to our clients is a heavy burden and as lawyers we must do our very best to protect the clients, their confidentiality and to avoid any and all conflicts of interests, even when they themselves no longer have the capacity to object."

The Rules are a guideline for the lawyer and they must be applied in light of the circumstances. The duty we owe to our clients is a heavy burden and as lawyers we must do our very best to protect the clients, their confidentiality and to avoid any and all conflicts of interests, even when they themselves no longer have the capacity to object.

Endnotes

1. New York Rules of Professional Conduct Part 1200 were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009 (hereinafter "Rule" or Rules"). These Rules supersede the former Part 1200 Disciplinary Rules of the Code of Professional Responsibility (*available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm).
2. Preamble to the New York Part 1200—Rules of Professional Conduct.
3. Rule 1.0 (j).
4. Rule 1.6 (a)(3) definition: "Confidential Information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
5. New York Rules of Professional Conduct Rule 1.0 (q) terminology: "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.
6. Rule 1.6 (b)(1).
7. Rule 1.6 (a)(2).
8. Rule 1.6 (b)(1).
9. Rule 1.7 (a): Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests.
10. Rule 1.9 Duties to former Clients.
11. Rule 1.14 (b).
12. Rule 1.14 (b).
13. Rule 1.14 (b).
14. Rule 1.14 (c).
15. Preamble to the New York Rules of Professional Conduct [6].

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The NYC Elder Abuse Center: Strengthening the Response to Elder Abuse Utilizing a Collaborative Model

By Risa Breckman, Mark Lachs and Joy Solomon

Risa Breckman

Mark Lachs

Joy Solomon

Each year, between 2-10% of older Americans are injured physically, debilitated psychologically, exploited financially and neglected, often by an adult child, spouse, other family relative or caregiver.[1] (An estimated 80% of abuse cases go unreported.)[2] The abuser, often dependent on the victim for care or financial support, frequently suffers from a severe and persistent mental illness, an addiction, caregiver burden or other significant mental health problem.[3] Elderly men and women of all ages with and without impairments or dependence on family for care, from all geographic and demographic backgrounds, are vulnerable to elder abuse. Those over 85 (the fastest growing segment of the population), and those with dementia, are at greatest risk.

Elder abuse has a profound impact on the health, overall well-being and mortality of the victims. In addition to the significant physical injuries that are sustained and the financial devastation that occurs, elder abuse victims often develop overwhelming feelings of fear, isolation and anger, and need extensive counseling to ease their emotional pain. Not surprisingly, there is a high prevalence rate of depression in elder abuse victims.[4] They also have a shorter survival rate than their non-victim counterparts, as the stress created from negative social interactions with family creates vulnerabilities influencing mortality.[5] A March 2009 study conducted by the Met Life Mature Market Institute entitled *Broken Trust: Elders, Family and Finances*, estimated the annual loss of by victims of financial elder abuse is at least $2.6 billion. This, in addition to the annual price tag of elder abuse's effects on the medical, social services and other government systems, is often unnecessarily borne by Medicare and Medicaid due to preventable injury and illness, and by families due to financial exploitation.[6]

Elder abuse is a unique problem. Older adults who have been abused are vulnerable in ways that younger people are not. Many chronic illnesses that go along with aging can either mask or mimic forensic markers of elder abuse. Physically, it is just harder to defend oneself or access help in an emergency, when frail, afraid, or functionally impaired. Cognitive impairment from dementia can make sequential thinking, a crucial mental process for problem solving, impossible. Older people relying on family, friends, or other caretakers to help with intimate aspects of activities of daily living, their health care, and their finances, make them more vulnerable to abuse. The dynamics of relationships change: some adult children become caregivers although they do not have the emotional, physical and/or financial resources to provide adequate care. There is also a tendency for society to infantilize older adults, so it is not uncommon for family, caregivers, physicians or other professionals to use patronizing or controlling communications with them, contributing to harmful self-perceptions and negatively influencing longevity.[7] With 77 million baby boomers aging and Alzheimer's disease on the rise, experts agree that the problem will get worse,[8] and will be exacerbated by the fragile economy. Compounding the problem is a lack of medical specialists in the field. In the U.S., only 300 geriatricians—usually internists with a sub-specialty in geriatrics—graduate from fellowship programs annually, and there are only an estimated 2,000 geropsychiatrists, many of whom are based in academic settings and do little or no clinical work. Making matters worse, medical professionals are not routinely trained in elder abuse detection, assessment and intervention.[9]

Elder abuse is a problem that requires a multidisciplinary approach. Elder abuse cases are complex, often involving a variety of medical, mental health, cognitive and legal problems. There are also considerable ethical issues and dilemmas often focused on beneficence vs. autonomy. For example, when determining how best to protect an elder from harm while preserving autonomy, professionals need to balance safety and risk, considering capacity, functional abilities and environmental supports. The abuser's intent to harm is also a significant factor in determining the best response. How do those assessing abuse and neglect cases investigate and assess capacity and intent? Who decides how these motivations should influence the range of possible responses?

Depending on how the case is viewed, this could involve one or more interventions (e.g., caregiver education and respite, mental health services, substance abuse treatment, utilization of home health aides, application for guardianship, or criminal prosecution). Assessing motivation and determining the correct response takes special and multi-disciplinary expertise and experience.

A multi-disciplinary team (MDT) approach to assessment and interventions allows a team of experts to determine answers to these and other difficult questions. The MDT approach enables multiple organizations from social services, law enforcement, medicine and other areas to review cases and coordinate assessments and interventions in order to improve outcomes. Collaborating can also lead to translational research suggestions, innovative service design and delivery, educational initiatives, closing up gaps in service and policy development. Evidence exists that a collaborative approach improves the effectiveness of each agency's response and efficiently utilizes scarce resources.[10]

The development of an NYC Elder Abuse Center was inspired by the vital need for a coordinated approach to helping victims and was informed by the Archstone Foundation's groundbreaking work in elder abuse and neglect, which includes funding six MDTs, in California as well as other initiatives.

New York City is fortunate to have an extensive elder services network that is unified, diverse and capable.[11] In 2006, the Weill Cornell Medical College's Division of Geriatrics and Gerontology (WCMC), in collaboration with The Harry & Jeanette Weinberg Center for Elder Abuse Prevention, Intervention of Elder Abuse at the Hebrew Home at Riverdale (The Weinberg Center) and the NYC Elder Abuse Network, created the Elder Abuse Case Coordination and Review Team (EACCRT), a multidisciplinary group of over 40 physicians, social workers, attorneys and other professionals meeting monthly to discuss cases of elder abuse and neglect in Manhattan. The complexities of elder abuse cases and the systemic problems preventing effective help inspired EACCRT members to further advance its collaborative model. With generous support from the Fan Fox & Samuels R. Foundation and an anonymous donor, WCMC, on behalf of EACCRT, accepted a grant in April 2008 to begin planning for a NYC Elder Abuse Center. The goals were to determine the Center's mission and priorities, identify stakeholders' interests, needs and priorities, and create a structure for the Center.

The Elder Abuse Center Planning Project brought together 24 professionals from diverse systems and backgrounds to serve on an Advisory Council. With guidance and direction from WCMC, Advisory Council members followed a thorough, methodical and democratic course to understand the current need for a Center in NYC and to define a viable structure. Activities included work by five sub-groups responsible for gathering and synthesizing data from the following areas: (1) concept mapping, a consensus-building research methodology conducted with over 200 NYC elder abuse stakeholders to determine Center priorities; over 1,200 ideas were generated for the Center, which were then winnowed to 124 items and ranked in terms of importance and feasibility by 41 local leaders in the fields of elder abuse and aging, providing a roadmap for our plan; (2) site visits and interviews with ten abuse advocacy programs including three child advocacy centers, three family justice centers, and four multi-disciplinary elder abuse teams; (3) one-on-one interviews with key NYC stakeholders; (4) a literature review of articles on multidisciplinary elder abuse teams; and (5) a web-based needs and interest survey of EACCRT members. Using this data, Advisory Council members created the framework for a NYC Elder Abuse Center through which services could immediately begin. While the design is informed by the Archstone-funded model used in California, it has been carefully customized to meet the unique and diverse complexities of New York City.

Currently, the NYC Elder Abuse Center, rather than being a bricks and mortar structure, is decentralized and without walls, using existing spaces. This enables the Center to avoid unnecessary capital expenditures; capitalize on the known benefits of serving elder abuse victims in their own homes and communities; and effectively build on the strengths of the existing elder abuse and elder service networks in NYC. WCMC has overall responsibility for the project, although activities are conducted by several organizations, many of which are also making in-kind contributions. Each of these organizations contributes specific expertise in one or more areas; all have experience working together during the planning project and in other elder abuse activities (e.g., EACCRT and NYC Elder Abuse Network), and have volunteered to play this active role.[12]

The Center is being created in phases. During Phase 1, activities are divided into 2 "cores": An *Administrative Core*, which oversees the Center's operations and a *Clinical Services and Education Core,* focused on providing direct services and professional training. This model has built-in elasticity. Existing cores can be expanded as needs arise, and contracted as goals are achieved. Additional cores can be established as new priorities emerge.

The Administrative Core provides leadership to all aspects of the Center and develops governance policies and procedures, while also building and maintaining an infrastructure comprised of important stakeholders from NYC's many diverse community-based, government, health care, criminal justice, legal and academic institutions.

Through the Clinical Services and Education Core, the Center provides elder abuse services immediately through a MDT in Brooklyn while continuing to plan for the Center to address elder abuse in all five boroughs.

The decision to begin work in Brooklyn was made by the Advisory Council after considering the existing services that are already in the borough and the capacity of these services to provide space and significant in-kind support. Demographics figured into the decision as well: over 30% of NYC s elder population lives in Brooklyn.[13]

The Brooklyn MDT includes representatives from Adult Protective Services (APS), the Kings County District Attorney's Office (KCDA), the NYC Department for the Aging (DFTA), the Jewish Association of Services for the Aged (JASA) and the Weinberg Center (WC). Other members include the Center's part-time geriatrician from WCMC and individuals from the panel of psychiatric and legal consultants as needed, as well as from community agencies (determined on a case-by case basis).

Building team culture and a process for effective collaboration is essential to the MDT's success. During this first six months of operations, the team meets weekly to determine the MDT's intake process; criteria for triaging cases (e.g., complexity, educational value, etc.); procedures during MDT meetings; a system for case tracking; and an orientation process for new members. During this period, the MDT s also reviewing cases, with procedures being tested and modified.

After the first 6 months, the team aims to review and discuss 2-3 cases at each session plus 2-3 follow-ups from previous sessions. Case referrals will come primarily from APS, KCDA, DFTA and JASA, but also from the aging services network and the medical community. The MDT Coordinator will conduct intake activities and triage the cases and ensure that each case is vetted by an attorney from the Weinberg Center for any legal issues that might otherwise go unnoticed. Each case review will include: A case presentation with a statement of the facts and actions already taken; a statement of the problem; a discussion of the safety issues and unmet needs; possible strategic approaches; a development of a clearly defined action plan; and scheduling of a follow-up meeting. If successful, the Center will bring MDTs to each borough in NYC. In conclusion, the NYC Elder Abuse Center is borne from a highly collaborative and thorough planning process. From this planning process emerged a solid plan and realistic expectations for the Center's first phase of operations. As it moves forward, the Center will utilize a collaborative approach to problem solving to overcome these and other obstacles.

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13. U.S. 2000 Census.

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Joy Solomon, Esq., is currently the Director and Managing Attorney for the Harry & Jeanette Weinberg Center for Elder Abuse Prevention located at the Hebrew Home at Riverdale in New York City. Joy is also the Director of Elder Abuse Programs at the Pace Women's Justice Center, a non-profit legal advocacy and training center based at Pace University Law School in Westchester County, New York. Prior to joining the Women's Justice Center in 1999, Joy investigated and prosecuted a variety of crimes including child abuse, fraud, and elder abuse as an Assistant District Attorney in Manhattan, where she served for eight years.

Where to Go After Homecare: Other Community Resources for Senior Citizens

By George L. Roach

A question often asked by family members caring for loved ones who are no longer able to live on their own in the community is: "What is available short of placing mom or dad in a nursing home?" The two main resources which immediately come to mind are Assisted Living Centers and Medical Model Adult Day Care Programs. Based on changing needs observed over the past thirty years, there is now a need for the type of care once provided to people in what was called a health related facility (HRF) setting. These facilities provided institutional care for people with activity of daily living skills (ADLs) that did not require placement in a skilled nursing facility (SNF) (what is thought of as traditional nursing home placement). The tremendous need for this in-between type of care, short of a nursing home, gave rise to the whole industry of providing assisted living care. There are several national chains providing assisted living care service throughout the country, including here in Suffolk County.

As with any form of long term care, the question becomes what does it cost and how do we pay for it? There are basically only three ways to pay for long term care in our society:

1. Long-term care insurance;
2. Privately from your "nest egg"; and
3. Taxpayer-funded medical care, commonly known as Medicaid.

Unfortunately, when it comes to assisted living facilities, neither Medicare nor Medicaid is available to pay for the personal care component the resident requires. Currently in Suffolk County, Medicaid will pay for the assisted living care being provided in two *pilot* programs. As these are *pilot* programs, however, the goal is to gauge the cost effectiveness of keeping people in assisted living settings versus traditional nursing home placement. The bottom line has yet to be determined.

In explaining the assisted living option to clients, I often compare the personal care component to a landlord-tenant relationship. For a specified sum of money per month, i.e., your rent, you get room and board, 24/7/365. In some places it is not a bad way to go…if you have the money. The ballpark figure for assisted living care, depending on how much you need, can range anywhere from $2,500 to $5,000 per month or more per individual resident. If you have good income, sufficient liquid assets or a good long term-care insurance policy to pay the freight, this is certainly a worthwhile long-term care option.

Two problems arise with assisted living facilities. The first is when a resident's condition deteriorates to the point where placement in a traditional nursing home setting becomes necessary. This is an unfortunate situation, which requires a change of residence and the difficult adjustment, but Medicaid will pay for nursing home care.

"When…seniors are not candidates for a nursing home, the result is a rude awakening. Sadly, the situation can be characterized as a race between poverty and death to see who gets to the door first."

The second is what happens when the resident runs out of money. Addressing the second issue first, a person can be evicted from an assisted living facility for non-payment of rent. Seniors may find themselves in this situation when placed by their children, who, with the best of intentions, used their parents' money until it was gone. When such seniors are not candidates for a nursing home, the result is a rude awakening. Sadly, the situation can be characterized as a race between poverty and death to see who gets to the door first. If the patient's condition deteriorates, in all likelihood he or she will be hospitalized and nursing home placement will occur from the hospital setting. If an application for Medicaid is going to be submitted on the resident's behalf for the nursing home, the cost of the assisted living facility is a legitimate spend-down of the resident's funds. Fortunately, there is a strategy which enables assisted living residents to access Medicaid home care benefits.

The assisted living resident can transfer funds to a trusted person (no transfer penalty for community

Medicaid) which can be used to pay the "room and board" cost of the assisted living facility. Excess income (above the community Medicaid level) can be deposited into a pooled income trust and also used to pay assisted living charges. An application for community Medicaid home care services can be made and some level of care will be authorized. The transferred funds (not the income from the pooled income trust) may also be used to augment home care services which are necessary but which Medicaid will not cover.

"I rely on the old Irish proverb, 'Live everyday as if it were your last…and someday you'll be right.'"

Medical Model Adult Day Care (MMADC) is another way to keep a senior in the community. Unlike assisted living facilities, Medicaid does pay for MMADC and the beauty is that its eligibility requirements come under the Community Medicaid umbrella. That is, there are no transfer rules or penalties to become eligible for this program. Assets and resources can be freely transferred out of the applicant's name without penalty. Incomes (i.e., Social Security and pensions) are subject to the Community Medicaid income cap of $787 per month, but with the use of the NYSARC trust applicants can get back virtually all of their Medicaid overage money to live on. Furthermore, if a spouse is involved and one spouse is in need of MMADC, the rules provide for the same spousal budgeting amounts as if the other were in a nursing home. If the income is there, the "community spouse" may be able to keep up to $2,739 per month, the community spouse income allowance for chronic care Medicaid. It is the best of both worlds.

Elder Law attorneys with knowledge of the Medicaid law and access to a vast array of community resources available should make the best of the bad situation clients may find themselves in through no fault of their own. I often begin my advice and consultation after hearing such tales of woe with, "The silver lining in the dark cloud is as follows.…" I find it helpful to the client to be able to minimize what he or she perceives to be the cruel twist of fate which no one planned. I rely on the old Irish proverb, "Live everyday as if it were your last…and someday you'll be right."

George L. Roach is the former Chief Attorney for the Legal Aid Society's Senior Citizen Division and is now a member of the firm of Grabie & Grabie, LLP, in Smithtown.

Real Estate Appraising: An Overview

By George Lucas

Many attorneys seek the services of an appraiser when their clients are engaged, for example, in divorce litigation, Medicaid applications, estate planning, bankruptcy cases, and, of course, home purchases and related mortgage loans. Other purposes include, but are not limited to, re-financing, PMI removal, and loan modifications. In formulating the valuation, appraisers must utilize the current sales in the marketplace where the appraisal is being performed in order to arrive at an opinion of market value. The more current the sales comparable, the more indicative it is of the market. All factors of the subject property and the sale comparables are taken into consideration by the appraiser when making a final decision about value. Some estate planning appraisals are especially challenging because they require the appraiser to perform a "forensic appraisal." A forensic appraisal is essentially an appraisal of property to determine a market value sometime in the past.

All Real Estate Appraisers are licensed by the individual states in which they practice. The minimum requirements to obtain a Certified Residential license in the State of New York are as follows:

1. 200 hours of Appraisal course work at a New York State-approved educational facility;
2. A minimum of 2,500 hours of field experience, over no less than two years and no more than five years, under the auspices of a Certified Residential Appraiser;
3. A number of specific college courses;
4. And finally, the taking (and passing) of the New York State Certified Residential Appraiser's Exam.

A Certified Residential appraiser is then granted a license to appraise any single to four-family property, without limitations on value, in any county or jurisdiction within the State of New York. With that said, a number of states allow for reciprocity, which allow certified individuals to apply for a Residential Appraiser's licenses in that jurisdiction. In order to maintain a license in good standing, an Appraiser must take at least twenty-eight hours of continuing education courses every two years prior to renewing his/her license.

The U.S. Government is currently involved in formulating heavier regulation for the industry. The Home Valuation Code of Conduct (HVCC) was the result of a joint agreement between New York Attorney General Andrew Cuomo, Freddie Mac and the Federal Housing Finance Agency (FHFA) in March 2008. The Code, as it is sometimes known, essentially mandates a buffer be placed between the appraiser and the mortgage broker/bank to eliminate any undue influence on the appraiser in deciding on the value of a particular piece of property. The Code opened the door to a new "cottage industry," the "Appraisal Management Company" (AMC). AMCs have controlled the mortgage process ever since. They are responsible for assigning the appraiser, tracking the progress, and generally acting as a go-between in resolving any issues that may arise between appraiser and mortgage broker/bank. Finally, the AMC decides on the fees charged to homeowners and fees paid to appraisers.

The Restoring American Financial Stability Act of 2010, being heard by a House-Senate Conference Committee at the time this article was written, mandates positive changes as an addition to the HVCC, while providing regulation that practitioners and consumers alike view as more realistic. If the bill is enacted into law it will change the current appraisal climate by allowing the HVCC to expire now, instead of letting it sunset in November 2010. Also, according to OREP (The Organization of Real Estate Professionals), the new legislation will call for the Comptroller General to determine the effect that the changes to the seller-guide appraisal requirements of Fannie Mae and Freddie Mac, contained in the HVCC, will have on small business, like mortgage brokers, independent appraisers, and other small business professionals in the financial services industry.

The Comptroller General will study the effects on consumers, including the quality and the costs of appraisals; the length of time for obtaining appraisals; their impact on consumer protection; and, most importantly, maintaining appraisal independence. The Comptroller General will also look at combating appraisal inflation, mitigating acts of appraisal fraud, the structure of the appraisal industry, appraisal management companies, fee-for-service appraisers, and the regulation of appraisal management companies by the states. One hopes that the Restoring American Financial Stability Act of 2010 will positively affect the health of the economy and consumers.

George Lucas is an independent New York State Certified Residential Appraiser and the owner of the Ambassador Appraisal Group.

Recent New York Cases

By Judith B. Raskin

Estate Sues Decedent's Estate Planning Attorney

A personal representative of an estate appealed from an Appellate Division decision dismissing the estate's claim against an allegedly negligent attorney for lack of privity. Reversed. *Estate of Schneider v. Finmann*, Slip Op 05281 (Ct. of Appeals, June 17, 2010.)

Plaintiff personal representative of an estate claimed the decedent's attorney improperly advised the decedent, resulting in estate tax that could have been avoided with proper planning. The Supreme Court dismissed the complaint for failure to state a cause of action based on the lack of privity between the estate and the attorney. The Appellate Division affirmed.

The Court of Appeals reversed, holding that a personal representative is standing in the shoes of the decedent and should have recourse to an attorney who provided negligent legal advice resulting in damages to the estate. The holding does not change the strict privity rules barring third parties and beneficiaries from bringing such a claim.

17-A Guardianship

Petitioner trustee sought Article 17-A guardianship for a developmentally disabled trust beneficiary. Guardianship of the person granted with required yearly reports to the court. *Matter of Mark C.H.*, N.Y.L.J., May 10, 2010, p. 18, col. 1.

When Mark C.H.'s adoptive mother became terminally ill she placed her then 14-year-old severely developmentally disabled son in a facility. On her death she left a trust with approximately $3 million for his benefit and appointed her lawyer and a bank as co-trustees. Adhering to a promise the lawyer made to Mark's mother, he petitioned for 17-A guardianship. The first hearing date was adjourned when it was evident that neither trustee had ever visited Mark, spoken to the facility regarding his needs or spent one penny for his benefit. The trustees hired a Certified Care Manager to visit with Mark C.H. and determine how the trust funds could be used for his benefit. Her report and the subsequent expenditures on his behalf enhanced his life considerably. The court appointed the lawyer/trustee as guardian of the person with the requirement that the trustees report to the court yearly pursuant to the requirements of Article 81, Sec. 81.31.

The decision included extensive discussion on the need to revise Article 17-A to include yearly reporting by the 17-A guardian.

Medicaid Transfers

In this appeal from a fair hearing decision, the petitioner argued that a transfer of assets just prior to the Medicaid application date should not cause a period of ineligibility. Denied. *Loiacono v. Demarzo*, 2010 NY Slip Op 03334 (App. Div., 2d Dept., April 20, 2010.)

Petitioner transferred assets to her son just before entering a nursing home and applying for medical assistance. A fair hearing decision upheld the agency determination that petitioner was ineligible for Medical Assistance for her nursing home care for 24 months because of the transfer. Petitioner argued that the transfer was not for the purpose of becoming Medicaid eligible.

The court took into account the age and medical condition of the petitioner when the transfers were made and concluded that the petitioner did not overcome the presumption that the transfers were "in anticipation of a future need to qualify for medical assistance."

Article 81—Sale of Life Estate

A property management guardian sought authority to sell her ward's life interest in real property. Granted. *Matter of Giordano*, 2010 NY Slip Op 20190 (Sup. Ct., Nassau County, May 13, 2010.)

Richard O.M., age 95, a nursing home resident and Medicaid recipient, held a life interest in real property. His daughter, the remainder person, predeceased him. Her children were the heirs of her estate. The guardian and the estate determined that selling the property was in the best interest of Richard O.M. and the heirs. It was understood that after the sale the proceeds belonging to Richard O.M. would terminate his Medicaid eligibility because he would then have excess resources. Nevertheless the court found it in Richard O.M.'s best interest to sell the property as it was vacant and subject to waste.

Two issues then arose:

1. *Whether the HCFA or the IRS table should be used in calculating the value of Richard O.M.'s life interest.* The HCFA table would attribute 22.887%. The IRS table would attribute 9.259% to the life estate which would give Richard O.M. less of the proceeds and benefit the estate. The court directed the guardian to use the HCFA tables. The court was concerned that the Medicaid agency would deem that Richard O.M. transferred assets if he did not get the greater proceeds based on the HCFA table.

2. *Whether the guardian should pay the proportional expenses of sale from the proceeds allocated to the life estate*. The Department of Social Services argued that the life tenant must be given the full proceeds attributed to the life estate. The court held that "net" should precede "proceeds." There is nothing in the regulations that expenses of sale cannot be deducted from the proceeds. In the context of rental income, the regulations do provide that rental income to the life tenant is net of the monthly rental after expenses. In addition, the estate's remainder interest should not be required to pay all of the closing costs. The court approved a percentage of the broker's commission to be paid from the life estate proceeds as well as the appropriate percentage of other closing costs and costs of sale.

Supplemental Needs Trust—Provisions

A disabled person sought approval of an SNT. Granted with amendments to proposed trust language. *Matter of Lula A*, N.Y.L.J., vol. 243 (Surr. Ct., Bronx County, April 27, 2010.)

Lula A. had a severe and chronic disability but was capable of handling her own affairs and did not need an Article 81 guardian. She sought approval of a supplemental needs trust (SNT) to be funded with her own resources and proposed her daughter as trustee. HRA requested that the annual and final trustee accountings be in accordance with Article 81.31, 81.32 and 81.33.

The court approved the SNT but held that the only portion of the HRA requested amendments that was relevant to a person who did not have an Article 81 guardian was subdivision seven of 81.31. This section referred to annual accounting requirements in the Surrogate's Court Procedure Act (SCPA). The court noted that as the court does not have subject matter jurisdiction to hear Article 81 cases, the SNT must delete all references to Article 81 and substitute SCPA, Section 1719.

Divorce in Guardianship

Decedent's son appealed from a decision abating his parents' divorce action where the only remaining step was for the guardianship court to approve the stipulation of settlement. Denied. *Acito v. Acito*, NY Slip Op 2981, 2010 N.Y. App. Div. LEXIS 2929 (App. Div. 1st Dept., April 13, 2010.)

The defendant in a divorce action died before the divorce was finalized. The defendant's son argued that the divorce should be deemed final as the stipulation of settlement had been signed. The Supreme Court held that the divorce action abated on the death of the defendant because there was not a final adjudication of divorce nor were there "mere ministerial" steps remaining before a final adjudication. The guardianship court, which had the duty to review and approve any settlements to assure they were in the best interest of the ward, still needed to approve the stipulation of settlement.

Nursing Home Collection of NAMI

Plaintiff nursing home sued daughter of deceased resident for unpaid NAMI. Denied. *Hillside Manor v. Barnes*, 2010 NY Slip Op 50966 (Civil Ct., Queens County, May 28, 2010.)

Ms. Simms, deceased mother of defendant, had resided at plaintiff's nursing home. Ms. Simms's daughter had control over her mother's funds during the nursing home stay. Plaintiff did not receive the Net Available Monthly Income (NAMI) due pursuant to the Medicaid budget and alleged the daughter intentionally defrauded the facility and prevented it from receiving this payment. Plaintiff submitted into evidence the first bill for the NAMI totaling $6,830.40 dated June 11, 2008, a few months after Ms. Simms's death, and did not produce any prior bills. The Medicaid approval letter was dated May, 2008 and the Medicaid budget was undated.

Defendant produced evidence that she had moved prior to June 11, 2008, the date of the bill and never received it. The expenditures from the then depleted account were in part for Ms. Simms's benefit but no evidence was elicited on the full nature of the expenditures.

The court held that based on the evidence presented, the defendant did not intend to defraud. She had no legal responsibility for payment from her own funds which would be void as against public policy even if she had signed a guarantee of payment.

Court Evaluator Seeking Payment of Fee

A court evaluator petitioned for payment of his court awarded fees where the guardian stated no funds were available for payment. Granted. *Matter of Sherman,* 2010 NY Slip Op 20213; 2010 N.Y. Misc. LEXIS 1409 (Sup. Ct., New York County, June 1, 2010.)

The appointed Article 81 guardian, the incapacitated person's daughter, never pursued a bond or commission following her appointment. By the time the court appointed another guardian, the Family Service Society of Yonkers (FSSY), much of the incapacitated person's funds had disappeared from the joint account held by the ward and his daughter. During the year 2009, FSSY collected the ward's social security and so had some funds to pay bills. FSSY paid the Jewish Home and Hospital where the ward resided and paid FSSY's guardianship fees. As little was left, they advised the court evaluator that there were insufficient funds to make the payment to him. The court evaluator petitioned for his court-awarded fee of $2,511, arguing that there were funds available before payments to other parties.

The court ordered FSSY to pay the full fee to the court evaluator from the fee it collected of $4,500. FSSY should not have told the court evaluator that there were no funds available.

I would welcome and appreciate any interesting decisions that you know of or have litigated so that they can be shared with *Elder Law Attorney* readers.

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Advance Directive News: Legislative Authority for Surrogate Decision Making by Same-Sex Couples

By Ellen G. Makofsky

A real source of anxiety for those in same-sex relationships is the worry of being powerless in a situation where a domestic partner encounters a medical crisis. The Family Health Care Decisions Act ("FHCDA") seeks to address this problem and recognizes the right of same-sex couples to make medical decisions for an incapacitated partner where no advance directive is in place.[1] The legislation is groundbreaking because it provides same-sex couples with medical decision-making powers identical to those powers afforded to married couples who reside together.

A. The History

FHCDA was first proposed 17 years ago. The legislation as originally introduced could not find the support of both the New York State Senate and Assembly. Each body eventually sought to modify the legislation. In 2003, the Senate passed a FHCDA bill which included a requirement that decisions made by a surrogate for a pregnant patient must consider the impact of the treatment decision on the fetus and on the course and outcome of the pregnancy. The Assembly refused to support the Senate's version of FHCDA and in turn, promulgated its own bill which gave a spouse and a domestic partner the same level of authority to make medical decisions for a loved one. Neither the Senate nor the Assembly would support the other's version of the bill, so year after year the legislation failed to move forward. The stalemate was broken in 2008 when the Democrats gained control of the New York State Senate. The shift to a Democratic majority led to the introduction of a Senate bill which tracked the Assembly version of the FHCDA.[2] The gridlock was over and on March 1, 2010 Governor Paterson signed the bill into law.

B. How FHCDA Works

FHCDA sets forth a prioritized list of persons empowered to make medical decisions, including the power to withhold or withdraw life-sustaining treatment, where there is no health care agent designated pursuant to a health care proxy, and a hospital patient or nursing home resident lacks the capacity to direct his or her own care.[3] Pursuant to the list, only a guardian authorized to decide about health care pursuant to Article 81 of the Mental Hygiene Law has a priority higher than that of a domestic partner whose decision-making ability is of exactly the same importance as a spouse.[4]

"[The Family Health Care Decisions Act] is groundbreaking because it provides same-sex couples with medical decision-making powers identical to those powers afforded to married couples who reside together."

Domestic partner is a defined term in the FHCDA legislation and the term is broadly construed. There are a number of different ways an individual may achieve recognition as a domestic partner under the law. The individual meets the criteria if he or she is:

1. Formally a party in a domestic partnership or similar relationship recognized by the laws of the United States, or any other state, local or foreign jurisdiction or registered as the domestic partner of another person with any registry maintained by the employer of either partner or state, municipality or foreign jurisdiction; or
2. Formally recognized as a beneficiary under the other person's employment benefits or health insurance; or
3. Dependent in some way on the other person's support, as evidenced by the totality of the circumstances which indicate a mutual intent to be domestic partners. Examples cited are common ownership or joint leasing of real or personal property; common householding, shared income and/or expenses; children in common; signs of intent to marry; and the length of the personal relationship of the individuals.[5]

An important component of surrogate medical decision-making is the right to have one's wishes respected. The FHCDA for the first time places domestic partners on equal footing with married couples in making medical decisions for a loved one. Public sentiment has changed during the 17 years it took to achieve passage of FHCDA and inclusion of domestic partners in the surrogate decision-making process makes the new law that much stronger.

Endnotes

1. N.Y. Pub. Health Law § 2994 (2010). The legislation became effective on June 1, 2010.
2. Robert N. Swidler, New York's Family Health Care Decision Act, 82 N.Y.St.B.A.J. 18, 22 (2010).
3. FHCDA applies only when an individual lacks capacity and is a patient in a hospital or resident of a nursing home. Where a health care proxy is in existence, the health care agent's decision has priority over all other decision-makers and the provisions of FHCDA do not apply.
4. The prioritized list includes in the following order: a guardian authorized to decide about health care pursuant to Article 81 of the Mental Hygiene Law; the spouse, if not legally separated from the patient, or the domestic partner of the patient; a child who is 18 years of age or older and then; a close friend.
5. N.Y. Pub. Health Law § 2994-a(7)(a)-(c) (2010).

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Potential Liability Pitfalls for Elder Law and Estate Planning Attorneys

By Marian C. Rice

Practice in the areas of elder law and trusts and estates covers a broad range of client services from estate planning to tax advice to estate administration and many other subjects in between. Statistics compiled by the ABA Standing Committee on Professional Liability show a slight but steady increase in claims asserted against attorneys practicing in these disciplines—from approximately 7% to 9%—in the 25 years since the figures were first compiled. While the ABA statistics do not track severity of claims by practice area, the provable damages in claims arising in the elder law and estate planning areas are ordinarily quantifiable without too much difficulty and can be significant. The following discussion includes some of the common causes for claims asserted against attorneys practicing in these areas.

A. Dabbling

Your cousin is going on a trip and confides she has never done a will. If you just run that "simple" will off the form that has been in the computer for at least a decade, she will feel better. Don't do it! Like many other areas of practice, the field of estate planning is highly specialized and technical. Boilerplate forms or provisions not specifically tailored to the individual client's current situation provide a constant source of claims. You cannot provide effective legal services in this area of practice by attending a CLE seminar and using a form.

B. Conflict of Interests

It is not at all unusual for a third party, perhaps a relative or family friend, to initiate contact with an elder law attorney on behalf of a potential elderly client. Regardless of the extent of the relationship with the third party, the attorney must never forget to serve the best interests of the client. To ensure that all parties are aware whose interests are being represented, the identity of the client should be specified in the engagement letter. Non-clients must also be alerted to the fact that their interests are not being protected by the attorney.

There are legitimate estate planning reasons for divesting title in property owned by the elderly client and for giving third parties the right to act for the elderly client. The attorney, however, must always be certain that contemplated transfers through testamentary bequests or non-probate transfers of property are actually what the client wishes and are structured in a manner that will protect the client throughout his or her lifetime. Where the wishes of the third party and the client conflict, the attorney must protect the client.

Problematic conflicts may also arise in the simultaneous representation of spouses in the elder law and estate planning context. Care must be taken to ensure that the interests of both spouses are completely aligned or the representation of one spouse should be referred to independent counsel.

Another area of concern arises where the financial planner is leading the way—and the way does not seem in the best interests of the client. Relying upon the excuse that the attorney was just the "scrivener" of an estate planning device developed by the financial planner or other third party and the client will not prevent a claim by the client. If an accountant or financial planner is a significant source of business, the independent professional judgment of the attorney will be called into question if the strategy proves not to be sound.

C. Scope of Services

In addition to identifying the client, a clearly written engagement letter will define the scope of the services being provided by the attorney. Equally as important is the specification of legal services that the attorney will not perform. If the attorney is not providing accounting services for the estate, transferring property or preparing a Medicaid application for an elderly client, be certain that the engagement letter spells out the fact that these services are not being provided and, if possible, specify the identity of the professional who is undertaking these services. If the client has not retained a professional to perform needed services excluded under the terms of the retainer, the client should be advised in writing about the need to seek professional assistance in the omitted areas.

D. Claims by Non-Clients

In most areas of practice, an attorney may only be sued by a client. Although many states permit the beneficiary of an estate to sue an attorney whose negligence caused the testator's intended disposition of the bequest to the beneficiary to fail, this is not true in New

York. This past month, the Court of Appeals held that while the estate may sue the decedent's attorney for errors in estate planning that resulted in increased tax liability, "strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third-parties to commence professional negligence actions against estate planning attorneys would produce undesirable results-uncertainty and limitless liability."[1] Notwithstanding the lack of a legal basis, to protect oneself against a claim by a dissatisfied beneficiary, the testator's wishes should be clearly documented, preferably in a document generated by the testator, and the testamentary documents should be checked and re-checked to ensure compliance with the testator's wishes.

Early recognition of the potential for client dissatisfaction is the most effective way of preventing claims. It is hoped that alerting the trust and estates and probate practitioner to some of the more common claim scenarios will enable the attorney to identify and avoid the potential pitfalls associated with these practice areas.

Endnote

1. *Estate of Schneider v. Finmann,* ___ N.Y.2d ___, 2010 WL 2399564 (June 17, 2010).

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Guardianship News: Personalities, or Embalming with Bile

By Robert Kruger

Over the years, the individuals for whom I serve as fiduciary (Guardian or Trustee) or their families often present, as a group, a Chinese menu of dysfunction. Mention the name of an IP and the horrors past are resurrected—the memories come flooding back. Passing by, in this parade, are Roxanne, Jennifer, Alice, Tywana and John.

One is the IP herself, one is a parent of an IP, two are children of IPs, and one is a sibling of an IP. I have long played with the notion that some, if not all, were deserving of monuments to their awfulness.

This article is not intended as a testament to my endurance, or mulishness, by hanging on as fiduciary when any sensible person would have thrown in the towel long before. This aspect of guardianship is rarely written on, although attorneys who accept fiduciary appointments know that family dynamics are the "guts" of guardianship. That is what people who are disengaged from the process do not understand…that people often behave in irrational, self-destructive ways.

These interpersonal relationships contain the seeds of most discord in guardianships. Successfully managing such relationships will determine an attorney's success or failure as a fiduciary in the guardianship realm. Corporate trustees are not exempt from such discord. However, with well appointed offices, and oozing the patina of wealth and power, corporate trustees can intimidate conflicted families more easily than an individual fiduciary can.

Let me, therefore, indulge in a few stories, starting with the inimitable Roxanne, the mother of six children by four (or was it five?) different fathers. One of those six children recovered a rather respectable six million plus (net) as a result of a medical malpractice settlement. A guardianship proceeding resulted in the appointment of your author as Property Management Guardian, and Roxanne was awarded a $3,000.00 monthly stipend.

Time passes and Roxanne moves her family to Georgia. The reasons why are not here germane. The guardianship is paying for some home care/babysitting for her. One day, a supervisor/social worker from the agency providing the home care workers calls to advise me that there is no food in the house and that the workers are bringing in bread, butter, milk and more. How can this be? Roxanne is receiving $3,000.00 per month. What is she doing with the money?

A few days later, I have my answer. She is using the stipend to pay the legal expenses of her incarcerated fiancée, who was convicted, and was serving time, for sexually molesting Roxanne's oldest daughter who was, during this period, living in the same residence with Roxanne and her five (5) siblings.

I reported this story to the Court and was directed to move the guardianship out of the New York Court to a Court in Georgia, which I did as quickly as I could. As is often said, you can't make this stuff up.

We turn now to John and, to a lesser extent, Alice. They are siblings and I am the Property Management Guardian for their father. Their grievance with me involves my attempts, during this lengthy recession, to sell real property the father owns.

John, in particular, pursues his agenda by litigation, a party to 38 known lawsuits, all of which he has lost. He has sued me four times thus far in the Eastern District. The first three suits were consolidated and dismissed by U.S.D.J. Jack Weinstein. The dismissals were affirmed by the Second Circuit Court of Appeals and John actually filed a petition for a writ of certiorari (probably denied by the time you are reading this article). Alice has filed a copycat lawsuit in the Southern District, not yet resolved.

The grievance John filed against me has also been dismissed. I mention in passing, without description, the 8 to 10 motions I have filed, six of which have resulted in Notices of Appeal from John, his Notice of Mechanics Lien, and the renewal thereof, and plenary actions brought against my ward because of (1) John's conveying title to his half of the family home to my ward, and (2) numerous lawsuits alleging that this conveyance was a fraudulent conveyance (which it was). In addition, my ward signed over title to another son's home, to guarantee his son's obligations, at John's behest, prior to the institution of the guardianship. This act generated considerable litigation, as John and his brother attempted to wriggle out of the consequences of this guarantee. Why was my ward in title to his son's home you might ask. Probably to avoid the son's creditors.

The magnitude of claims against John will exceed $1,000,000.00 once all are reduced to judgment. Add to this a mortgage in foreclosure, and my ward's home will, inevitably, be foreclosed or partitioned. The misguided actions of my ward's now deceased wife, who made John a joint owner of the home with her, placed my ward at John's mercy. It has not worked out well.

I include Alice in the pantheon because of her unrelenting rage at me for attempting to sell an apartment in Naples, Italy which she intends to preserve. She has threatened litigation in Italy and succeeded in scaring off all interested parties. She deserves her place more as a result of her unpleasantness coupled with unbridled rage than as a result of her sabotage of her father's interests, which will, unfortunately, succeed.

Tywana is self-interested, scheming to access her brother's estate. This is hardly unique. However, the fact that she married a man who, as a guest of the state, is serving an extended term for manslaughter, secures her place on the list. There is serious concern that, upon his release from prison this year, the gentleman will visit his disabled and wheelchair-bound brother-in-law for a loan. When he doesn't get what he wants, who knows what the reaction will be?

Last on the list is Jennifer, who allegedly suffers from multiple chemical sensitivity. The condition, to a certain extent, mimics chronic fatigue syndrome, but on a much more pervasive level. She is functional a few hours a day and is close to a state of exhaustion for the rest of the day.

She is not, however, cognitively impaired. She graduated from an elite college and, intellectually, is quite intelligent. The problems she presents are psychological. In court papers, I described the problem she presents thus: a guardian is appointed to make executive decisions and secure the assistance of others to carry out these decisions. The guardian is not a handmaiden. Conversely, Jennifer wants staff…she wants to make decisions and have the guardian carry them out. In truth, Jennifer does not need or want a guardian and the guardianship (but not the SNT) has now been terminated.

What makes dealing with Jennifer so problematic are her constant demands for special accommodations. She was accepted in the TBI waiver program but she has gone through several service coordinators, largely because they could not accommodate all of her requests, and she was correspondingly unhappy with them. For the last year-and-a-half or two of the guardianship, she refused to talk to me, or the geriatric care manager on the case, because we had to tell her things she did not want to hear.

The care manager, TBI and I found her an apartment, courtesy of HRA, in a safe neighborhood, that was untainted by chemicals, but she refused to move in because, as it turned out, she wanted to remain in her current apartment which she had originally asserted was chemically unsafe for her to live in. I note that there was a judgment of eviction against her for non-payment of rent. Her rent exceeded her monthly SSD check and the Judge, who stayed the eviction for three years, nine months, finally said "enough." Yet, when we pressed the danger of eviction on her, we were exiled.

I have never had a case where the Judge, her law secretary, the court officer, the part clerk, the people from TBI, and HRA, and many others, despised the IP. There were many conversations about whether she really did suffer from multiple chemical sensitivity. Or was she a sociopath? Or a borderline personality? Jennifer's relentless self absorption, and demands for accommodations (she attended court hearings wearing a World War II gasmask, which she removed to eat an apple) exhausted everyone.

I am now out of this case, except for her appeal from my award of counsel fees. MHLS, who represented her throughout, is perfecting the appeal in MHLS's supine acquiescence to her wishes. This is a story for another day.

Jennifer has now moved to Sullivan County, where she is torturing new people with her demands.

In rereading this article, I question my purpose in telling these stories. Part, no doubt, was therapy for me. But a part was recognition of how central family dynamics are to the operation of a guardianship. Only one of these guardianships involved an elderly person, the father of John and Alice. Ordinarily, the warring children want to kill each other, not the guardian. Therefore, serving as guardian for an elderly person strikes me as easier than serving a younger person. My position as guardian for John's father is time limited in a way that serving as guardian for Jennifer would not have been. And, therefore, perhaps more tolerable than serving as Jennifer's guardian would be.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of the Article 81 (Guardianship) training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court evaluator and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

Divorce and Planning for Children with Special Needs

By Adrienne J. Arkontaky

As we all know, the divorce rate in America is staggering. The statistics are unclear as to whether the divorce rate among couples with children with special needs is higher. Dealing with the challenges of raising a child with a disability can certainly add stress to a marriage. Some couples report that the challenge brings them closer together while others indicate that the pressure of the situation can cause added tension in the marital relationship.

"Matrimonial attorneys, although very well versed in handling divorce matters, may not be skilled in dealing with the unique needs of a child with disabilities."

If a couple with a child with special needs does divorce, special care should be taken by both the matrimonial attorney and estate planning attorney in dealing with the situation. Matrimonial attorneys, although very well versed in handling divorce matters, may not be skilled in dealing with the unique needs of a child with disabilities. The matrimonial attorney must consider the effect that child support payments may have on the child's ability to secure government benefits. The attorney must also consider the educational needs of the child and who will be the one to make decisions and advocate for the child. Children with severe disabilities may need guardianship after they reach the age of majority. Consideration should be given to who will retain guardianship. Also, many separation and divorce agreements mandate that parents maintain insurance policies to ensure that children will be taken care of after the death of the parents. It is important for attorneys to consider how the payment of insurance policy proceeds will affect a special needs child's ability to secure public benefits. This article will explore these issues and provide an overview on the some of the problems and effective planning options available.

A. Life Plan

When considering a plan for caring for a child with special needs in the context of a divorce, it is important to consider and possibly negotiate who will be responsible for making medical, educational, housing, vocational decisions for the child post divorce and who will be financially responsible for the cost of the same. The divorce decree should be very clear in setting out these provisions. The attorney and the parties should be very careful that none of these provisions conflict. Families and matrimonial attorneys should consult with professionals with expertise to address the capacity of the child with special needs and how the parties should plan for the child's future. The parties must be sure that the decisions made on behalf of the child with special needs are based on a well thought out assessment of the child's unique needs.

B. Child Support and Government Benefits

One of the most common problems that occur is in the area of child support. The divorce agreement usually sets out the amount of child support that will be paid to ensure that the children of the divorcing couple will be taken care of at least until the age of majority or when the children finish college. However, in the case of a child with special needs the need for financial support may carry over throughout the child's lifetime. It is important that a child with special needs receive the proper amount of financial support but unfortunately, child support payments, if not handled properly, can jeopardize the child's ability to receive certain government benefits including supplemental security income ("SSI") and Medicaid. Even if the child can afford the loss of SSI, in many cases the loss of Medicaid denies the child access to health care coverage which can be devastating. Medicaid in many cases covers a child's therapeutic interventions such as physical, occupational and speech therapy. It also may cover prescriptions, medical equipment and nursing services.

Matrimonial attorneys may not be aware of the effect that child support payments have on the child with special needs ability to access government benefits. Attorneys must consider how to balance child support and the need to maintain eligibility for government benefits for children with disabilities. The proper use of a special needs trust in a divorce proceeding can greatly enhance the quality of life for a child with disabilities. One solution is to direct child support payments to a special needs trust set up for the sole benefit of the child with disabilities. This may be done by either the non-custodial, or in some cases the custodial, parent if the planning was not done as part of the divorce process. In some cases, the irrevocable assignment must be part of the court order. Assignment to a special needs trust should not affect the child's ability to receive SSI and/or Medicaid. Attorneys should reference the Social

Security Administration's (SSA) Program Operations Manual System (POMS) for a detailed explanation of how SSA deals with child support. In many cases, although an attorney may be successful in obtaining a greater amount of child support for a child, inadvertently, the attorney may compromise a disabled child's ability to access public benefits.

C. Child Support and Life Insurance

Many divorce agreements mandate that one or both parents maintain a specific amount of life insurance to ensure that financial support will be available after the death of the parents who are divorcing. There is usually a negotiation and settlement (or court order) as to the amount of life insurance that should be held. If the child has special needs, one planning option is to have the life insurance proceeds made payable to a special needs trust. Usually this type of arrangement can be facilitated through the use of a third party supplemental needs trust without warranting a Medicaid payback if handled properly. In addition, at the death of the child with disabilities, any remaining funds can be distributed to whomever the insured desires.

D. Guardianship

In many cases, divorce agreements address the needs of the children until they reach the age of majority or they finish college, but in the case of a child with special needs, the need for on-going care may be lifelong. Many children with special needs will be unable to make their own decisions even after they reach the age of majority. It is imperative that the issue of how to address who will retain guardianship be addressed during the divorce proceeding if possible. Being proactive in this manner may in fact circumvent a potential contested guardianship later on.

E. Educational Decision Making

Children with special needs are often entitled to special education services through their local school districts. It is also important that attorneys consider who will be primarily responsible and who will have the authority to make educational decisions for the child with special needs. If this issue is not addressed, in many cases, children are denied appropriate services because they are caught in the crossfire between parents who, for various reasons, cannot agree on how to handle the educational needs of the child.

F. Estate Planning and Divorce

As special needs planning practitioners, we need to realize the sweeping effect that divorce can have on estate planning for families post-divorce. It is prudent to meet with a recently divorced couple as soon as practicable to review and update estate planning documents including all advance directives. When a family has a child with special needs, care should be taken to review the estate plan to be sure that the child's unique needs are addressed. A special needs trust can be used to provide financial security for the child.

"The divorce process is difficult in general but when you are trying to plan for a child who will need lifelong support, attorneys are faced with an even greater challenge."

Conclusion

As you can see, it is imperative for special needs attorneys to get involved as early as possible to educate the matrimonial bar on how best to plan for a child with special needs. The divorce process is difficult in general but when you are trying to plan for a child who will need lifelong support, attorneys are faced with an even greater challenge. It is important for matrimonial attorneys, judges and special needs attorneys to work together early in the process to ensure that the child with special needs is protected in every aspect of life.

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Why a Client's Status as a Veteran Should Be an Important Component of Your Planning

By Felicia Pasculli

The Elder Law Bar has come a long way in recognizing the importance of a client's or client's spouse's status as a veteran and how it may relate to eligibility for compensation and pension benefits, as well as access to health care. Attorneys are incorporating advice regarding the array of veterans benefits into their care planning consultations. These benefits range from needs-based programs such as pension, to geriatric programs, to compensation for service-related disabilities. They can be a critical component of a specific client's long term financial and health care plans. Last year, in further recognition of the importance of a client's status as a veteran, NYSBA's Elder Law Section added the Veterans Benefits Committee to its committee roster, for which I serve as Chairperson.

The Department of Veterans Affairs (DVA) is the second largest governmental agency. It has Cabinet-level status and is responsible for administering benefits programs for veterans, their families, and survivors through the Veterans Benefits Administration (VBA). These benefits include disability compensation, pension, education, home loans, and life insurance.

The DVA also administers the country's largest healthcare system through the Veterans Healthcare Administration (VHA). The interest of elder law attorneys in this area is relatively new and related somewhat to the change in attorney representation rules regarding veterans. Up to now, it has been focused largely on obtaining pension benefits for elderly veterans or their widows(ers). Attorneys concentrating in the areas of elder law and special needs should also be attuned to potential eligibility of clients who are the dependents of veterans, whether parent or child, and to special programs for veterans suffering traumatic brain injury (TBI).

Clients who are veterans should always be advised to enroll in and seek assistance from their local DVA Medical Centers (VAMC), whether or not they are presently interested in obtaining care directly from the particular facility. The VAMC has a priority system that is budget sensitive and is not legally obligated to care for every veteran who seeks assistance. Due to the downturn in the economy, lack of healthcare coverage, and the demand of returning servicepersons, many VAMCs have had to turn away veterans. The low cost of prescription medications is usually reason enough for a veteran to enroll.

Questions to incorporate into initial consultations with clients should include the following:

A. Are you or your spouse a veteran?

(Please answer even if spouse is deceased)

The spouse of a veteran is not eligible for pension benefits unless he or she is also a veteran or the spouse veteran is deceased. The surviving spouse could be eligible for compensation based on the cause of the veteran's death if it's due to a service-connected disability or VA negligence.[1] Recently, I undertook a case regarding a Vietnam veteran who suffered from diabetes and died suddenly at 59 of a heart attack. His death certificate states heart disease and diabetes as contributing factors to the cause of death. Although the veteran never applied for a service connection (diabetes is presumed by the VA to be caused by service in Vietnam),[2] his widow can make a claim connecting his death to his service.

B. In what branch of service (Army, Navy, etc.) did you serve? During what years did you serve?

Eligibility for pension benefits requires service during "periods of war"[3]

World War II—	December 7, 1941 through December 31, 1946
Korean Conflict—	June 27, 1950 through January 31, 1955
Vietnam Era—	August 5, 1964 through May 7, 1975 (Real start date 2/28/61)
Persian Gulf War—	August 2, 1990— officially ongoing

C. Were you ever awarded a service-connected disability rating? If so, at what percent are you rated?

Having a service-connected disability (compensation) gives the veteran priority in terms of treatment at VA facilities. If the rating is 70% or more, the VA is obligated to pay for the veteran's nursing home care

whether or not it's related to the service-connected disability[4]

D. Do you have any dependents?

In addition to spouses and children, in limited circumstances, VA benefits are payable to veterans with dependent parents or to surviving parents of deceased veterans. Eligibility is based on a proven parental relationship to the veteran and whether or not the parent was financially dependent upon the veteran. "…[p]arent means (except for purposes of…39 USCS § 1902 et seq…a father, a mother, a father through adoption, a mother through adoption, or an individual who for a period of not less than one year stood in the relationship of a parent to a veteran at any time before the veteran's entry into active military, naval, or air service.…"[5] The types of benefits available to parents are certain accrued benefits the veteran was entitled to at the time of death under existing ratings or decisions or those based on evidence in the file at date of death;[6] wartime death compensation;[7] and, dependency and indemnity compensation, where the veteran's death was due to a service-connected disability or VA malpractice or negligence.[8]

E. Do you have a child who was determined to be disabled before the age of 18?

Although it is an arcane and somewhat offensive term, "helpless child" is used by the VA to describe a veteran's biological child, stepchild, or adopted child "who, before attaining the age of eighteen years, became permanently incapable of self-support."[9] The child may be disabled due to a physical or mental disability. A claimant should submit pertinent medical and/or psychiatric reports to support the existence of the disability before age 18.[10] The child may be eligible for monthly compensation, health care benefits, and educational benefits.

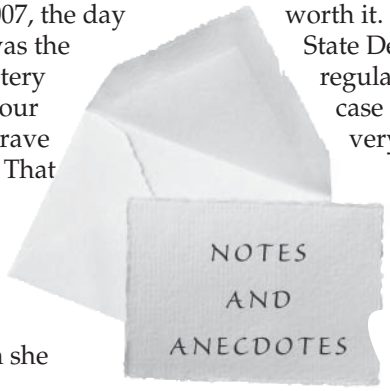
The guardian of a developmentally disabled 52-year-old sister recently sought my advice regarding obtaining health care benefits for his ward. He had been insuring her through his employment, but the company was now requiring a monthly payment of almost $1,000. His sister was also the beneficiary of a testamentary trust. We considered applying for Medicaid benefits until I realized her only income seemed to be a compensation payment from the VA. At his death, the ward's father had a service-connected disability rated at 100%. Since the ward was a "helpless child," she is also entitled to health care coverage under CHAMPVA, at no cost to her.

Hopefully, you have found the preceding information both interesting and enlightening. It would be impossible to cover all of the intersections between elder law and veterans law in one article. One goal is to have elder law attorneys recognize financial and health care opportunities available through the VA. Equally important is to imbue our section with a healthy respect for the area of Veterans Law and an understanding that a responsible attorney can no more "dabble" in veterans law than one can in elder law. The Editor of *Elder Law Attorney* has graciously offered to give me and the Veterans Benefits Committee the opportunity to provide ongoing information and insight to our section in coming issues. We are also planning to survey the section on the extent to which they practice veterans law and the training and information that would be most beneficial to them. Your input regarding these goals would be greatly appreciated.

Endnotes

1. 38 U.S.C. § 1310.
2. § 1116(a)(2)(H).
3. § 1101(2)(A) and (B).
4. § 1710(A).
5. § 101(5).
6. 38 U.S.C. § 5121.
7. § 1121 (a)(6).
8. § 1315.
9. § 101 (4)(A)(ii).
10. § 1803.

Felicia Pasculli is a Certified Elder Law Attorney, a certification of the National Elder Law Foundation. She is a founder of the Long Island Alzheimer's Foundation and is presently Chair of its Legal Advisory Board. Ms. Pasculli is also active in the area of Veterans Law and is admitted to practice before the U.S. Court of Appeals for Veterans Claims and is a volunteer attorney for the Veterans Legal Consortium. She was appointed as Chair to the newly created Veterans Benefits Committee of the Elder Law Section of the New York State Bar Association.



By Fredric Saunders

I can never forget that date, May 29, 2007, the day after the Memorial Day celebration. That was the day that my wife and I drove to a pet cemetery in eastern Long Island to visit the grave of our beloved dog Lacy. Genevieve cried at the grave site and was very quiet on the drive home. That evening she displayed the classic symptoms of a stroke. I called 911 and she was promptly taken to the local hospital where they confirmed that she indeed had suffered a serious cerebral hemorrhage. During the course of the next month she suffered two more strokes.

The tests had revealed that she had significant damage to the cognitive areas of the brain. I knew that I had to plan for her long-term care so I spoke to a neighbor whose son had had a spinal injury. She referred me to an elder law attorney's office who recommended a rehabilitation center that had a brain injury unit. When Genevieve was stabilized, she was discharged to that wonderful rehabilitation center where for the next two-and-a-half months she underwent physical, occupational and cognitive therapy. She improved greatly but still had major cognitive deficits and physical limitations.

In the interim, with the input of the neurologists in the hospital, I began planning with the elder care attorney for Genevieve's ongoing care. The head neurologist recommended medical model day care to provide the mental and social stimulation needed to keep Genevieve's cognitive condition stable as well as to monitor her blood pressure and dispense necessary medications. It was also clear that Genevieve would need help at home with toileting, bathing, dressing, among other daily tasks. Clearly, with all the care that Genevieve would need, I feared, we would quickly become impoverished before we could qualify for Medicaid.

The elder law attorney's office helped me identify the best medical model day care facility for my needs and a reliable home health care agency. Fortunately, Genevieve's neurologist consulted at the Head Injury unit which was part of a nursing facility which also had the medical model day care unit. The home health care agency sent us an aide who, to this day, is providing Genevieve with wonderful care.

Meanwhile, we were working on the Medicaid application with all the data-gathering effort that that requires. I had no idea of the knowledge, effort and persistence it takes to overcome the inertia of the Social Services bureaucracy. I've learned many important lessons which I've tried to impart to people in similar circumstances.

Pick the right elder law attorney. Unless the disabled person has very few financial resources and the family caregiver has a great amount of time to spend on the process, an attorney is essential. Compared to the cost of home care and/or day care, the attorney's fees are well worth it. The attorney must not only be expert in State Department of Social Services (DSS) law and regulation but local DSS services as well, in our case at the County level. My attorney was also very helpful in identifying the rehab facility and reliable health care agencies. The attorney's knowledge and experience was most helpful in contacting and working with those agencies. I did not have the time or the "clout" to deal with them as effectively or expeditiously as he did.

Besides good references, you have to rely on your "gut" to tell you if the attorney will give you the time to expedite the Medicaid application and execute whatever documents are required. It's a tough time for the family caregiver so his empathy towards you and your loved one helps you through.

Prepare for the Medicaid nurse's evaluation visit. It is at that time where he/she will determine what services will be recommended. It is a good idea to consult with your attorney as to how best to present your case. I can't stress enough how important this is.

Make sure you have executed and reviewed wills, powers of attorney, living wills and health care proxies. Because our Powers of Attorney were more than a decade old, they did not have gifting powers. We had to go to court to get a temporary guardianship to enable us to move Genevieve's assets out of her name and into an irrevocable trust. Although Genevieve's will and other documents couldn't be changed, our attorney updated and executed my estate documents.

Be patient, but not too patient. The Medicaid approval process takes months, even a year, to get to the point where it pays for medical care and community services such as home health care and day care. In the interim, you are responsible for such services until the effective date of community Medicaid approval. Respond promptly to all requests for information. Keep informed on where you are in the process and what can be done to keep it moving forward. Try to keep your case at or near the top of your attorney's priority list without being obnoxious.

Don't take no for an answer from the various departments within State and local DSS. Some of the people you deal with are not experienced enough to know all the ins and outs of their regulations. When I submitted a Nursing Home invoice to the Monthly Overage Department, I was told emphatically that it was too old to be considered. My attorney, armed with documentation and DSS regulations, escalated the matter within DSS and, after some months, got that invoice accepted as a medical expense eliminating our monthly overage for more than a year.

As a result of our attorney's efforts, my wife's life is as stable, happy and safe as I could reasonably hope for.

NYSBA

Elder Law Section and Senior Lawyers Section

Joint Fall Meeting

Renaissance Westchester Hotel
White Plains, New York
October 28-30, 2010

For experienced attorneys this program will provide up to 16.5 MCLE credits including 1.5 credits in Ethics, 3 credits in Skills and 12 credits in Law Practice Management/Professional Practice. For newly admitted attorneys this program will qualify for up to 5.5 MCLE credits, 4.0 in the Basic Skills sessions and 1.5 in the Ethics session.

SCHEDULE OF EVENTS

Thursday, October 28, 2010

8:30 a.m. - 5:30 p.m. **Registration and Exhibits -** The Commons

9:00 a.m. - 10:15 a.m. **Elder Law Section Executive Officers' Meeting -** Kykuit/Lyndhurst

10:30 a.m. - 1:00 p.m. **Elder Law Section Executive Committee Luncheon Meeting -** Irving

ELDER LAW SECTION and COMMITTEE ON ISSUES AFFECTING PEOPLE WITH DISABILITIES
JOINT GENERAL SESSION
Cooper/Greeley

1:30 p.m. - 1:45 p.m. **WELCOMING REMARKS**
SHARON KOVACS GRUER, ESQ.
SECTION CHAIR
Sharon Kovacs Gruer, P.C.
Great Neck

PROGRAM INTRODUCTION
TAMMY R. LAWLOR, ESQ.
FALL PROGRAM CO-CHAIR
Miller & Milone, P.C.
Garden City

MILES P. ZATKOWSKY, ESQ.
FALL PROGRAM CO-CHAIR
Dutcher & Zatkowsky
Rochester

NANCY H. HALLECK, ESQ.
CHAIR, COMMITTEE ON ISSUES AFFECTING PEOPLE WITH DISABILITIES
NYS Office of Mental Health
Albany

1:45 p.m. - 5:20 p.m. **PRACTICAL SKILLS CLASSROOM SESSIONS**
The Practical Skills Classroom will be an opportunity for participants to engage in an interactive presentation on some of the basic components of elder law. These basic programs are eligible for credit for newly admitted attorneys. For those experienced practioners, we offer in-depth coverage of various topics relevant to those who represent persons who are elderly and/or have disabilities. You will be able to attend one of the two offered topics during each time slot.

Please note that pre-registration for each classroom setting is not required.

1:45 p.m. - 2:35 p.m. **PRACTICAL SKILLS CLASSROOM SESSION 1**

Basic **BASIC MEDICAID PLANNING -** Hutchinson/Zenger
DOUGLAS J. CHU, ESQ., Hynes & Chu, LLP, New York

Advanced **HOW TO FILE SSD APPLICATIONS, SSI APPLICATIONS, AND APPEALING SSD DETERMINATIONS -** Cooper/Greeley
ARLENE KANE, RN, ESQ., Law Offices of Arlene Kane, RN, Esq., Roslyn

2:35 p.m. - 3:25 p.m. **PRACTICAL SKILLS CLASSROOM SESSION 2**

Basic **HOW TO PREPARE AND CONDUCT A FAIR HEARING AND ARTICLE 78 PROCEEDING -** Hutchinson/Zenger
MORIAH R. ADAMO, ESQ., Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success

Advanced **AN OVERVIEW OF SPECIAL EDUCATION LAW AND HOW TO HANDLE CSE APPEALS -** Cooper/Greeley
SUSAN J. DEEDY, ESQ., Law Office of Susan Deedy, Esq., Wantagh

3:25 p.m. - 3:40 p.m. **Break** - The Commons

3:40 p.m. - 4:30 p.m. **PRACTICAL SKILLS CLASSROOM SESSION 3**

Basic **DISTINGUISHING GUARDIANSHIPS -** Hutchinson/Zenger
LISA M. PETROCELLI, ESQ., Law Secretary to the Hon. Joel K. Asarch, Mineola

Advanced	**HOW TO INITIATE A KENDRA'S LAW PROCEEDING AND CONDUCT A RIVERS V. KATZ HEARING -** Cooper/Greeley SUANNE L. CHIACCHIARO, ESQ., Suanne L. Chiacchiaro, Esq., East Northport
4:30 p.m. - 5:20 p.m.	**PRACTICAL SKILLS CLASSROOM SESSION 4**
Basic	**HOW TO DRAFT A SUPPLEMENTAL NEEDS OR SPECIAL NEEDS TRUST -** Hutchinson/Zenger ELIZABETH MURPHY, ESQ., Miller & Milone, P.C., Garden City
Advanced	**THE ATTORNEY GENERAL'S POSITIONS WITH REGARD TO SUPPLEMENTAL NEEDS TRUSTS -** Cooper/Greeley MARK D. BRODY, ESQ., Office of the Attorney General of the State of New York, Albany **(1)** Update on Litigated SNT Positions • When/How the AG seeks to oppose or void SNTs • When/Why the AG seeks to create or consent to SNTs • How competing statutory obligations are balanced **(2)** AG's SNT Positions in Guardianship Proceedings • Payback vs. Pooled Trusts • Art 81 vs. SCPA 17-A
6:00 p.m. - 7:00 p.m.	**Cocktail Reception -** Irving All are welcome. Join us for cocktails and hors d'oeuvres. Dinner is on your own. *Sponsored by Jasper Surety*

Thursday, October 28, 2010 - Senior Lawyers

8:30 a.m. - 5:30 p.m.	**Registration and Exhibits -** The Commons
10:00 a.m. - 11:00 a.m.	**Senior Lawyers Section Executive Officers' Meeting** - Van Cortlandt/Vanderbilt
11:00 a.m. - 1:00 p.m.	**Senior Lawyers Section Executive Committee Luncheon Meeting -** Van Cortlandt/Vanderbilt

SENIOR LAWYERS SECTION and DISPUTE RESOLUTION SECTION — JOINT GENERAL SESSION

Masefield

Mediation Comes of Age - A New Frontier for Elder Law Practitioners and Senior Lawyers

1:30 p.m. - 1:45 p.m.

WELCOMING REMARKS
JUSTIN L. VIGDOR, ESQ.
SENIOR LAWYERS SECTION CHAIR
Boylan, Brown, Code, Vigdor & Wilson, LLP
Rochester

PROGRAM INTRODUCTION

WALTER T. BURKE, ESQ.
SENIOR LAWYERS SECTION CHAIR-ELECT
Burke & Casserly, P.C.
Albany

SIMEON H. BAUM, ESQ.
DISPUTE RESOLUTION SECTION PROGRAM CO-CHAIR
Resolve Mediation Services
New York City

1:45 p.m. - 3:00 p.m.

MEDIATION OF ESTATE ISSUES & DEVELOPMENT OF THE USE OF MEDIATION IN SURROGATE'S COURT

The panel will address the wide range of issues and the rich possibilities that can be found in the mediation of estate disputes. It will discuss the recently established mediation program established by Surrogate Glen in New York County. It will also include a mock mediation of an estate matter highlighting some of the more sensitive issues that arise in this context.

Moderator:	RICHARD LUTRINGER, ESQ. Chair, Joint Committee on NY County Surrogate's Court Mediation Program New York City
Panelists:	HON. KRISTIN BOOTH GLEN New York County Surrogate's Court New York City
	DANIEL M. WEITZ, ESQ. Deputy Director, Division of Court Operations Coordinator, Office of ADR and Court Improvement Programs Office of Court Administration New York City
3:00 p.m. - 3:15 p.m.	**Break** - The Commons
3:15 p.m. - 4:30 p.m.	**AN INTRODUCTION TO THE LANDSCAPE OF ELDER LAW ISSUES THAT CAN BENEFIT FROM MEDIATION** The panel will discuss mediation in a wide variety of areas, including: family business disputes, life insurance issues, parent/child issues, health law, long-term care facility and nursing home matters, and contested guardianship proceedings.
Moderator:	MARK J. BUNIM, ESQ. Managing Director, Case Closure, LLC New York City
Panelists:	LEONA BEANE, ESQ. Mediator and Guardianship Expert New York City
	LINDA MARTIN, ESQ. Executive Vice President, Aging in America Bronx
	JODIE L. OUSLEY, ESQ. d'Arcambal, Levine and Ousley, LLP New York City
	JEROME GOTKIN, ESQ. Mintz Levin Cohn Ferris Glovsky & Popeo PC Boston, MA
4:30 p.m. - 5:20 p.m.	**BUILDING A MEDIATION PRACTICE - TIPS FOR CONTRACT DRAFTERS, REPRESENTATIVES AND MEDIATORS** This section of the program will address an issue of interest to any member of the Senior Lawyers Section who has contemplated commencing a practice as a mediator or increasing his or her involvement in mediation, whether as representative or drafter of mediation clauses. The presenters will identify elder law areas where mediation can be helpful, and opportunities for adding mediation clauses to contracts (wills, trust documents, operating agreements, etc.). The presenters will address selection of cases that are appropriate for mediation and of mediators for those cases. The presenters will provide tips on effective representation in mediation, and will offer advice on developing a practice as a mediator.
Panelists:	SIMEON H. BAUM, ESQ. Litigator, Mediator, and President, Resolve Mediation Services, Inc. New York City
	DANIEL M. WEITZ, ESQ. Deputy Director, Division of Court Operations Coordinator, Office of ADR and Court Improvement Programs Office of Court Administration New York City
6:00 p.m. - 7:00 p.m.	**Cocktail Reception -** Irving All are welcome. Join us for cocktails and hors d'oeuvres. Dinner is on your own.

SCHEDULE OF EVENTS

Friday, October 29, 2010

7:30 a.m. - 6:00 p.m. **Registration and Exhibits -** The Commons

7:30 a.m. - 8:30 a.m. **Elder Law Section Committee Breakfast Meeting -** Irving

GENERAL SESSION - Cooper/Greeley

8:30 a.m. - 8:45 a.m.

WELCOMING REMARKS
SHARON KOVACS GRUER, ESQ.
SECTION CHAIR
Sharon Kovacs Gruer, P.C.
Great Neck

PROGRAM INTRODUCTION

TAMMY R. LAWLOR, ESQ.
FALL PROGRAM CO-CHAIR
Miller & Milone, P.C.
Garden City

MILES P. ZATKOWSKY, ESQ.
FALL PROGRAM CO-CHAIR
Dutcher & Zatkowsky
Rochester

WALTER T. BURKE, ESQ.
SENIOR LAWYERS SECTION CHAIR-ELECT
Burke & Casserly, P.C.
Albany

8:45 a.m. - 10:15 a.m. **ELDER LAW UPDATE**

ESTATE TAX, INCOME TAX, AND NON-MEDICAID ELDER LAW UPDATES
• Will Include the New Power of Attorney Legislation and Form

Speaker: MICHAEL J. AMORUSO, ESQ.
Amoruso & Amoruso, LLP
Rye Brook

MEDICAID & FAIR HEARING UPDATES
Speaker: ANTHONY J. ENEA, ESQ.
Enea, Scanlan, & Sirignano, LLP
White Plains

10:15 a.m. - 11:05 a.m. **MEDICARE NUTS AND BOLTS**
Speaker: JOSEPH R. BAKER, III, ESQ.
Medicare Rights Center
New York City

11:05 a.m. - 11:20 a.m. **Break** - The Commons

11:20 a.m. - 12:20 p.m. **HEALTH CARE ISSUES PANEL**
Updates Regarding:
• Health Care Proxy
• Family Health Care Decisions Act
• Implementation of MOLST and Modifications Due to Family Health Care Decisions Act

Speakers:

ELLEN G. MAKOFSKY, ESQ.
Raskin & Makofsky, Esq.
Garden City

PATRICIA A. BOMBA, MD
Patricia A. Bomba, MD FACP
Rochester

ROGER OSKVIG, MD
University of Rochester Medical Center
Rochester

12:20 p.m. - 12:50 p.m. **ASSISTING THE "SNOWBIRD CLIENT"**
Speaker: HOWARD S. KROOKS, ESQ.
Elder Law Associates PA
Florida

SCHEDULE OF EVENTS

1:00 p.m. - 2:00 p.m. **LUNCH - Financial/Retirement Planning** - Irving
Sponsored by RDM Financial Group

2:00 p.m. - 2:50 p.m. **LITIGATION IN ELDER LAW - RULES OF EVIDENCE AND OBJECTIONS IN GUARDIANSHIP AND THE SURROGATE'S COURT**

Speaker: DAVID A. SMITH, ESQ.
Law Office of David A. Smith, PLLC
Garden City

2:50 p.m. - 3:50 p.m. **DSS MEDICAID PANEL**

Panelists: DANIEL J. TARANTINO, ESQ.
Deputy Director, NYS Department of Health
Albany

D. STEVE RAHMAS, ESQ.
Albany County Department of Social Services
Albany

RICHARD A. MARCHESE, JR., ESQ.
Monroe County Department of Social Services
Rochester

PHILIP A. VAN DER KARR, ESQ.
Ontario County Department of Social Services
Canandaigua

WILLIAM G. HOLST, ESQ.
Suffolk County Department of Social Services
Central Islip

CAROL F. ARCURI, ESQ.
Westchester County Department of Social Services
White Plains

3:50 p.m. - 4:05 p.m. **Break** - The Commons

4:05 p.m. - 4:55 p.m. **ADMINISTRATION OF SUPPLEMENTAL/SPECIAL NEEDS TRUSTS**

Speaker: JOAN L. ROBERT, ESQ.
Kassoff, Robert, & Lerner Law
Rockville Centre

4:55 p.m. - 5:45 p.m. **HEALTH CARE REFORM PANEL**

Speakers: LEE A. HOFFMAN, JR., ESQ.
Law Offices of Lee A. Hoffman, Jr.
New City

JUDITH D. GRIMALDI, ESQ.
Grimaldi & Yeung, LLP
Brooklyn

5:45 p.m. - 6:45 p.m. **Cocktail Reception** - The Commons
All are welcome. Join us for cocktails and hors d'oeuvres.

7:00 p.m. **Elder Law Section Comedy Dinner** - Irving
Full Three-Day Fall Conference Registrants Only.

7:00 p.m. **Senior Lawyers Section Dinner** - Masefield
Full Three-Day Fall Conference Registrants Only.

SCHEDULE OF EVENTS

Saturday, October 30, 2010

8:00 a.m. - 8:15 a.m.

OPENING REMARKS - Irving
SHARON KOVACS GRUER, ESQ.
ELDER LAW SECTION CHAIR
Sharon Kovacs Gruer, P.C.
Great Neck

PROGRAM INTRODUCTION
TAMMY R. LAWLOR, ESQ.
FALL PROGRAM CO-CHAIR
Miller & Milone, P.C.
Garden City

MILES P. ZATKOWSKY, ESQ.
FALL PROGRAM CO-CHAIR
Dutcher & Zatkowsky
Rochester

WALTER T. BURKE, ESQ.
SENIOR LAWYERS SECTION CHAIR-ELECT
Burke & Casserly, P.C.
Albany

8:15 a.m. - 9:30 a.m.

THE ETHICS OF DEALING WITH FRAUDULENT CLIENT CONDUCT
MICHAEL S. ROSS, ESQ.
Law Office of Michael S. Ross
New York

Michael Ross is an adjunct professor at both Cardozo Law School and Brooklyn Law School, teaching Responsibility and Ethics in Litigation. His practice is focused on the representation of attorneys before disciplinary and grievance committees and advising attorneys on ethical issues.

9:30 a.m. - 10:20 a.m. **ROUNDTABLE DISCUSSIONS SESSION 1**

10:20 a.m. - 10:35 a.m. **Break**

10:35 a.m. - 11:25 a.m. **ROUNDTABLE DISCUSSIONS SESSION 2**

11:25 a.m. - 12:15 p.m. **ROUNDTABLE DISCUSSIONS SESSION 3**

ADVANCED PRACTICE WORKSHOPS - Irving
The Advanced Practice Workshops will be interactive roundtable discussions on some of the more complex issues in elder law. In addition, the Senior Lawyers Section is presenting a workshop on how lawyers can assist their clients (and themselves) with retirement life planning. Each participant will attend three sessions over the course of the morning and will be able to select from the following topics.
Please note that pre-registration for each discussion is not required.

TOPICS

- **Community Care Options and Benefits Available**
  Ellyn S. Kravitz, Esq., Littman Krooks, LLP, New York
- **Guardianship and Part 36 Appointment Issues**
  Anthony J. Lamberti, Esq., Brooklyn
- **Medicaid's Treatment of Real Property Issues (Reverse Mortgages, Life Estates)**
  Robert J. Kurre, Esq., Robert J. Kurre & Associates, PC, Great Neck
- **Mental Health Issues and Services**
  Eve Green Koopersmith, Esq., Garfunkel Wild, PC, Great Neck
- **Practice Management Tips in a Slumping Economy**
  Ronald A. Fatoullah, Esq., Ronald Fatoullah & Associates, Great Neck
- **Veteran's Benefits**
  Felicia Pasculli, Esq., The Elder Law and Special Needs Practice of Felicia Pasculli, P.C., Bayshore
- **Retirement Life Planning for Attorneys & Their Clients - It's About More than Money**
  Rosemary C. Byrne, Esq., Step By Step Coaching, Englewood, NJ

Program Concludes

IMPORTANT INFORMATION

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Under New York's MCLE Rule, experienced attorneys will qualify for up to 16.5 MCLE credits including 1.5 credits in Ethics, 3 credits in Skills and 12 credits in Law Practice Management/Professional Practice. For newly admitted attorneys this program will qualify for up to 5.5 MCLE credits, 4.0 in the Basic Skills sessions and 1.5 in the Ethics session.

DISCOUNTS AND SCHOLARSHIPS: New York State Bar Association members and non-members may apply for a discount or scholarship to attend this program, based on financial hardship. This discount applies to the educational portion of the program only. Under that policy, anyone who has a genuine basis for his/her hardship, and if approved, can receive a discount or scholarship, depending on the circumstances. To apply for a discount or scholarship, please send your request in writing to Kathleen M. Heider at: New York State Bar Association, One Elk Street, Albany, New York, 12207, or email to kheider@nysba.org.

SPECIAL DISCOUNTS: The Elder Law Section has approved a new policy which allows for a 50% discount on the registration fees for all Elder Law Section members who practice in government, public sector or as Court personnel. This discount is not automatic and ***must be requested in writing*** as stated above under *Discounts and Scholarships.* **Members of the Judiciary may also register as a guest and pay the reduced guest registration fee.**

ACCOMMODATIONS FOR PERSONS WITH DISABILITIES: NYSBA will make reasonable modifications/accommodations to allow participation in its services, programs, or activities by persons with disabilities. NYSBA will provide auxiliary aids and services upon request. NYSBA will remove architectural barriers and communication barriers that are structural in nature where readily achievable. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Kathy Heider at 518.487.5500 or kheider@nysba.org.

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WEALTH PARTNERS

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Section Committees and Chairs

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