NYSBA WINTER 2009 | VOL. 19 | NO. 1

Elder Law Attorney

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

Message from the Chair

Timothy E. Casserly

In 2009, we will have a new President, new representatives at both the federal and New York State levels and new deficits in New York State's budget. As such, we can anticipate any number of legislative proposals that will have a great effect on our clients and our practices. These changes will likely reach our income and estate tax systems; the treatment of some of our waiver programs; and the Medicaid budget, including the state's approach to spousal impoverishment and the right of recovery being expanded beyond simply proceeding against the probate estate. And with the condition of the economy and the state's budget, it is not likely that we will see many proposals that we would consider beneficial to our clients.

As Chair, it has been one of my priorities to continue our Section's active role in the legislative process on several levels, including the ongoing implementation and interpretation of the Deficit Reduction Act (DRA) by New York State. I think it is safe to say there will be no shortage of issues calling for the input of both our Section's Committees and the Bar Association itself.

Among those issues is the Compact for Long Term Care, which is again listed among the Association's top four legislative priorities for 2009. Having this support is no small measure, seeing that our President, Bernice Leber, solicits from all Section and Committee officers a list of their priorities for the coming year. In August, I submitted that list on behalf of our Section and then, following the review of NYSBA's Committee on Legislative Policy, those numerous recommendations were pared down to a small list on which the Association will focus its legislative efforts for this year. (The other top priorities of the Bar Association include 1) judicial salary reform for New York State judges, 2) access to the judicial system for impoverished persons, and 3) legal rights for same-sex couples.) Hopefully, this support plus the ongoing efforts and creativity of our Compact working group will continue to work with the state to design and implement an alternative for long-term care that would be not only cost neutral to

Inside this Issue

NYSBA

New York State but also likely to result in substantial savings as well. In furtherance of this matter, several of our members, including NYSBA's former President Kathryn Madigan, recently met with members of the Department of Health to discuss the Compact and variations for alternative programs for long-term care. It is my expectation that these discussions will continue and, ultimately, produce a proposal that Governor Paterson will find workable and beneficial to Seniors in New York State.

In addition to the Compact, our Legislation Committee, co-chaired by Amy O'Connor and Michael Amoruso, has been very busy through the Fall working with the Trusts and Estates Law Section on separate pieces of proposed legislation pertaining to interests on bequests, directed trusteeships and exemptions for benefit of family (amending EPTL 5-3.1). Sharon Gruer continues to work tirelessly in refining proposed legislation for a qualified elective share supplemental needs trust, while other committees are proposing, drafting or commenting on legislation ranging from allowing a disabled person to create his or her own SNT to reviewing certain provisions of Article 81 (the latter being the work of the Task Force established by Bernice Leber and which is comprised of members of our Section and the Trusts and Estates Law Section).

Besides legislation, our Section's committees have been working on numerous projects and programs. In terms of programs, Cora Alsante chaired a great Fall program in Cooperstown at the Otesaga Resort Hotel, which attracted 120 attorneys. The two-day program was immediately followed by our Advanced Institute, which was chaired by Amy O'Connor and Robert Kurre. The 14 MCLE credit hours covered a great range of topics including practice management, DRA planning from the nursing home's perspective, planning under the DRA and a 90-minute panel discussion by DSS attorneys from several counties, as well as Dan Tarantino, Deputy Director of New York State Department of Health. Having the opportunity to gain the insight of how various counties and the state interpret and implement the DRA as well as other laws affecting our clients made this session especially enlightening. Therefore, thanks not only to Mr. Tarantino but also to Paula Mallory Engel and Morgan Thurston (Onondaga County), Kevin Caraccioli (Oswego County), Shelia Giess (Monroe County) and Steve Rahmas (Albany County) for participating.

One other noteworthy highlight of the Fall Meeting was the first ever Elder Law Section Softball Classic which, but for a few bruised egos, was successfully played without any major injuries. Thank you Kathy Heider and Lori Nicoll for not only doing your regular great job in helping us plan and run our meeting, but also for supplying the uniforms, hats and Cracker Jacks for the game as well.

In other program news, I hope that as you are reading this you are already registered for our New York City meeting on January 27, 2009. Ellyn Kravitz has assembled a great program including some familiar names and several speakers new to the Section. Also, if your schedule permits, feel free to join us for the Executive Committee Meeting at 10:30 a.m. that same day and/or join us at the cocktail reception immediately following our Annual Meeting. We will also be holding committee meetings that day at 1 p.m.

In addition to the Annual Meeting, other dates to set aside in 2009 are for our Section's Unprogram on April 24 (co-chaired by Martin Hersh and Shari Hubner), our Summer Meeting in Washington, D.C., at the Ritz Carlton, July 23 through 26 (chaired by Anthony Enea) and our Fall Meeting at Lake George at the Sagamore Hotel, October 28 through 31 (chaired by JulieAnn Calareso). I think that you will find that each of the programs will be of the same consistent high quality that our Section is known for. I also believe that attending any of these upcoming meetings will inspire you to get involved in any of a number of our Section's committees and projects. Some of these projects include our Pro Bono Clinics, which are overseen by David Stapleton and our District Delegates, wherein we provide free legal services to Seniors in each District at least once a year; the *Senior Citizen Handbook*, which we are preparing and updating jointly with the Young Lawyer Section so as to provide this valuable resource to consumers this year; and the Continuing Legal Education Committee, co-chaired by Ami Longstreet and Ellen Makofsky, which is in the process of assembling speakers and writers for upcoming CLE programs, including a series of one-hour Webinars. Alternatively, if you cannot make it to New York City on January 27, please feel free to contact me or any other Committee Chair directly to get involved in any area in which you might have a particular interest.

Timothy E. Casserly

Editor's Message

It is truly a rare occasion when a quarterly New York State Bar Association publication can boast of having four (4) articles authored by nationally recognized authorities in a particular field of law. I am proud to say that our Section has been able to accomplish this rare feat in this edition of the *Elder Law Attorney* (*ELA*). We have been blessed with articles covering the full spectrum of issues relevant to Veterans benefits from our esteemed colleagues, Victoria Collier, Esq., Alice Reiter Feld, Esq., Arlene Kane, Esq. and Felicia Pasculli, Esq., all of whom are nationally recognized as preeminent authorities in the field of Veterans benefits.

If you often find yourself perplexed about whether your Veteran client or his or her spouse is eligible for Veterans benefits, I am confident that this edition of the *ELA* will provide you with many answers. It is truly a "keeper."

Additionally, we are blessed with a fantastic collection of articles from our regular contributing authors: Salvatore M. Di Costanzo, Esq., Robert Kruger, Esq., Ellen G. Makofsky, Esq., and Judith T. Raskin, Esq.

In conclusion, I am confident that you will find this edition of the *Elder Law Attorney* both enjoyable and highly educational. Grab a cup of hot cocoa and enjoy.

Anthony J. Enea

New VA Laws Regarding Representation and Attorneys' Fees

By Victoria L. Collier

Do you help elderly clients with VA applications? Or advise on planning techniques so that the veteran or the widowed spouse can become eligible for VA pension with Aid and Attendance? If you answered yes to either of those questions, you must NOW be accredited through the VA.

Who Can Represent a VA Claimant?

1. The **Claimant** can represent himself or herself directly.
2. A **Veteran Service Organization (VSO**) that is accredited through the VA.[1] Examples of such are the American Legion, the Disabled American Veterans, the Veterans of Foreign Wars, or state VA offices. A full list can be found at http://www.va.gov/ogc/recognizedvsos.asp.
3. An individual who has been accredited by the VA.[2] Generally this is an individual who has received training by the VA and has passed a test provided by the VA. The agent must agree not to charge for services rendered in assisting with the claim.
4. A "one-time" power of attorney person. This person is usually a child or relative of the claimant.[3]
5. An **ATTORNEY** who is a member in good standing with a State Bar *AND has been accredited by the VA, as of June 23, 2008*.[4] Accreditation of attorneys requires that the attorney file a VA Form 21a, Application for Accreditation as a Claims Agent or Attorney, with the Office of General Counsel. The form can be downloaded from the VA Web site at http://www.va.gov/vaforms/va/pdf/VA21a.pdf.

Once the Office of General Counsel (GC) receives the form, it will make a determination as to character and fitness. The GC will presume an attorney's character and fitness to practice before the VA based on State Bar membership in good standing unless the GC receives credible information to the contrary.[5] Assuming accreditation is approved, which will occur approximately 30 days after the GC receives the application, the attorney can then represent veterans with the preparation, presentation and prosecution of claims before the VA.

After receiving accreditation approval, both agents and attorneys are required to complete three (3) hours of qualifying continuing legal education (CLE) during the first 12-month period following the date of initial accreditation by the VA.[6]

The CLE course must be approved for a minimum of three (3) hours of CLE by ANY State Bar association and, at a minimum, must include the following topics:[7]

1. Representation before the VA;
2. Claims Procedures;
3. Basic Eligibility for VA benefits;
4. Right to Appeal;
5. Disability Compensation (38 U.S.C. Chapter 11);
6. Dependency and Indemnity Compensation (DIC) (38 U.S.C. Chapter 13); and
7. Pension (38 U.S.C. Chapter 15).

After completing the three-hour CLE, the attorney shall certify in writing to the GC that he or she has completed the qualifying CLE.[8] The certification shall include the title of the CLE, date and time of the CLE, and identification of the CLE provider.[9]

To maintain accreditation beyond the first year, the agent or attorney must complete an additional three (3) hours of qualifying CLE on Veterans benefits laws not later than three (3) years from the date of initial accreditation and every two years thereafter.[10]

Legal interns, law students, and paralegals cannot be independently accredited to represent claimants under 38 C.F.R. § 16.629. Nevertheless, a legal intern, law student or certified paralegal may assist in the preparation, presentation, or prosecution of a claim, under the direct supervision of an attorney of record designated under section 14.631(a), if the claimant's written consent is furnished to the VA.[11]

Must the Attorney Be Accredited to Provide Pre-Filing Consultations?

It depends. If the attorney is providing "general" advice on VA benefits and basic eligibility criteria PRIOR to the veteran expressing an interest to file a specific claim, then the attorney does not have to be accredited by the VA. However, if the attorney is providing advice that includes making the claim ready or eligible for filing then the attorney must be accredited. "This is because the advice is given in regards to a specific application for benefits rather than general advice not related to a specific claim." (See http://www.va.gov/ogc/accred_faqs.asp for questions and answers regarding accreditation of attorneys.) Thus, if an attorney is doing VA benefits

and is planning to assist a client in becoming eligible for benefits, then the attorney must be accredited.

Can You Charge Attorneys' Fees?

Only accredited agents and attorneys may receive fees from claimants or appellants for services provided in connection with representation.[12] **However, no organization or individual, including lawyers, can charge for the preparation, presentation and prosecution of a claim.**[13] But, if a claimant is denied or approved for fewer benefits than what was expected, a claimant may hire a paid representative to assist with an appeal ***after*** a Notice of Disagreement has been filed (for appeals filed on or after June 20, 2007), and wherein the attorney has complied with the power of attorney requirements in 38 C.F.R. § 14.631.[14]

For appeals filed prior to June 20, 2007, agents and attorneys may charge fees only for services provided after both of the following conditions have been met:[15]

1. A final decision was promulgated by the Board of Veterans Appeals with respect to the issue, or issues, involved in the appeal,[16] and
2. The agent or attorney was retained not later than one (1) year following the date that the decision by the Board was promulgated.[17]

Fee agreements must be in writing, signed by both the claimant and attorney,[18] and include the following information: name of veteran, name of claimant (if different from the veteran), name of any third party disinterested payer, applicable VA file number, and specific terms under which the amount to be paid for services of the attorney will be determined. They must also clearly specify if the VA is to pay the attorney directly out of past-due benefits.[19]

Attorneys' fees must be reasonable,[20] but there is no limit. Fees can be based on flat-fee arrangements, hourly rates, a percentage of benefits recovered, or a combination of these.[21] If fees are limited by the agreement to 20% of past-due benefits, then they are presumed to be reasonable[22] and the VA will pay them without question. If fees are for more than 33-1/3% of past-due benefits, then the fees are presumed to be unreasonable, which is a presumption that can be rebutted.[23]

Can You Charge for Pre-Filing Consultative Services?

The VA does not regulate the charging of fees for advising veterans about VA benefits not involving a specific claim; thus, fees can be charged for providing general consultative services. (See letter from Richard Hipolit, Assistant General Counsel, addressed to Richard Cohen, Executive Director, National Organization of Veteran Advocates, Inc., dated September 26, 2008.) Moreover, reviewing and researching possible available VA benefits, "advising a veteran as to potential benefits before he or she decides to file a claim are not part of the preparation, presentation, or prosecution of a claim, and as such, are outside of VA's accreditation authority."[24] Lastly, Mr. Hipolit's letter states that "an attorney's provision of elder-law advice in general is outside VA's authority to regulate." This position is consistent with the letter from the Office of General Counsel to Honorable Lane Evans (former ranking Democratic member of the House Committee on Veterans Affairs), dated May 24, 2004.

The accredited attorney who is providing advice on how to become eligible for a specific claim should be cautious with the fee structure. If the attorney charges a flat fee or fixed fee for elder-law advice that includes document preparation for a claim for VA benefits, the attorney will need to explicitly structure the fee so as not to charge for services related to the preparation of the VA claim.[25]

Contact the author of this article to obtain more information about available CLE courses approved for accreditation.

Endnotes

1. 38 U.S.C.S. § 5902(a); 38 C.F.R. § 14.628 (2003).
2. 38 U.S.C.S. § 5903; 38 C.F.R. § 14.630 (2008).
3. 38 C.F.R. § 14.631.
4. 38 U.S.C.S. § 5904 (not yet updated with current changes); 38 C.F.R. § 14.629(b) (May 22, 2008).
5. 38 C.F.R. § 14.629(b)(ii) (May 22, 2008).
6. 38 C.F.R. § 14.629(b)(iii) (May 22, 2008).
7. *Id.*
8. *Id.*
9. *Id.*
10. 38 C.F.R. § 14.629(b)(iv) (May 22, 2008).
11. 38 C.F.R. § 14.629(c)(3) (May 22, 2008).
12. 38 C.F.R. § 14.636(b) (May 22, 2008).
13. FR Vol. 73, No. 100, page 29866 (May 22, 2008).
14. 38 C.F.R. § 14.636(c) (May 22, 2008).
15. 38 C.F.R. § 14.636(c)(2) (May 22, 2008).
16. 38 C.F.R. § 14.636(c)(2)(i) (May 22, 2008).
17. 38 C.F.R. § 14.636(c)(2)(ii) (May 22, 2008).
18. 38 C.F.R. § 14.636(g) (May 22, 2008).
19. 38 C.F.R. § 14.636(g)(1)-(2) (May 22, 2008).
20. 38 C.F.R. § 14.636(e) (May 22, 2008).
21. *Id.*
22. 38 C.F.R. § 14.636(f) (May 22, 2008).
23. *Id.*
24. Letter from Richard Hipolit, Assistant General Counsel, addressed to Richard Cohen, Executive Director, National Organization of Veteran Advocates, Inc., dated September 26, 2008.
25. *Id.*

Victoria L. Collier, Esq. is an attorney with the Elder and Disability Law Firm of Victoria L. Collier, P.C. of Decatur, Georgia, telephone # 866-371-6100.

Veterans Benefits for the Elderly and Disabled

By Alice Reiter Feld

Overview

Veterans benefits are an excellent source of funds for long-term care for the elderly (either at home or in a facility). The changes in asset protection planning resulting from the Deficit Reduction Act of 2005 make the ability to access this benefit of even greater importance.

The benefits provided by the Department of Veterans Affairs generally fall into two categories: Service Connected and Non-Service Connected. Statutes regulating Veterans benefits can be found in Title 38 of the U.S. Code and the Federal Regulations. In addition, M21-1MR, the VA Adjudication Procedures Manual Rewrite, deals specifically with the adjudication of claims for compensation, pension and related benefits within the province of the Veterans Service Center. It applies to all VA regional offices, service centers with regional office activities, and the VA Records Management Center in St. Louis, Mo.[1]

"VA Speak"

Claimants seeking Veterans benefits can rely on a national network of lay advocates who work for a Veterans Service Organization (VSO). Examples of VSOs are the American Legion and the Disabled American Veterans. These advocates are prohibited from charging a fee. Most local governments or counties have a county Veterans Service Office that is staffed with accredited National Service Officers who are available to prepare claims for veterans and their families. These service officers designate one of the VSOs to represent the claimant. Applications can also be filed directly with the VA.

In general there are two types of benefits that a veteran or dependent can receive. **"Compensation"**[2] generally refers to benefits derived from a service-connected disability (the VA equivalent of SSDI). **"Pension"**[3] refers to payments made to veterans or dependents based on need and do not require a service-connected injury (the VA equivalent of SSI). It is important to understand and recognize the difference between "pension" and "compensation" when reading information regarding Veterans benefits in places such as a state Medicaid manual.

Service-Connected Compensation

This is a monthly payment to a veteran with a disability either caused or exacerbated in the service. A client may have, for example, a 20% disability and receive a small compensation benefit from the VA. As discussed below, the practitioner should note that a veteran with a service-connected disability can file for an increase in the percent rating if the condition worsens.

Basic Entitlement for Service-Connected Benefits

Service-connected benefits are for disabilities resulting from injury or disease *incurred in or aggravated by* military service in the line of duty and not the result of misconduct. There are five (5) ways that a disability is service connected. The two most important for the elder law attorney are: **Direct**—a condition diagnosed during military service, and **Aggravation**—a condition that existed prior and was aggravated beyond normal progression during military service.

A client with a service-connected disability may have reason to reopen the matter years after the initial award. Reopening a claim requires that "new and material" evidence be submitted. This is evidence not previously submitted that is so significant that it must be considered in order to fairly decide the merits of the claim. Claims are reopened when a condition has worsened or aggravated.

Special Monthly Compensation

A rating above 100% disabled is called Special Monthly Compensation and is for extremely severe injuries. Although very few qualify, it can more than double the normal monthly payment. Information should be requested on the initial intake regarding the service record of the client and any deceased spouse. The attorney should also be requesting information from the client who has a service-connected illness. If the client is not already receiving medical benefits from the VA, an increase in the rating to 50% may enable the client to receive these benefits. In addition, an increase to 70% may allow the client to be eligible for nursing home benefits without the necessity of qualifying for Medicaid.

Non-Service-Connected Pension

Non-service-connected benefits are the benefits most likely to be available to our clients. These benefits are called "pension"; this term tends to be confusing because it has nothing to do with years of service, as we normally think of a pension. Instead, it is available to certain wartime[4] veterans (or their dependents) who are totally disabled[5] because of a non-service-connected condition and who are in financial need.[6] (You will also see the program referred to as "improved pension"—this simply applies to the program that came into effect after 1979 in which all assets and income of the vet-

eran are considered for eligibility.) Once the veteran's eligibility requirements are met, a family member may be able to obtain benefits based on his or her status as the veteran's dependent. If the applicant is the surviving spouse of the veteran, the applicant must have been validly married to the veteran at the time of the veteran's death. If the surviving spouse remarries after the death of the veteran, eligibility is terminated. The surviving spouse cannot have been divorced from the veteran and must have been married for at least one (1) year prior to the veteran's death.

Pension is a needs-based benefit. The veteran's income cannot exceed the maximum annual pension rate (MAPR), currently (2008) $11,181 per year, or approximately $932 per month. The pension that the veteran is entitled to is the difference between his or her income and the MAPR. Additional dependents add additional amounts to the MAPR.

There is a specific portion of the pension program that is of particular importance to our clients. This program is pension plus **"Aid and Attendance"** and is available to a veteran who is not only disabled but has the additional requirement of needing the aid and attendance of another person in order to avoid the hazards of his or her daily environment.[7] The amount the veteran can receive can be higher because certain unreimbursed medical expenses are deducted from income to determine the benefit. Under the Aid and Attendance pension benefit, a veteran can receive a maximum of $1,842 per month in benefits, and a surviving spouse can receive up to $998 per month. The numbers are adjusted annually. Although the surviving spouse or other dependents may be the benefit of pension, this article will refer to the recipient of the benefit as the applicant, beneficiary or disabled person.

Service Requirements

A veteran is defined as a person who served in the active military, naval or air services and who was discharged or released under conditions other than dishonorable.[8] In general, to qualify, the veteran must have 90 days or more of active duty under other than dishonorable conditions, one day of which was during wartime.[9] Since the dates of wartime service do not always match the actual dates of war, the advocate should check those dates against the VA's published list of service dates.[10]

Disability Requirements

The applicant must be determined to be "permanently and totally disabled." The VA will generally accept a letter from the person's personal doctor as to the Veteran's disability. (This can be filed instead of form 21-2680.) The letter should state that the person has an incapacity which requires care or assistance on a regular basis to protect the claimant from the hazards or dangers incident to his or her daily environment. The applicant does not need to be helpless—he or she need only show that he or she is in need of Aid and Attendance on a regular basis. A patient in an assisted living facility (ALF) is generally presumed to be in need of Aid and Attendance. In some states, the facility will have completed a Health Assessment Form that describes the diagnosis and need and is signed by the doctor or nurse practitioner. The practitioner should secure a copy of this form from the ALF as well as the contract showing the services provided to the applicant.

Because of the increase in applications for pension, the VA may sometimes consider only that portion of the ALF that is considered "medical." As the advocate, it is important to submit documentation showing as much of the cost as possible attributed to medical care as well as documenting need. The VA may also call and/or visit the client. This is an advocacy opportunity to present all documentation showing the need for A&A. In addition, if dementia is the primary diagnosis, the VA will require its own guardianship, which will significantly delay the process. Therefore, if at all possible the main diagnosis should not be dementia and the form should state that the person can make his or her own decisions.

Net Worth Requirements

The VA will consider the net worth of the applicant and will deny the application if the net worth is such that "it is reasonable for the claimant to consume some or his/her estate for maintenance. A *net worth administrative decision should be made* (emphasis added) if it is determined that the claimant's net worth should be used for maintenance."[11] A home is not counted.

The conventional wisdom is that the cutoff is $80,000. This, in fact, is not true in practice. Unlike Medicaid, there is no published number for the assets an applicant can keep, and indeed the number seems to be falling as more applications for benefits are made. The only reference to the $80,000 number appears in the MR21-1MR[12] which states that a *formal* net worth administrative decision must be completed if the applicant has more than $80,000 and that this has been determined not to be a bar to benefits. It specifically does not state that the net worth bar has been met if the applicant is under $80,000.

Unlike with a Medicaid application, there is a tremendous amount of discretion that each caseworker has in determining how much is reasonable for a person to keep and not spend on his or her care. In addition to this discretion, which is different among caseworkers, the amount a person can keep is based on recent action by the VA to consider life expectancy of the applicant and whether the applicant is married

or single in determining the amount of assets that it is reasonable to keep. A wise practitioner will keep this number as low as possible and provide as much documentation of need as possible.

There is no penalty period for transfer of assets prior to filing the initial application. The VA regulation governing transfer of assets provides that a gift of property to someone other than a relative residing in the grantor's household will be recognized as reducing the *corpus* of the grantor's estate if it is clear that the grantor has relinquished all right of ownership, including the right of control of the property.[13] After application, asset transfers can become problematic as they may be considered "income" to the veteran causing him or her to lose benefits for up to a year. (See later discussion on "Changes of Income or Net Worth After Application.") The application simply asks for the net worth of the applicant on the date of the application and does not inquire as to previous transfers. Transferring of assets may become an important part of qualifying for these benefits. Transferring assets outright can be done; however, the preferred way may be an Irrevocable Trust giving the trustee ultimate discretion with regard to distribution and providing no income or control to the applicant (see below).

Presumably assets can be transferred into an Irrevocable Trust. An IDGT is preferred over an Income Only Trust because there should be no applicant receiving income. This can be especially effective for transferring the home because sale of the home after application can be problematic. The trust must provide that the grantor has relinquished all rights of ownership, including the right to control the property.[14] This must be considered when determining which "grantor trust provisions" are used to create the grantor trust status.

There has been some discussion about whether the transferees should or must be receiving the income from the property for the transfer to be complete. This is based on the manual provision which states "[i]f a transferee takes legal title to the property and receives income from the property, a true transfer is deemed to have occurred. However, if the transferee turns income from the property back to the claimant, the income is countable under 38 CFR 3.271 as a gift of money."[15] Note that the title to the provision is "When Claimant Transfers Property but Takes Income from the Property." It is my opinion that as long as the "trust/transferror" receives the income, an IDGT should work as long as income is not provided to the applicant.

Income Requirements

The general rule is that even if the applicant fulfills all of the above requirements, the application will be denied if the applicant's countable income exceeds the maximum annual pension rate, which is currently $1842 per month. Countable income is all income of any kind attributable to the veteran.[16]

In computing the income of the applicant, certain items can be deducted from income. Specifically, unreimbursed medical expenses (UMEs) paid by a applicant may be used to reduce the applicant's income.[17]

Many items constitute unreimbursed medical expenses,[18] that is, the beneficiary will receive no reimbursement from insurance or any source. A deduction for the medical expense can only be made if the expense has actually been paid since receipts or other documentation of the expenses are required.[19]

The unreimbursed medical expenses can be incurred by either the beneficiary or a relative of the beneficiary who lives in the same household. This person does not have to be a dependent of the veteran.[20]

Under normal pension rules, the deduction of unreimbursed medical expenses from income is done after the fact.[21] However, if the claimant has consistently recurring unreimbursed medical expenses, (e.g., a nursing home patient), it may be possible to allow the medical expenses on a continuing basis. Examples in the procedure manual of recurring unreimbursed medical expenses are: nursing home fees, in-home attendants, insurance premiums and non-prescription drugs.[22] I suggest that you submit information regarding any and all recurring expenses including prescription drugs, assisted living facility and anything else that occurs on a regular basis and provide documentation (e.g., a doctor's letter) stating that these are recurring and will not change throughout the year.

However, after the first year, other UMEs can be considered in increasing the benefit as "after the fact." The advocate should advise the client to keep meticulous records of all unreimbursed medical expenses after the initial application. This includes:

- Insurance premiums paid by the beneficiary or member of the household. Insurance includes health insurance, including medigap policy premiums and long-term care policies.
- If a physician directs a beneficiary to take non-prescription drugs, the cost of such over-the-counter medicines is an allowable medical expense deduction.
- Mechanical and electronic devices that compensate for a claimant's or dependent's disabilities are deductible medical expenses to the extent that they represent expenses which would not normally be incurred by non-disabled persons.
- The costs of an adult day care center, rest home, group home or similar facility or program is an allowable medical expense as long as the facil-

ity provides some medical or nursing services for the disabled. The services do not have to be paid to a licensed health-care professional. An Alzheimer's Day Care program would be an example of this.

- Hearing aids, eyeglasses, Ensure, Depends, travel to doctors, co-pays, dentures, therapy, etc. can all be used as unreimbursed medical expenses to increase the benefits after the first year if the applicant is not receiving the maximum.

Changes in Income or Net Worth After Application

One issue that consistently comes up in practice is the "conversion of assets" after application, and in particular the sale of the home. Much debate has been made on this subject. Section 3.272 of 38 C.F.R. excludes profit from the sale of property but refers only to the "determination of *entitlement* of improved pension" and not *after* application (emphasis added).The VA manual specifically states that "income received from the sale of property is viewed as a conversion of assets and is not countable income for improved pension purposes. . . ."[23] NONETHELESS, many regions will impose a one-year penalty on this receipt of income, presumably citing M21-MR Part V (I) Chapter 3 (A) as "one time income." Although it is incumbent upon the elder Bar to reconcile this issue, nonetheless, increase in *resources* can still present a problem because after approval the "new resources" will be considered in determining continued eligibility.

Coordinating Veterans Benefits and Medicaid

Advocates generally advise clients of all benefits to which they may be entitled. Being able to inform clients of this valuable benefit and how to take advantage of it adds to the value we offer our clients. Sometimes we assist our clients with the transfer of assets in order to qualify for Veterans benefits. We must remain mindful of the fact that these transfers can ultimately create an ineligibility period for Medicaid purposes should Medicaid benefits be necessary in the future. Veterans benefits may be an excellent way to bridge the time between the expiration of a gifting period for Medicaid to kick in.

Usual VA compensation and pension payments are counted as unearned income for Medicaid eligibility purposes. The portion of the benefit that is Aid and Attendance benefits, however, is specifically excluded from the definition of income.[24] After eligibility, if the single veteran resides in a nursing home, the Aid and Attendance pension benefit is reduced to $90 payable directly to the veteran.[25] A married veteran can keep his or her Aid and Attendance for maintenance of the spouse in the marital home. The courts have disagreed as to whether payments made under other Medicaid programs (e.g., Medicaid Waiver) would be reduced by actual payments made for Aid and Attendance. Presumably, since Aid and Attendance is excluded in the definition of income and does not fall under the $90 exception above, it should continue to be excluded for other purposes as well. In fact, I have obtained both benefits for clients.

The VA Health-Care System

Contrary to what many veterans expect, every veteran is not eligible for benefits from the VA health care system. The system principally covers veterans with service-connected injuries, those with low income and the very elderly with wartime service. The system requires the veteran to enroll on a yearly basis. This can be done in person, by mail or over the Internet. Adverse decisions concerning the VA health-care system are appealable. Advocates should encourage their clients to enroll in the VA system even if they currently do not need or are not entitled to benefits.

A veteran should attempt to enroll in the system despite the fact that the veteran has been told that he or she is not eligible or that there is a long waiting list. The system can be inconsistent and I have had many clients receive benefits such as prescription drugs for which they otherwise would have had to pay. Veterans who have a service-connected disability in excess of 50% receive priority in enrollment. Additionally, veterans who receive increased pension based on their need for Aid and Attendance, or are housebound, also receive a higher priority and are entitled to receive free medication from a VA pharmacy even if they are not otherwise receiving medical care.[26]

The VA medical benefits package includes prescription drugs and medical exams. Because veterans with a higher percentage of disability have a higher priority, the veteran should consider filing for an increased rating. While the amount of money received on a monthly basis will increase minimally, the health-care benefits can be enormous.

Nursing Home Care

Nursing home care is for veterans who are too sick, disabled or elderly to care for themselves. Nursing home care must be provided for any veteran with a service-connected disability in excess of 70% or whose service-connected illness has caused the need for nursing home care.[27] If additional space is available in a VA nursing home, the facility may provide services to other veterans but the services must be privately paid or paid by Medicaid.

Usual VA compensation and pension payments are counted as unearned income for Medicaid eligibility purposes. Aid and Attendance pension benefits, however, are specifically excluded from the definition of income.[28] After eligibility if the single veteran resides in a nursing home, the Aid and Attendance pension benefit is reduced to $90 payable directly to the veteran.[29] (However, see DIC below.) A married veteran can keep his or her Aid and Attendance for maintenance of the spouse in the marital home.[30]

The VA also provides alternatives to nursing home care such as hospice and palliative care, home- based primary care, skilled home health-care, homemaker and home health aide services, adult day health care, dental, drug and alcohol treatment and respite care.

In certain circumstances, income may be relevant to eligibility for VA health-care. The income reported is the last 12 months and is not the same as the calendar year used by the IRS. The veteran must be sure to provide the actual income for the last 12 months, which may be significantly less if the income of the Veteran has dropped recently.[31]

Medical care may also be available for dependents, survivors and widows of veterans.

Other VA benefits include minimal burial benefits and special benefits for the disabled such as adaptive equipment and automobiles.[32]

Spouse Benefits/DIC

A well-kept secret is **Dependency and Indemnity Compensation.**[33] DIC is a monthly payment that is available to eligible surviving spouses when the VA determines that the veteran's death was service-connected. In general, a surviving spouse must have been legally married to the veteran at the time of death and have lived with the veteran throughout the marriage. A veteran's death should be considered service-connected if the VA determines that a service-connected disability was the principal or contributory cause of the veteran's death. This means that when the spouse files a claim for DIC, the VA must determine whether the condition was or could have been service connected, whether the condition caused or contributed to the death, and whether the claimant is eligible for DIC.

The spouse may be receiving Aid and Attendance benefits as part of DIC. Since DIC is compensation and not pension, presumably it is not limited to the $90 cap.

Attorneys' Fees

The general rule is that attorneys are precluded from representing veterans before the VA regional offices or before the Board of Veterans Appeals. Only when the Board of Veterans Appeals has made a final decision can an attorney charge a fee.[34] The exception is if fees are paid from a disinterested party (not the spouse, child or parent of the claimant).[35] However, there is a Department of Veterans Affairs official correspondence to Congressman Lane Evans, the then ranking Democratic member of the Committee on Veterans Affairs (dated May 24, 2004), that states that attorneys may charge veterans for pre-filing consultation without violating the attorneys' fees provisions set forth above. A pre-filing consultation may consist of review of records, research and counseling. The attorney is still precluded from actually filing the claim for benefits without meeting the above requirements. The letter concludes by stating that for the attorney the better practice is to charge for the pre-filing consultation and simply prepare the claim on a pro bono basis.

Accreditation Requirements for Attorneys

Attorneys who practice before the VA must be in good standing of a state Bar and apply in writing via VA Form 21a that they are authorized to provide representation.[36] The certification must be reviewed annually. Additionally attorneys must complete three (3) hours of continuing legal education in the initial year and three (3) hours every additional two years. The CLE must meet the requirements established by the VA. For information on accreditation go to http://www.va.gov/ogc/accred_faqs.asp.

Filing of Application

The application is filed either directly with the VA or by a Veterans Service Representative with the local VA regional office. However, in order to establish the earliest possible date, a letter to the VA requesting pension will suffice. As the advocate, you facilitate this process by providing all of the necessary backup information discussed in this article. It takes approximately 3-6 months to be approved but is retroactive from the first of the month after the month applied for.

The VA Web site is an excellent source of information. Go to www.va.gov. Additional resources are as follows:

- National Veterans Legal Services Program (www.nvlsp.org)
- Veterans Benefit Manual 2008 Edition (Lexis Nexis)
- Elder Law Portfolio Series Chapter 14 (Aspen Publishers)
- Veterans Affairs Web site www.va.gov (benefits–compensation and pension–pension home page).

The link to the Procedures manual is as follows:

- www.warms.vba.va.gov/admin21/m21_1/mr/part5/subpti/ch03/ch03_toc.doc

Conclusion

In December 2006, Secretary of Veterans Affairs Jim Nicholson stated that "[v]eterans have earned this benefit by their service to our nation. We want to ensure that every veteran or surviving spouse who qualifies has the chance to apply." Let us assist the Secretary in this endeavor.

Endnotes

1. VA Adjudication Procedures Manual, M21-1MR, Part V.
2. 38 U.S.C.S. Part II Chapter 11.
3. 38 U.S.C.S. §§ 1521 *et seq.*
4. 38 U.S.C.S. § 1521j.
5. 38 U.S.C.S. § 1521a.
6. 38 U.S.C.S. § 1522, 38 C.F.R. § 3.274.
7. 38 U.S.C.S. § 1502b.
8. 38 U.S.C.S. § 101(2).
9. 38 U.S.C.S. § 1521(j).
10. 38 U.S.C.S. § 1501.
11. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart I, Chapter 3 § A § 4.
12. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart I, Chapter 3 § A.
13. 38 C.F.R. § 3.275(b) 2008.
14. VA Adjudication Procedures Manual, M21-1MR, Part III, Chapter 1, § I, 65a.
15. VA Adjudication Procedures Manual, M21-1MR, Part III, Chapter 1, § I, 65b.
16. 38 C.F.R. §§ 3.262, 3.271.
17. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § A.
18. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § D, Chapter 13.
19. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § D.
20. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § D, Chapter 13.
21. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § D, Chapter 13. d.
22. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § D, Chapter 13. d.
23. Chapter 1, § I, number 64.
24. State Medicaid Manual § 3705.
25. 42 U.S.C. § 1396a(r)(1)(B).
26. VHA Directive 2003_068 (Dec. 11, 2003).
27. Pub. L. No. 106_117 § 101, 113 Stat. 1545 (1999), codified at 38 U.S.C.S. § 1710A.
28. State Medicaid Manual § 3705.
29. 42 U.S.C. § 1396a(r)(1)(B).
30. 38 U.S.C. § 5505.
31. VA Adjudication Procedures Manual, M21-1MR, Part V, Subpart i, Chapter 3 § A 3. c.
32. 38 C.F.R. § 17.36(e).
33. 38 U.S.C § 1318(b).
34. 38 C.F.R. § 20.609.
35. 38 C.F.R. § 20.609(d).
36. 38 C.F.R. § 14.629(b).

Alice Reiter Feld is in private practice in Tamarac (Fort Lauderdale) and Delray Beach, Florida. Ms. Feld is board certified by the Florida Bar as an Elder Law Specialist, and nationally certified as a "CELA" by the National Elder Law Foundation. She is "AV" rated by Martindale Hubbell, the highest rating afforded to an attorney.

Alice is the past President of the Academy of Florida Elder Law Attorneys. Ms. Feld is admitted to practice before the U.S. Court of Appeals for Veterans Claims and is a volunteer attorney for the Veterans Legal Consortium. Alice is a frequent lecturer on Non-Service Connected Veterans Benefits at such venues as the National Academy of Elder Law Attorneys, the Elder Law Section of the Florida Bar, and the Academy of Florida Elder Law Attorneys, as well as numerous community and civic organizations. Her article regarding Veterans Pension for Non-Service Connected Veterans appeared in the *Elder Law Report* in 2005, the *Marquette Elder's Advisor* in the Fall, 2003 and the *Guardianship SIG Bulletin* in Fall, 2002. Ms. Feld is a contributor to the *Veterans Benefits Manual*, published by Lexis Nexis, on the interconnection between Medicaid benefits and VA benefits. Ms. Feld is a 1974 graduate of Brooklyn College and a 1980 graduate of St. John's University School of Law in Jamaica, N.Y.

Department of Veterans Affairs Publishes Final Regulations for Representation

By Arlene Kane

On May 22, 2008 the Department of Veterans Affairs (VA) published final regulations permitting "accredited" attorneys to represent veterans for a fee. Both attorneys and non-attorneys who establish "accredited" status (discussion below) will be permitted to represent veterans/claimants, file a fee petition and procure a fee, in a similar manner currently provided for in SSA claims.[1]

"Unfortunately, the vast numbers of claims are denied, as veterans/claimants are rarely aware of the process, laws and abundance of medical evidence necessary to meet the very stringent burden of proof required by the Department of Veterans Affairs."

A Bit of History

If you are thinking that the cost of fuel has risen in your lifetime, how about this: the last regulated fee for attorneys representing veterans was $5! This legislation was enacted post-Civil War and was increased years later to $10. It was not until 1988 that Congress passed legislation prohibiting attorneys from representing veterans during the claims process and thereby eliminating all fees. The U.S. Court of Appeals for Veterans Claims (CAVC) was created and the rationale for prohibiting "outside" assistance was that CAVC provided the veterans/claimants with a vehicle to pursue claims denied at the VA Regional Office (VARO) level.

Unfortunately, the vast numbers of claims are denied, as veterans/claimants are rarely aware of the process, laws and abundance of medical evidence necessary to meet the very stringent burden of proof required by the Department of Veterans Affairs. Counsel is usually a local county service officer along with the VARO to coordinate the claim and represent the veteran before the VA. Although the review process is intended to be non-adversarial, absent a zealous advocate these cases rarely culminate in a successful outcome and all too often are abandoned by the claimant. If there is an appeal to the Board of Veterans Appeals (BVA), adjudicators frequently do not afford claimants all of the assistance required by law. All too frequently the adjudicators erroneously deny otherwise meritorious claims, based on a finding of insufficient or incomplete evidence. Those veterans who do get to the appeals level and are denied on appeal find themselves facing an even greater challenge at the U.S. Court of Appeals of Veterans Claims level. As the decision below is given substantial weight, the chances of the veteran prevailing are diminutive.

Establishing Disability

In order for the veteran to prevail in a disability claim there must be a finding that the onset of the illness or disability is "coincident" to a period of time when the veteran was in military service. The disability need not have occurred during a time of war. As the amount of the benefits correlate to the veteran's earning capabilities, they can vary greatly. The amount of benefits awarded depends on the severity of the illness or injury, which is rated on a scale from 0-100. Experienced advocacy can make a tremendous difference in the final rating and therein the amount of compensation awarded. Monthly compensation can range from a few hundred to a few thousand dollars. Causation is not a factor in determining benefits nor need it be established.

Special Monthly Compensation (SMC), monies paid in addition to regular disability compensation, may be available to a veteran who as a result of military service incurred the loss of specific organs or extremities. There are also higher rates for combinations of these losses (for purposes of this article a more detailed explanation shall not be included). Herein again, good advocacy can make a great difference in the final award.

Procedure for Attorney Representation and Compensation

An attorney or non-attorney may become an accredited representative of a veteran/claimant if he or she is of good character and fitness and has not been disbarred or suspended from practice from any court or agency. The individual representative must complete and file/submit VA Form 21a, "Application for Accreditation as a Claims Agent or Attorney," with the VA General Counsel. An attorney must provide self-certification of admission information concerning practice before any court, Bar or state or federal agency. The fact that the attorney is of good character will be presumed

for the attorney in good standing based on State bar membership unless the Attorney General receives credible information to the contrary.

Additionally, the agent or attorney must complete three (3) hours of qualifying CLE credits on veterans' benefits law and procedure. The original regulation allowed for a 12-month period from the date of filing for the attorney to become accredited (as of this writing, I have learned that that grace period has been eliminated). The attorney or agent must also complete an additional three (3) hours of CLE credits within three (3) years of the initial accreditation in order to maintain accredited status, and again every two (2) years thereafter. The CLE courses must be approved for at least (3) three hours by the State Bar association of any state. Agents or attorneys are required to furnish to the VA as part of the annual certification, certification of completion of the CLE requirement.[2]

A VA Form 21-22a, "Appointment of Attorney or Agent as Claimant's Representative," signed by the veteran, his or her parent or legal guardian, must be filed with the Department, appointing an accredited attorney or agent to advocate on behalf of the veteran/claimant in a particular claim. Compliance with all filings authorizes the VA to disclose any information to the "accredited" attorney or appointed representative, as well as to allow that representative to advocate on behalf of the veteran before the Department. The veteran/claimant can discharge the attorney from serving as representative at any time.

For all other agents or representatives a power of attorney, executed on a VA 21-22, "Appointment of Veterans Service Organization as a Claimant's Representative," signed by the veteran, his or her parent or legal guardian, must be filed with the Department. A power of attorney can be revoked at any time. A new power of attorney constitutes a revocation of any existing power of attorney.[3]

Fees and Fee Agreements

"Accredited" attorneys and agents may receive fees for their services on behalf of the veteran/claimant only after both a favorable decision and the appropriate filing of fee agreements and other forms required by the Department have been submitted. Fee agreements must be limited to 20% of the benefits due and owing to the veteran/claimant or said fee will not be withheld by the Department for direct payment to the attorney or agent.[4] The elements that must be present for a fee agreement to be valid are set forth in 38 C.F.R. § 14.636(g) as follows: (1) the name of the veteran or the claimant if other than the veteran; (2) the name of any disinterested third-party payer and the relationship between the payer and the claimant or appellant; (3) the file number assigned to the claim; (4) the exact terms and conditions for determining fees.

Fees must be conditioned on a meritorious outcome for the veteran as claimant/appellant and a past-due benefit must be due and owed to the claimant. Past due benefits are defined as "a nonrecurring payment resulting from a benefit, or benefits, granted on appeal or awarded on the basis of a claim reopened after a denial by a VA agency of original jurisdiction or the Board of Veteran's Appeals or the lump sum payment that represents the total amount of recurring cash payments that accrued between the effective date of the award and the date of the grant of benefits."[5]

An attorney and veteran as claimant/appellant may execute and submit a fee agreement that is paid directly by the veteran to their representative and that is not withheld by the Department for direct payment to the representative. These agreements may provide for an amount greater than the 20% to be paid by the veteran claimant/appellant. This is not a "direct-pay fee agreement."

The attorney must within 30 days of the execution of the fee agreement: file a copy of the agreement with the Office of General Counsel (022D), 810 Vermont Avenue NW, Washington DC 20420, and notify the office of original jurisdiction of the existence of the agreement and provide that office with a copy of the fee agreement.

Additionally, the VA charges 5% of the fee for processing the claim. The 5% fee is capped at $100.

It would be prudent for an attorney or agent to obtain a signed agreement for the reimbursement of expenses incurred in connection with the claim. Expenses incurred in connection with the prosecution of the claim may be reimbursed from the client. Expenses are not considered fees and the VA will not pay or withhold the expenses on behalf of the attorney/agent.

Fee Approval

Fees will be approved only if they are deemed "reasonable." Reasonableness can be based on a fixed fee, a percentage of past-due benefits, or fees fixed at 20% of past-due benefits. Fees in excess of one-third of past-due benefits will be deemed excessive and thereby "unreasonable." This presumption can be rebutted upon a showing of excessive hours or any extraordinary complexities involved in the case, the level of competence and skill required of the representative, the results achieved (this includes benefits amount), the stage of the case when the attorney was retained, and whether and to what extent the services were contingent on the outcome.[6]

Fees may be appealed by the veteran as claimant/appellant or by the VA on its own motion or on motion on behalf of a claimant/appellant. If the fee agreement is capped at 20% the VA Office of General Counsel must establish by a preponderance of the evidence or by clear and convincing evidence that the fee was unreasonable before the fee is reduced.[7]

Conclusion

The new regulations represent a great opportunity for both veterans and attorneys. Absent the opportunity for their representatives to obtain fees, veterans encountered great hardships advocating on their own behalf, in spite of agency representation. Although the enactment of federal regulation for the payment of fees for representatives is a long overdue milestone for veterans and attorneys alike, it is not without flaws. Payment of fees is limited to those representatives who become accredited and for representation only after a "Notice of Disagreement" has been filed (similar to requesting reconsideration in a SSA claim). This makes the challenge of good advocacy much more arduous. The opportunity to properly advocate for the claimant is at the initial stage of developing the case. At the onset of a case the accredited advocate has the best opportunity to develop and analyze the evidence before it is presented for review. Additionally, seeking to overturn an unfavorable initial review is an onerous task in itself. The best outcome for the veterans/claimants is an expeditious one at the earliest stage of review.

Endnotes

1. 73 Fed. Reg. 29852 (May 22, 2008).
2. 38 C.F.R. § 14.629(b)(4).
3. 38 C.F.R. § 14.631.
4. 38 C.F.R. § 14.636(g).
5. 38 C.F.R. § 14.636(h)(3).
6. 38 C.F.R. § 14.636(e)(f).
7. 38 C.F.R. § 14.636(i).

Arlene Kane is an attorney as well as a registered nurse. She maintains an office in Roslyn, NY, and is also of counsel to the Law Office of Raskin & Makofsky in Garden City, NY. She also handles federal matters, including Social Security Disability, in Boca Raton, FL as well as New York.

The End of Splendid Isolation: The History and Expansion of Veterans Law

By Felicia Pasculli

At the NYSBA Elder Law Section's Fall Conference of 2002 at West Point, I delivered a presentation regarding veterans benefits for the elder law client. We were still recovering from the shock of 9/11 and, with mounting dread, anticipating an overseas conflict. Unfortunately, it materialized with the start of the war in Iraq on March 20, 2003. We were forever changed as a country. My purpose at the time was merely to alert our Section to the importance of their clients' status as veterans, the benefits these clients might be eligible for, and the existence of veterans law as a practice area.

The Elder Law Bar, both statewide and nationally, has come a long way in educating members on the panoply of the Department of Veterans Affairs (VA) services. 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. Locally, this interest has resulted in the publication of this issue dedicated to understanding how to access these benefits and the legal qualifications necessary to represent veterans in this process. However, as attorneys, it is important to recognize and appreciate Veterans Law as an area of concentration and to appreciate the tortured history of attorney representation of veterans. Do not take it for granted, for there are still powerful organizations advocating repeal of the newly enacted statute allowing attorney representation.

The RAND Corporation's compilation of Iraq and Afghanistan battlefield casualty estimates 320,000 veterans experiencing traumatic brain injury and 300,000 veterans experiencing post traumatic stress disorder. There is no question that our veterans need and deserve legal assistance. It is astounding to realize that the people who fought to keep our freedoms had less access to attorney representation than other citizens. This year is a particularly appropriate time for NYSBA members to get involved as we mark several anniversaries that meaningfully changed the practice of Veterans Law and made representing veterans a more viable focus of an attorney's legal skills.

Most significantly, November 18, 2008, marked the 20th anniversary of the Veterans Judicial Review Act of 1988 (VJRA), which ended the "splendid isolation" of the Department of Veterans Affairs as the only federal administrative agency functioning without judicial review. As a result of the VJRA, the so- called "Veterans Court," the U.S. Court of Appeals for Veterans Claims (http://www.vetapp.uscourts.gov/) was created to hear appeals from the VA's Board of Veterans Appeals (BVA). Not only did the VJRA create an Article I court to hear veterans' appeals, but it also removed the Civil War era prohibition against attorney representation. In its place, the VJRA allowed a veteran to pay a lawyer a reasonable fee for representation, with the restriction that the representation must have begun within one year from the first final BVA decision on the claim.

"[I]t is important to recognize and appreciate Veterans Law as an area of concentration and to appreciate the tortured history of attorney representation of veterans. Do not take it for granted, for there are still powerful organizations advocating repeal of the newly enacted statute allowing attorney representation."

Then, on January 4, 1993, a handful of lawyers who were individually representing veterans incorporated the National Organization of Veterans Advocates, Inc., (NOVA) (http://www.vetadvocates.com/) a non-profit 501(c)(6) corporation. For the past 15 years, this membership organization has provided bi-annual training seminars and mentoring, in person and on its bulletin board, in furtherance of its mission to develop and encourage high standards of service and representation for all persons seeking benefits through the federal veterans benefits system. In 2000, the Veterans Court recognized NOVA's work on behalf of veterans when it awarded the organization the Hart T. Mankin Distinguished Service Award. I mention NOVA because without its tenacious advocacy, the new rules regarding attorney representation would not have happened.

In December 2006, President Bush signed into law the Veterans Benefits, Health Care, and Information Technology Act of 2006. This was important because part of the legislation—section 101—removed the restrictions on legal representation and allowed a veteran to hire a lawyer at the initial appeal stage in the case, i.e., the notice of disagreement. The law went into effect on June 20, 2007. In order to implement the 2006 legislation, on May 22, 2008, the VA issued new regulations

published in the *Federal Register*[1] for accreditation of attorneys and agents and governing fees. Among other things, these new regulations require attorneys to be accredited by the VA to represent veterans and their appeals for benefits, and maintained the key date—June 20, 2007—after which an attorney may be retained to represent a veteran for a fee at the administrative level. Unfortunately for some veterans with already pending appeals, the law is prospective only, so that veterans with older appeals still must wait for a first and final decision from the BVA to seek legal counsel.

As of a few weeks ago, more than 300 attorneys' applications for VA accreditation were approved by the Office of the General Counsel of the VA. New attorneys are joining the field of Veterans Law every day. They are desperately needed: the Veterans Court has the highest *pro se* rate of any federal court, approximately 70%. Many law firms are expanding their practices areas of personal injury, workers' compensation, Social Security disability, and elder law to include a Veterans Law component. I applaud and welcome your interest in this area, but ask that you accord these clients the respect and dignity they deserve.

Endnote

1. Vol. 73, No. 100, p. 29852, *et seq.*

Felicia Pasculli, Esq. concentrates in the areas of Elder & Special Needs Law, Estate Law, and Veterans Law. Her practice emphasizes comprehensive, creative and compassionate solutions to long term health care and estate planning. Felicia is a graduate of Marymount Manhattan College, where she was included in *Who's Who Among America's Colleges and Universities*. She is also a graduate of the City University of New York Law School at Queens College (CUNY), a public interest law school, whose mission is "law in the service of human needs." At CUNY, she was the recipient of the Eric Karp Community Advocacy Scholarship and was awarded a grant from the Revson Foundation for a study on Homeless Veterans in Nassau and Suffolk counties.

Felicia is one of the founders of the Long Island Alzheimer's Foundation (LIAF) and Chair of its Legal Advisory Board. She is a sustaining member of the National Organization of Veterans Advocates (NOVA) and is admitted to practice before the Court of Appeals for Veterans Claims (CAVC). Felicia founded the Family Council at the Northport, N.Y., VA Medical Center's nursing home. She is also a member of the National Academy of Elder Law Attorneys, the New York State Bar Association, the Suffolk County Bar Association, and is a founding member of CAVC's Bar Association. She resides and practices in Bay Shore, N.Y.

Muhlstein v. N.Y.C. Human Res. Admin.

2008 NY Slip Op. 07916

Linda Muhlstein, Etc., Petitioner, v. New York City Human Resources Administration, et al., Respondents.

Decided on October 14, 2008.

Supreme Court of the State of New York.
Appellate Division: Second Judicial Department.
Peter B. Skelos, J.P.
Joseph Covello.
Ruth C. Balkin.
Thomas A. Dickerson, JJ.

2007-06278
(Index No. 39676/06)

Matthew J. Nolfo, New York, N.Y., for petitioner.
Michael A. Cardozo, Corporation Counsel,
New York, N.Y.
(Pamela Seider Dolgow and Suzanne K. Colt of counsel), for respondent New York City Human Resources Administration.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Michael S. Belohlavek and Ann P. Zybert of counsel), for respondents New York State Office of Temporary Disability Assistance and New York State Department of Health.

DECISION & JUDGMENT

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Health dated August 30, 2006, which, after a fair hearing, confirmed a determination of the New York City Human Resources Administration dated January 3, 2005, denying the petitioner's application for reimbursement for home care services for her father.

ADJUDGED that the petition is granted to the extent of annulling so much of the determination dated August 30, 2006, as confirmed that part of the determination dated January 3, 2005, relating to the application for reimbursement for home care services provided to the petitioner's father by the two home care attendants who submitted signed affidavits relating thereto, that portion of the determination dated August 30, 2006, is annulled and that portion of the determination dated January 3, 2005, is disaffirmed, on the law, with costs, the petition is otherwise denied, the proceeding is otherwise dismissed on the merits, and the matter is remitted to the respondent New York City Human Resources Administration for a calculation of the reimbursement due to the petitioner in accordance herewith, and for a new determination thereafter.

In 2004 the New York City Human Resources Administration (hereinafter HRA) approved 24-hour home care for the petitioner's father, who died later that year, retroactive to August 1, 2003. The petitioner paid home health care attendants in cash, and requested HRA to provide her reimbursement, submitting, *inter alia*, checks made out to cash and an agency form affidavit attesting to receipt of the cash signed by one of the three home care attendants that took care of her father. HRA found that the petitioner failed to substantiate her payments "because all checks were made out to cash and endorsed" by her. An administrative appeal to the New York State Department of Health (hereinafter the DOH) ensued.

Following a two-day evidentiary fair hearing, at which a second home care aide affidavit was provided, the DOH upheld the HRA determination, making additional findings that the petitioner failed to meet her burden of proof given the discrepancies between her ledger entries, checks, the affidavits, and testimony at the hearing. The petitioner commenced the instant CPLR article 78 proceeding, and the Supreme Court transferred the proceeding to this Court as involving a substantial evidence/question under CPLR 7804(g). The administrative determinations should be annulled.

The DOH has in previous cases found that payments made in cash for home care are reimbursable if agency affidavits signed by the home care attendants are submitted as proof of payment (*see Matter of App. of GS*, DOH Dec. FH # 3864203J, Feb. 14, 2003; *Matter of App. of MG*, DOH Dec. FH # 3834019J, Dec. 27, 2002). Whether or not there is substantial evidence, "[a]bsent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious" and must be annulled (*Matter of Charles A. Field Delivery Serv.* [*Roberts*], 66 NY2d 516, 518; *see Matter of Aliperti v Trotta*, 35 AD3d 854). Here, the signed affidavits of the two home health care aides should be considered by HRA on the issue of reimbursement, in light of the DOH's prior acceptance of such evidence. Accordingly, so much of the determination dated August 30, 2006, as confirmed that part of the determination dated January 3, 2005, relating to those two home health care aides must be annulled, and the matter remitted to HRA for a recalculation of the reimbursement due to the petitioner. However, with respect to the attendant for whom the petitioner did not have a signed affidavit, there was substantial evidence to support the respondents' determination and that determination is consistent with prior determinations.

Skelos, J.P., Covello, Balkin and Dickerson, JJ., concur.

ENTER:
James Edward Pelzer
Clerk of the Court

Housing and Economic Recovery Act of 2008

By Salvatore M. Di Costanzo

On July 30, 2008, President Bush signed the Housing and Economic Recovery Act of 2008, H.R. 3221 (HERA).[1] HERA is being dubbed as a "rescue plan" for the current economic crisis.

HERA contains roughly $16 billion of tax incentives to rejuvenate lending and spur home ownership. Since HERA is intended to be revenue neutral, it includes tax incentives as well as revenue offsets.

While there are several tax provisions affecting individuals,[2] there are two that our clients should be alerted to. The first is a possible increase in the standard deduction for those who do not itemize deductions. The second limits a taxpayer's ability to fully exclude the gain realized on the sale of a primary residence where the premises were used other than as a principal residence.

Increased Standard Deduction for Real Property Taxes

When computing taxable income, a taxpayer is permitted to take either a standard deduction or to itemize deductions.[3] The standard deduction is reported directly on the taxpayer's individual income tax return. The taxpayer must elect to itemize deductions by filing Schedule "A" with the taxpayer's individual income tax return. For 2008, the standard deduction is $11,900 for married taxpayers, and $5,950 for singles. Itemized deductions include deductions for medical expenditures in excess of 7.5% of adjusted gross income,[4] state and local real property and income taxes[5], mortgage interest,[6] charitable contributions,[7] etc. Obviously, when the total of a taxpayer's itemized deductions exceeds the standard deduction, the taxpayer generally elects to itemize deductions.

Many of our clients are retired and have satisfied any mortgages. Although medical expenses may be available as deductions, the limitation on the amount of the deduction (i.e., medical expenses above 7.5% of a taxpayer's adjusted gross income) severely reduces the amount of deductible medical expenses. Often, the combination of real estate taxes, the deductible portion of medical expenses, and charitable contributions simply are not enough to justify itemizing deductions.

Section 3012 of HERA amends Section 63(c)(1) of the Internal Revenue Code ("Code") to increase a taxpayer's standard deduction by the lesser of (i) the amount allowable as a deduction for state and local real property taxes or (ii) $500 ($1,000 in the case of a married couple filing jointly). Although it may not seem significant, an elderly married couple on a fixed budget with real property taxes in excess of $1,000 will save $150 if they are in the 15% tax bracket. This provision applies to tax years beginning in 2008 and can produce a benefit on the taxpayer's 2008 individual income tax return.

Limited Exclusion of Gain Pursuant to Section 121

Section 121 of the Code allows a taxpayer to exclude $250,000 ($500,000 for married couples filing a joint return) of gain realized on the sale of a principal residence if the taxpayer used and owned the residence as a principal residence for at least two of the five years ending on the date of sale.[8] In limited circumstances, a taxpayer who cannot meet the "use and ownership" tests is allowed a fractional exclusion. For instance, where a taxpayer cannot meet the "use and ownership" tests as a result of a change in employment, health reasons, or other unforeseen circumstances, a fractional exclusion may be allowed.[9]

Prior to HERA, taxpayers who owned both a principal residence and a vacation home, or a home used for investment purposes, could avoid the capital gains tax on the sale of both properties by selling the principal residence, and moving into the vacation home. Once the "use and ownership" tests were met for the vacation home, the taxpayer would again qualify to apply Section 121 to the sale of the vacation home. In such cases a married couple could exclude as much as $1,000,000 of gain from the reach of the IRS.

Section 3092 of HERA amends Section 121(b) of the Code to close this loophole. Under HERA, gain from the sale of a primary residence attributable to periods of "non-qualified use" is not excludable under Section 121(a) of the Code. "[N]onqualified use is defined as any period (other than the portion of any period preceding January 1, 2009) during which the property is not used as the principal residence of the taxpayer or the taxpayer's spouse or former spouse." It does not include (i) any period after the last date the property is used as a principal residence of the taxpayer or spouse, (ii) any period (not to exceed an aggregate period of 10 years) during which the taxpayer or the taxpayer's spouse is serving on qualified official extended duty and (iii) any other period of temporary absence (not to exceed an aggregate period of two (2) years) due to change of employment, health conditions, or such other unforeseen circumstances as may be specified by the Secretary.

Under the new law if a taxpayer sells a principal residence and moves into a vacation home or rental property ("New Home") after December 31, 2008, and then subsequently sells the New Home, the taxpayer must divide the aggregate periods in which the New Home was not used as a principal residence by the total years of ownership. The fraction thus created is then multiplied by the total realized gain from the sale of the New Home. The product is the portion of realized gain that cannot be excluded under Section 121.

The following example is provided in the technical explanation prepared by the Joint Committee on Taxation:

> Assume that an individual buys a property on January 1, 2009, for $400,000, and uses it as rental property for two years claiming $20,000 of depreciation deductions. On January 1, 2011, the taxpayer converts the property to his principal residence. On January 1, 2013, the taxpayer moves out, and the taxpayer sells the property for $700,000 on January 1, 2014. As under present law, $20,000 gain attributable to the depreciation deductions is included in income. Of the remaining $300,000 gain, 40% of the gain (2 years divided by 5 years), or $120,000, is allocated to nonqualified use and is not eligible for the exclusion. Since the remaining gain of $180,000 is less than the maximum gain of $250,000 that may be excluded, gain of $180,000 is excluded from gross income.

This article only addresses the situation where a taxpayer sells a principal residence and moves into a vacation home or investment property after December 31, 2008. The impact of the new law should be considered in other situations such as where a taxpayer converts a principal residence into a rental or investment property.

For those who intend on selling a principal residence and relocating to a vacation home or investment property, it may be prudent to advise them to accelerate such a move to limit the period of nonqualified use.

I have received several inquiries from clients who misunderstand the new law. Many think that they can no longer exclude the gain on the sale of their principal residence. Hopefully this article will help you correct such misconceptions.

On a Separate Note

Just as a reminder, in 2009, the annual gift tax exclusion increases to $13,000 and the unified credit increases to $3,500,000.

Endnotes

1. Pub.L. 110–289.
2. One such provision is a first-time homebuyer's credit equal to the lesser of 10% of the purchase price of a home or $7,500. The catch is that the credit is only effective for purchases between April 9, 2008 and July 1, 2009 and needs to be repaid over 15 years beginning in the second year after the purchase.
3. I.R.C. § 63(b).
4. I.R.C. § 213.
5. I.R.C. § 164.
6. I.R.C. § 163.
7. I.R.C. § 170.
8. I.R.C. § 121(a).
9. Treas. Reg. § 1.121–3.

Salvatore M. Di Costanzo is a partner with the firm of McMillan, Constabile, Maker & Perone, LLP. Mr. Di Costanzo is an attorney and accountant whose main areas of practice include Trusts and Estates, Tax Law and Elder Law. Prior to being a partner with McMillan, Constabile, Maker & Perone, LLP, Mr. Di Costanzo was an attorney with Ernst & Young, LLP in its estate and business succession planning group, where he provided estate planning and income tax services for individuals, corporate executives, and closely held business owners, as well as estate and trust taxation and administration services. Prior to practicing law, Mr. Di Costanzo was an auditor with Deloitte & Touche, LLP in Stamford, CT. He earned a B.B.A. in accounting from Siena College and a J.D. from Pace University School of Law.

Mr. Di Costanzo is a member of the National Academy of Elder Law Attorneys and is active in the Real Property, Elder Law and Tax Sections of the New York State Bar Association. He is also the current co-chair of the Elder Law Committee of the Westchester County Bar Association. He is licensed to practice law in New York, Connecticut, the United States District Court for the Southern District of New York and the United States Tax Court. Mr. Di Costanzo is a regular contributing author for the *Elder Law Attorney* on various tax matters affecting the practice of elder law. He can be reached at (914) 834-3500 or via e-mail at smd@mcmillanconstabile.com.

Guardianship News: Thoughts About Scandals

By Robert Kruger

Many readers, particularly those whose practice involves guardianships infrequently, may not be aware that our fiduciary world anticipates some ugly headlines. And soon, probably before we usher in 2009.

One of our number, not yet indicted, is suspected of looting accounts where he was guardian of sums in excess of $2,000,000. He is under active investigation by the office of the Manhattan District Attorney. The outlook for exculpation is not good.

After years of which our practice was subject to limitations and restrictions imposed by a very unsympathetic Office of Court Administration, the guardianship Bar certainly did not need new scandals. Well . . .

The burden of this article is to discuss ways in which, in the future, misappropriations may be prevented. I do not authoritatively know how the thefts occurred. I have heard, however, that part occurred when an IP died and funds were turned over to an estate fiduciary. If, for example, the closing balance of the guardianship was $850,000, only $750,000 was transferred to the estate fiduciary, who may not have thought to question the amount.

Another example may have involved manipulating the accounting numbers in the area of unrealized appreciation. If actual unrealized appreciation was, for example, $250,000, and if the accounting under-reports that appreciation, the Court Examiner would, of necessity, have to carefully review the accountings and, particularly the statements, to catch the manipulation.

A third (and last example) may have involved manipulating an opening balance for an accounting year that was lower than the closing balance appearing on an annual accounting for the previous year.

A reader might ask why the Court Examiner did not catch these and other machinations promptly. I believe that discovery is inevitable. Eventually. Yet, if the filing of annual accountings is untimely, or the perpetrator promises to deliver requested backup material and continuously fails to deliver these promises, the perpetrator can push off the day of reckoning for another year or so, and sometimes two, if the Court Examiner is passive.

What proposals can we offer that make sense and address the problem without maiming the positive aspects of guardianship practice? My great concern, to use a cliché, is that we not throw out the baby with the bath water.

The President of the New York State Bar Association, Bernice Leber, has formed a task force to address the problems and offer solutions. I have been nominated to serve as a member of that task force, and I believe that we have one opportunity, and only one, to shape the debate. This task force will, almost certainly, focus on the issue of scandal and will not digress into other problems with guardianship, real or imagined. Therefore, I invite my readers to send me your suggestions. Do not worry about the practicality of these suggestions. An impractical suggestion may contain a gem of a good idea. The proposals[1] in this article are just that, proposals, to be reviewed, discussed, adopted or discarded as we explore this matter more deeply.

First and foremost, since the problem is probably most pronounced in high-asset cases, I would limit the amount that the guardian can access at any one time. If, for example, the guardianship has a net worth in liquid assets of $3,000,000, allow the guardian to control, in an operating account, no more than $200,000 or $250,000, and require a Court Order to access the balance in the "restricted account." Certainly, a motion will be required to replenish the operating account, and the motion, with prior years' annual accountings attached as exhibits, will demonstrate how the money in the operating account was spent, providing a very real additional degree of oversight beyond that provided by the Court Examiner. It will not be impossible to steal, but it will be much, much harder to do so on a grand scale.

Second, a Court Examiner colleague[2] suggests that the Court Examiner be copied on all bank and brokerage statements for guardianships having seven figures, thereby providing real-time scrutiny over the accounts.

Third, that Court Examiner suggests a quicker resort to motion practice if requested documentary backup is not timely received. Why should an annual accounting drift in space when the guardian is slow to file or respond. This is not intended to be a proposal enforced in a punitive fashion. Certainly, illness may prevent an accounting from being filed by May 31st of any given year. And other valid reasons for delay may offer an acceptable excuse. But, if a guardian is

perceived to be blowing off the Court Examiner, why wait?

Fourth, the turnover to the estate fiduciary, when an IP dies, shouldn't pose a problem if the reviewing attorney, often the Court Examiner, is on top of the final accounting. Downstate, the compliance parts of the court have already improved oversight, and they should continue to do so aggressively.

In addition, the compensation schedule for Court Examiners might well be reviewed, particularly if their responsibility increases.

I would also address notions that I believe are poorly conceived. For example, appointing not-for-profit fiduciaries, rather than attorneys or family members, sounds like a promising proposal. From my perspective, while "not-for-profit" has a soothing ring to it, the individuals running the not-for-profits, the last time I looked, are human beings who are subject to the same temptations as other human beings. It is my belief that not-for-profits are quite profitable for those who run them and any solution in that direction is not a change of substance but, instead, is cosmetic only.

In addition, the not-for-profit fiduciary, or a public guardianship for that matter, is a bureaucracy. The employees work 9 to 5. They are on salary, and not a lavish salary either. The incentive toward excellence doesn't exist and the lower-echelon people have little incentive to go the extra mile. Would you be willing to put your mother's life, her care, or her resources, into the hands of such a guardian? I wouldn't. Guardianships of any complexity, such as family conflicts or financial exploitation, are beyond the competence of the not-for-profits. Although they might argue the point, dealing with family dynamics of any complexity is beyond them, often because their staff is young and unseasoned.

The last suggestion I discuss—having a CPA review the high-net-worth accountings—is also flawed. The problem here is that the Court Examiners, if they lose their compensation on the big cases, would resign in droves. Who will replace them? The courts? Are the courts doing a credible job on the other tasks they perform? What would give us confidence that overworked and underpaid Court Clerks could handle these tasks?

It seems to me that the oversight process performed by Court Examiners is well conceived. A tightening, such as I have suggested, particularly with restricted accounts, offers the best guarantee that theft will be curtailed and, perhaps, eliminated.

I do not offer these suggestions to be all inclusive. Or a panacea. And I repeat my invitation to the concerned Bar to send me your thoughts.

I can be reached at rk@roberkrugerlaw.com or (212) 732-5556.

Endnote

1. These suggestions are derived from conversations with, among others, Kate Madigan, Anthony Enea, Ira K. Miller, Tony Lamberti, John Dietz and Jeff Abrandt. They do not represent a consensus . . . just proposals.
2. Peggy Barbanel of Kings County.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997) 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)).

Advance Directive News: Living Longer but Dying Slower

By Ellen G. Makofsky

Americans are living longer and dying differently, and the legal profession has been on the forefront responding to these developments. The idea of surrogate health-care decision-making is a relatively modern idea. The seminal cases *Cruzan, In re O'Connor* and *In re Eichner*[1] were each decided within the last three decades. The Health Care Proxy Law was first enacted in 1991.[2] Emerging case law and new legislation were the legal reactions to changes in the way more and more Americans were dying.[3]

Thirty years ago most deaths occurred as a sudden cataclysmic event. In 1978 heart attack, stroke and accidents were leading causes of death. These deaths were fast: the deceased was dead and the family and friends were left to mourn. Society mobilized to reduce these deaths with changes in technology and behavior. As a result of these efforts we now have a national 911 system, new pharmaceuticals, portable affordable defibrillators, stents, CPR, mandatory seat-belt laws and changes in smoking habits, diet and exercise. Since 1970 we have seen improved technology, education and new medical interventions reduce fatal heart attacks by 52%, reduce death due to stroke by 63% and reduce accidental deaths by 36%.[4] In 1908 the average person's life span was 47 years and in 2008 it was 78 years. An amazing two-thirds of these gains have occurred since 1960 as a result of the mobilization against sudden death. Life expectancy in America continues to grow.[5]

While Americans are living longer they are dying differently. Today the majority of deaths tend to occur slowly and incrementally. Statistics reveal a 102.8% increase in deaths attributed to chronic respiratory ailments.[6] Deaths caused by Alzheimer's disease have doubled since 1980 and it is expected that such deaths will increase in years to come. Instead of a loved one dying suddenly, today's family is more often faced with a slow death requiring many health-care decisions along the way.

Where we die has also changed. Society has confined sickness to hospitals and more and more of the aged and chronically ill to nursing homes. In 1920 75% of Americans died in their own homes, while in 1994 the figures reversed, and 75% of all Americans now die in hospitals or other institutions.[7] While the overall number of hospitals in the United States has declined, the number of intensive care beds has increased.[8] And this has occurred while Americans were living longer and more of them were succumbing to slow deaths. The manner of dying and the manner of its treatment have been moving in opposite directions.[9] We have the technology to breathe for the patient, drugs to sustain blood pressure, feeding tubes for nutrition and hydration and the machinery to sustain the lungs, kidney and bladder. We have medical technology that in many cases cannot cure the patient but can prolong the patient's life. We need to have a way to say no more.

Forty years ago, advance directives were less imperative. Sudden death did not require endless medical decision-making. Slow death is different. It forces the patient and the family to make choices and to face mortality. The provisions in the law that allow surrogate health-care decision-making provide the patient faced with a slow death a way to remain in control of the life that remains.

Endnotes

1. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (U.S. 1990); *In re O'Connor,* 72 N.Y.2d 517, 534 N.Y.S 2d 886 (1988); *In re Eichner* (*In re Storar*), 52 N.Y.2d 363,438 N.YS.2d 266 (1981).
2. N.Y. Pub Health Law Article 29C.
3. The idea for this column was born during a keynote address given by Stephen P. Kiernan, author of Last Rights: Rescuing the End of Life from the Medical System (New York, St Martin Griffin 2007) at the Fall 2008 Institute presented by the National Academy of Elder Law Attorneys (NAELA). Mr. Kiernan's book is quite instructive and I recommend it heartily.
4. A. Jemal, E. Ward, Y. Hao *et al.*, *Trends in the Leading Causes of Death in the United States, 1970-2002,* JAMA (2005), 294(10): 1255–1259.
5. Stephen P. Kiernan, Last Rights; Rescuing the End of Life from the Medical System (New York, St Martin Griffin 2007), 15–17.
6. Ahmedin *et al.*, 1256.
7. Kiernan, Last Rights, p.10.
8. The number of hospitals declined by 16% between 1980 and 2003 while intensive care beds increased 11% during the same period.
9. Kiernan, *Last Rights,* p. 27.

Ellen G. Makofsky is a *cum laude* graduate of Brooklyn Law School. She is a partner in the law firm of Raskin & Makofsky with offices in Garden City, N.Y. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is a past Chair of NYSBA's Elder Law Section and serves as an alternate member of the NYSBA House of Delegates.

Recent New York Cases

By Judith B. Raskin

SNT Recovery

DSS appealed from a decision denying it full recovery from a self settled SNT. Appeal denied. *In re Ruben N.*, NY Slip Op. 6997, 2008, N.Y. App. Div. LEXIS 6802 (App. Div. 2d Dep't, September 16, 2008).

Ruben N. was born with Down's Syndrome. Medicaid provided for his care starting in July, 1992. In July 1997, Ruben N. was injured during spinal surgery. He received a settlement in a medical malpractice action of approximately $1,600,000. Medicaid agreed to accept $102,423.56 to settle its lien against the settlement proceeds. Ruben N.'s sister, as Article 81 guardian, created an SNT for the remainder of the net proceeds.

Ruben N. died on September 22, 2003. Medicaid sought recovery in the amount of $632,714.22 for all of the services provided to Ruben N. during his lifetime. The SNT states that on death of the beneficiary Medicaid gets reimbursed to the extent of its expenditures.

The Supreme Court held that DSS was only entitled to recover $50,226.63, which represented the sum expended for Ruben N.'s care for the period after the SNT was created, and not for the period prior to the injury.

The Appellate Division affirmed. The Court spent considerable time discussing the reasons why the SNT language does not prevail. It divided Medicaid's services into three periods, prior to the injury, injury to creation of the SNT, and after creation of the SNT. Payments made in the first period, prior to the injury, were payments correctly paid. Medicaid settled on the amount it had received for the period from the injury to the creation of the SNT. After receiving settlement proceeds Ruben N. would have had excess resources and been denied Medicaid but for the SNT. Medicaid cannot recover for assistance correctly paid in the first period. It settled for the second period. It was entitled to be reimbursed for its costs during the third period.

Increase in MMMNA

A community spouse appealed from a decision denying her an increase in her MMMNA to pay for her living expenses. Reversed. *Balzarini v. Suffolk County DSS*, 2008 NY Slip Op. 6704, 2008 N.Y. App. Div. LEXIS 6586 (App. Div. 2d Dep't, September 2, 2008).

Mrs. Balzarini, a community spouse, sought an increase in her Medicaid minimum monthly maintenance needs allowance (MMMNA) to pay for her living expenses, which exceeded her spousal income allowance and her actual income. Her income of approximately $2,500 per month was insufficient to pay her claimed monthly expenses of approximately $4,814. The expenses at issue were housing costs, utilities, car, Medicare premium, food, clothing, medical care, credit card payments and home maintenance. Mr. Balzarini had sufficient income to provide for these expenses but Medicaid budgeted his excess income to be paid to the nursing home.

Mrs. Balzarini unsuccessfully appealed at a fair hearing and in an article 78 proceeding.

The Appellate Division reversed as to all expenses but credit card payments. The court based its decision on the intent of the Medicare Catastrophic Coverage Act to protect community spouses from financial catastrophe. It found that Mrs. Balzarini's situation met the standard of exceptional circumstances which would result in significant financial distress. Ordinary expenses can rise to extraordinary expenses when the spouse is left with insufficient funds to provide for reasonable housing and living expenses. The matter was remitted to the agency to determine the appropriate income allowance.

Adult Home Required to Assist with Medications

Plaintiff appealed from a decision upholding regulations requiring adult home non-nursing staff to assist residents with their medications. Denied. *NY Coalition For Quality Assisted Living, Inc. v. Novello*, 2008 NY Slip Op. 6343, 861, N.Y.S.2d 857, 2008, N.Y. App. Div. LEXIS 6158 (App. Div. 3d Dep't, July 17, 2008).

Plaintiff organization represents adult homes and registered nurses. Defendant Commissioner of Health issued regulations requiring adult homes to use their staff to assist residents in taking their medications. The regulations require the staff as a personal care matter to assist residents where necessary in reading their medication labels, interpreting the labels, ingesting, injecting or applying medications, following instructions, opening bottles and other containers, measuring and preparing medications and safely storing medications when needed. The homes are responsible for 1) seeing that the medications are properly taken, 2) recording the details of the regimens for each resident, 3) record-

ing any assistance the resident has received and 4) safely storing the medications.

The plaintiff argued that these regulations require the staff to engage in administering the medications, therefore engaging in the practice of nursing in violation of the Nurse Practice Act.

The court held that the regulations set forth routine tasks that the residents would have carried out themselves without the assistance of a nurse or a physician. The tasks do not require mental judgment.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA) and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter.

Section Committees and Chairs

Bylaws
Joan L. Robert
Kassoff, Robert & Lerner LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Client and Consumer Issues
Lee A. Hoffman Jr.
Hoffman, Wachtell, Koster & Maier
399 Knollwood Road
White Plains, NY 10603-1900
lhoffman@hwkmlaw.com

Frances M. Pantaleo
Walsh & Amicucci LLP
2900 Westchester Avenue, Suite 205
Purchase, NY 10577
FMP@walsh-amicucci.com

Communications
Rose Mary K. Bailly
Law Revision Commission
80 New Scotland Ave.
Albany, NY 12208-3434
rbail@albanylaw.edu

Howard S. Krooks
Elder Law Associates, PA
7000 W. Palmetto Park Road, Suite 205
Boca Raton, FL 33433
hkrooks@elderlawassociates.com

Estate and Tax Planning
Ami S. Longstreet
Mackenzie Hughes LLP
101 South Salina Street, Suite 600
Syracuse, NY 13202
alongstreet@mackenziehughes.com

Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Financial Planning and Investments
Walter T. Burke
Burke & Casserly, P.C.
255 Washington Ave. Ext.
Albany, NY 12205-5504
wburke@burkecasserly.com

Laurie L. Menzies
Pfalzgraf Beinhauer & Menzies LLP
455 Cayuga Road, Suite 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Guardianship
Anthony J. Lamberti
435 77th Street
Brooklyn, NY 11209
ajlesq@alamberti.com

Health Care Issues
Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 5th Floor
Brooklyn, NY 11209
jgrimaldi@gylawny.com

Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Boulevard
Suite 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education
Ami S. Longstreet
Mackenzie Hughes LLP
101 South Salina Street, Suite 600
Syracuse, NY 13202
alongstreet@mackenziehughes.com

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530-2009
EGM@RaskinMakofsky.com

Legislation
Amy S. O'Connor
McNamee, Lochner, Titus & Williams, P.C.
PO Box 459
Albany, NY 12201-0459
oconnor@mltw.com

Michael J. Amoruso
Amoruso & Amoruso, LLP
800 Westchester Avenue
Suite S-320
Rye Brook, NY 10573
michael@amorusolaw.com

Litigation and Fair Hearings
Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street, Suite 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Long Term Care Insurance
Louis W. Pierro
The Pierro Law Group, LLC
20 Corporate Woods Boulevard, 3rd Floor
Albany, NY 12211
lpierro@pierrolaw.com

Medicaid
Valerie J. Bogart
Selfhelp Community Services Inc.
520 Eighth Avenue, 5th Floor
New York, NY 10018
valbogart2@aol.com

Ira Salzman
Goldfarb Abrandt Salzman & Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118
salzlaw@aol.com

Membership Services
Ellyn S. Kravitz
Littman Krooks LLP
655 Third Avenue, 20th Floor
New York, NY 10017
ekravitz@littmankrooks.com

Mental Health Law
Sharon Kovacs Gruer
Sharon Kovacs Gruer, PC
1010 Northern Boulevard, Suite 302
Great Neck, NY 11021
skglaw@optonline.net

Practice Management and Technology
David Goldfarb
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Suite 1100
New York, NY 10118-1100
goldfarb@seniorlaw.com

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

Robert J. Kurre
Robert J. Kurre & Associates, PC
1010 Northern Boulevard, Suite 232
Great Neck, NY 11021
rkurre@kurrelaw.com

Real Estate and Housing
Neil Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, NY 10601-5105
nrimsky@cuddyfeder.com

Special Needs Planning
Vincent J. Russo
Vincent J. Russo & Associates, PC
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
vincent@vjrussolaw.com

Joan L. Robert
Kassoff, Robert & Lerner LLP
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Trust and Estate Administration
Marie Elena Rosaria Puma
Vincent J. Russo & Associates, PC
3740 Expressway Drive South
Hauppauge, NY 11749
mepuma@vjrussolaw.com

ELDER LAW ATTORNEY

Elder Law Attorney is published by the Elder Law Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without a charge.

ISSN 1070-4817 (print) ISSN 1934-2012 (online)

NYSBA
NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

PRSRT STD
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155