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Elder Law Attorney

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

Message from the Chair

What a magical weekend was in store for all who attended our Section's Summer Meeting in Washington, D.C., during which we honored our past chairs and celebrated the 20th anniversary of our Section's birth. Attendees raved about the unique opportunity to spend a day in workshops with our past Section Chairs learning cutting-edge planning strategies and addressing issues that affect our practice and profitability. Our Hail to the Chairs Gala Celebration culminated in a video tribute to each of these past Chairs, acknowledging the sacrifice and commitment they made to shape the Section into what we know today. I want to extend a personal "thank you" to **Robert Freedman, Robert Abrams, Walter Burke, Michael O'Connor, Kate Madigan, Louis Pierro, Cora Alsante, Joan Robert, Howie Krooks, Dan Fish, Ellen Makofsky** and **Tim Casserly** for making this such a special event for our Section members! The meeting concluded on Saturday with a dazzling series of lectures from our Section's rising stars dealing with tax issues, the new power of attorney statute and efficient processing of Medicaid applications. Thank you to my Program Chair, Anthony Enea, and Program Vice Chair, Robert Kurre, for staging an incredible program.

My promise to provide interactive programming continues as our Section heads to Lake George this fall from October 29-31 to reunite in the crisp Fall weather at the beautiful Sagamore Resort. My Program Chair, JuliAnn Calareso, and my Program Vice Chair, Richard Weinblatt, have organized a powerhouse meeting that offers a gem for every stage of practice. The first day consists of Practical Skills Workshops that will offer our attendees four small classroom lectures on some of the basics of Elder Law, including required skills to transition into an Elder Law Practice, the basics of Medicare and Medicaid, understanding the new Power of Attorney form and advanced directives. Friday morning will feature our popular Elder Law update, a panel discussion on the role of Long-Term Care Insurance in our planning and practice, and an important lecture on how to plan for an emergency in your law prac-

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tice. Friday afternoon commences with the Advance Practice Forum which provides for roundtable interactive discussions on some of the more sophisticated planning issues in Elder Law, including Supplemental Needs Trusts, Planning for the Multistate Client, and an Open Forum on document drafting for the advanced practitioner. The meeting concludes Saturday morning with a dynamic ethics presentation using video clips, an important training session on Veterans' Benefits by Felicia Pasculli, and a survey by Matthew Nolfo of the Medicaid planning strategies permitted in Guardianship proceedings across the state after the implementation of the Deficit Reduction Act of 2005.

I am pleased to announce that the Fall Meeting is being co-sponsored by the newly formed Senior Lawyers Section, which has secured a nationally renowned Life Coach, Rosemary Byrne, to speak with us on the transition from active law practice into retirement. As for fun, JuliAnn Calareso has arranged for a Halloween themed "Murder Mystery Dinner" on Friday, which will be sure to have all of us on the edge of our seats! This meeting offers unparalleled training for attorneys at every level of the practice. I look forward to sharing good times with all of you at the meeting!

As you are aware, the new Power of Attorney statute went into effect on September 1, 2009. While the Elder Law Section, in conjunction with other Sections of NYSBA, was successful in recommending technical amendments to the bill, those amendments have not yet been voted on by the legislature. Please watch the listserv and your e-mail for an E-Blast from our Section alerting you to the substance of those technical amendments once they are acted upon by the legislature.

Most of all, I call each of you to action! Get involved with the Section, let your professional life flourish . . . and, who knows, you might even make a few new friends along the way. Feel free to contact me to discuss any interest you may have in contributing to the magnificent work our Section proudly produces for the Bar Association and for our special needs and elderly clients.

Michael J. Amoruso

Editor's Message

Anthony J. Enea, Esq. has contributed so much to the Elder Law Section through his continued commitment not only to this publication but to the Section meetings, including our recent Summer Meeting in Washington, D.C. I appreciate Michael Amoruso's invitation for me to join the Publications Committee, and I am delighted to now join Anthony as a Co-Editor-in-Chief of the *Elder Law Attorney*.

It has often been noted that the members of the Elder Law Section are remarkably giving of their time and insight, and I've experienced this generosity in spades during my tenure as a member of the Section. The practice of Elder Law makes the complexity of the regulatory scheme (federal securities law), and the challenges of dealing with the regulators (the SEC, NASD, etc), of my prior life in corporate practice seem like a cakewalk. The omnipotence of the SEC seems manageable when one contemplates challenging the equivalent—the Department of Social Services—in multiple counties! The members of the Elder Law Section in New York State have made a significant contribution to the development of the law at the federal level, and especially at the state level, and—not least—county-by-county with each encounter with local regulators. These contributions made by our members have benefited the public, and raised the stature of the practitioners of Elder Law. The intellectual commitment and time required for that continuing effort by our members is truly extraordinary.

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact *Elder Law Attorney* Editors:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

The *Elder Law Attorney* is one of many venues for members of this Section to share their knowledge and practical experience, and thereby further the practice of Elder Law. We have been fortunate to have regular contributors we can count upon, and we know that there is precious little time to write while serving clients and managing a practice. At the Summer Meeting Executive Committee session, it was evident how many of you are contributing in ways that others in this Section may not realize. I hope that more of you will consider sharing your experience and insight on an ongoing basis by contributing articles, however short, to the *Elder Law Attorney*. Whether it's a notable fair hearing or court challenge, your insight in solving a particularly complex client problem, or an update on the progress made by your Executive Committee on behalf of the Elder Law Section, the news and information are valuable.

Issues on special topics allow us to present a topic in greater depth. Therefore, the Winter issue will focus on Home Care, which is a need arising with increasing frequency and one that will require new and novel solutions. Your ideas for topics to be covered would be very welcome, and certainly your contribution of an article to the Home Care issue would be gratefully received.

Turning to this issue, we are fortunate to have excellent and timely articles from our regular contributors as well as a few new contributors. René H. Reixach, Esq. and Aytan Y. Bellin, Esq. review the significant implications of the Court of Appeals' *Wong v. Doar* decision for chronic care planning: While income in a SNT might not be counted for eligibility purposes, that it now counts as part of NAMI means that there may be little or none left for needs that are truly supplemental.

In Guardianship News, Robert Kruger, Esq. shares with us the case that he turned away after careful reflection on the potential subject of the Guardianship proceeding—an irascible, if not psychotic, husband and father, and the family dynamics surrounding this man—a reminder that sometimes one has to conclude that the case the client urges on just does not justify the effort and expense when the desired result is unlikely to be achieved and the justification is ambiguous.

Judith Raskin, Esq., in her regular column Recent New York Cases, has summarized a number of important recent case decisions. These include a number of

Supreme Court decisions from counties across the state, including two that reflect the acceptability of gift/note planning, and the Court of Appeals decision in *Khrapunsky v. Doar*, in which the Court determined that there was no violation of equal protection arising from the denial of certain SSI benefits because New York was mandated to adopt the federal regulations that resulted in the denial.

Deepak Mukarji, Esq. has contributed an article concerning the nuances of the timing of a Medicaid application and the effect of an outstanding spend-down bill. The advocacy in *In re Appeal of TL* not only corrected errors in the argument put forth by the New York City Human Resources Administration, but also resulted in a pre-application nursing home bill being paid out of post-eligibility NAMI despite the availability of pre-eligibility excess resources.

Ellen Makofsky, Esq. has written about a difficult case concerning the interpretation of a health care proxy, a document that on the one hand could be deemed to provide "clear and convincing" evidence of the principal's wishes yet, because of a statement either poorly placed or phrased, is determined to be neither clear nor fully convincing after testimony by the health care agent about the patient's orally expressed opinions and wishes.

David Okrent, Esq., CPA, reviews the intricacies of the current tax basis step up/down rules affecting estates; EGTRRA, which provides for a new carryover basis regime for the income tax, scheduled to take effect for decedents dying and generation-skipping transfers made after December 31, 2009; and the planning issues presented by the changes to the rules concerning death-bed transfers.

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Wong v. Doar

By René Reixach and Aytan Y. Bellin

René Reixach

The U.S. Court of Appeals for the Second Circuit issued its long-awaited decision in the *Wong* case, *Wong v. Doar*, 2009 U.S. App. LEXIS 13311 (2d Cir. June 22, 2009). While the court upheld the district court's ruling that income placed into a supplemental needs trust (SNT) generally is not exempt from being counted in computing the net available monthly income (NAMI) required to be contributed by an individual toward the cost of his or her nursing home bill (*Wong v. Daines*, 583 F. Supp. 2d 485 (S.D.N.Y. 2008)), the court did clarify that income placed into an SNT should be exempt in the determination of Medicaid eligibility.

When Congress enacted the Omnibus Budget Reconciliation Act of 1993, it authorized the establishment of, and exemption rules for, SNTs (42 U.S.C. § 1396p(d)). It also re-defined assets for purposes of the transfer of assets rules as including both resources and income (42 U.S.C. § 1396p(h)(1)). That statute established the criteria for three types of SNTs, including a self-settled "payback" trust, 42 U.S.C. § 1396p(d)(4)(A), and a charitable "pooled" trust, 42 U.S.C. § 1396p(d)(4)(C). It also provided that notwithstanding the normal rules that income or resources in a trust should be counted as available to the trust beneficiary by Medicaid if the trustee had discretion to distribute them to or for the beneficiary, those rules would be subject to the SNT rules "[f]or purposes of determining an individual's eligibility for, *or amount of*, benefits under a State plan. . . ." 42 U.S.C. § 1396p(d)(1) (emphasis added).

For individuals in nursing homes, Medicaid technically does two separate determinations. First, it determines eligibility by comparing the individual's income, after various disregards, including the nursing home bill, to the Medicaid income allowance for an individual ($767 per month this year). Unless the individual's income is quite high, he or she almost always will be eligible based on income after taking into account the nursing home bill. Then Medicaid makes a separate "post-eligibility" determination of the NAMI, and 42 C.F.R. § 435.832 has provided for over 25 years, back over a decade before the SNT statute was enacted, that in computing the NAMI, income that was included in determining eligibility must be counted back in determining that post-eligibility NAMI amount.

Aytan Y. Bellin

Thus the Medicaid program was giving with one hand by not counting income placed into an SNT for purposes of determining eligibility, while taking that away with the other by counting that income in determining the NAMI. That policy was enshrined in § 3259.7 of the *State Medicaid Manual* issued by the federal Centers for Medicare and Medicaid Services (CMS).

Things came to a head on this issue when a number of local social services districts, mostly in the New York City area, began counting income placed into an SNT in determining the NAMI. Mr. Wong certainly had supplemental needs that deserved to be met by using income placed into his SNT. He was in his early 50s and had suffered a traumatic brain injury. His agitated state required that he have someone watch over him at all times, and since he only spoke Cantonese, the assistance had to be provided by someone who spoke that, too. His family covered some of those needs, but they had to hire someone for part of the time.

When the New York City Human Resources Administration (HRA) counted Mr. Wong's Social Security benefits that he had placed into an SNT in computing his NAMI, Mr. Wong sued the Commissioners of HRA and the New York State Department of Health, plus the Secretary of the Department of Health and Human Services, in federal court. The trial court ruled against him, albeit on grounds that were not advanced by any of the parties.

The district court agreed with Mr. Wong that the provisions of § 1396p(d)(1) concerning "assets" (defined as including income) placed into an SNT not affecting the determination of his "amount of benefits" meant that his income placed into the SNT could not be counted in determining his NAMI. For an instant, that seemed like a victory for Mr. Wong. However, at the very end of the decision the court held that income could not be protected that way because it was not "contained" in the SNT as required by § 1396p(d)(4)(A), and that not only did that mean that it could be counted in determining his NAMI, it also meant that it could be counted in determining his eligibility. That latter conclusion obviously had not been urged by Mr. Wong, and the defendants did not urge that either. In essence the district court

ruled that the CMS policy in the *State Medicaid Manual* exempting income placed into an SNT for eligibility determinations was invalid.

That determination obviously posed a significant problem for individuals using SNTs to protect income over the community income allowance who were receiving community-based services like home care, and who needed all their income to meet their living expenses in their homes and apartments. Fortunately for them, but not for Mr. Wong, the Court of Appeals gave considerable deference to the CMS policy, and held that it had the flexibility in interpreting what the Court felt was not a clearly drawn statute to exempt (or not exempt) income in both the Medicaid eligibility and post-eligibility processes. Thus the good news out of all this was that the Court upheld the CMS policy that income placed into an SNT should be disregarded in computing eligibility. Since, in New York, outside of the institutional context, the income determined to be available in determining eligibility is all that is counted in determining whether the individual has to spend down excess income before obtaining Medicaid coverage, this was a victory of sorts by ratifying the use of SNTs for community Medicaid cases. *See* 18 N.Y.C.R.R. §§ 360-4,1(b)(1)(iv) and 360-4.8(a)(1).

While the case for Mr. Wong was unsuccessful, its favorable consequence should be to ratify use of income SNTs in community cases.

Mr. Wong was represented by Elder Law Section members Aytan Y. Bellin, Esq., of White Plains, and René H. Reixach, Esq., of Rochester, the authors of this article.

René Reixach, Esq. is a partner in Woods Oviatt Gilman LLP in Rochester, New York where he chairs the elder law and health law practice groups. René is a graduate of Yale College and the Harvard Law School and has been a member of the New York State Bar since 1972. He has litigated Medicaid eligibility cases, mostly in federal court, for over thirty years, including one case in the Supreme Court of the United States. While he practices mostly in New York, he has been admitted *pro hac vice* in cases in Iowa, Ohio, Pennsylvania, Connecticut, Maryland and the District of Columbia. He is a Fellow of the National Academy of Elder Law Attorneys and received the Outstanding Practitioner award from the Elder Law Section of the New York State Bar Association, and he serves on the Executive Committee of that Section. He has written and lectured about Medicaid eligibility and Medicaid litigation for numerous elder law organizations and Bar associations.

Aytan Y. Bellin, Esq. is the principal attorney of the New York law firm of Bellin & Associates LLC, which concentrates in estate litigation, trusts and estates, elder law and disability planning. In his estate litigation practice, Mr. Bellin regularly appears in Surrogate's Court throughout the New York area and handles all types of disputes concerning estates and trusts. His trusts and estates planning practice includes all aspects of estate planning, asset protection, will and trust drafting and probate and administration of estates. Mr. Bellin's elder law and disability planning practice deals with a broad range of issues affecting persons of all ages including living wills and health care proxies for healthcare decision making, Medicaid planning and eligibility for Medicaid coverage of long-term home care and nursing home care, Medicare entitlements, hospital and nursing home matters, litigation, and contested and uncontested guardianships. Mr. Bellin formerly served as an Assistant District Attorney in the Manhattan District Attorney's Office, where he conducted trials and appeals, and as a law clerk to Judge Kenneth Conboy of the United States District Court for the Southern District of New York. Mr. Bellin received his law degree from the Columbia University School of Law and his B.A., magna cum laude, from Yale University.

Estate Tax Reform: Don't Forget About Basis Issues

By David R. Okrent

As we approach the end of the year, many are talking about what is going to happen to the federal estate tax in 2010. Most of the focus is on the tax itself. Questions such as, "Will the estate tax really disappear forever?" "Will it only disappear only for 2010 and return with a federal exemption of one million dollars"? However, with EGTRRA,[1] came additional changes, equally important, one of which is changes to what a beneficiary's basis in an inherited assets case will be.

A. Tax Basis at Death Rules Applicable Before 2010

Under our current law the recipient's cost or tax basis of property acquired from or passing from a decedent is the property's fair market value at the date of death (or at the alternate valuation date, if that date is elected for estate tax valuation purposes). Consequently, any potential gain due to increase in the fair market value of the property since the decedent acquired it will never be subject to federal income tax.[2]

Alternatively, if the property depreciated in value after the decedent acquired it, when the property is subsequently sold the accrued loss will not be deductible for income tax purposes because (for loss- recognition purposes) the income tax basis will have stepped down at the time of death. *Planning tip:* Perhaps any asset with an accrued (but unrealized) loss should be sold prior to death to avoid the loss of the loss. Be careful, though—the sales of assets to family members may prevent the recognition of the loss.[3]

The income tax basis of property either acquired or passing from the decedent is often referred to as the "stepped-up basis" (although, if the property is depreciated, the basis will be "stepped down"). For purposes of determining that property which is given a stepped-up basis, the test is generally whether the property is included in the gross estate of the decedent for federal estate tax purposes.[4] Property transferred by a decedent at death receives a stepped-up basis for federal income tax purposes even if no federal estate tax is due on the transfer. This includes property transferred to a surviving spouse and protected by the estate tax marital deduction. When transfers are exempt for federal estate tax purposes there is an incentive to overvalue property to enable an increase in its income tax basis. IRC § 6662 imposes, however, an additional penalty on individuals who have an underpayment of tax attributable to a valuation overstatement.

In addition, for income tax basis purposes, the surviving spouse's share of community property also owned by a decedent is treated as if it were acquired from or passed from the decedent and, therefore, that share also acquires a stepped-up (or stepped-down) basis.[5] This occurs even though the surviving spouse's property is not includible in the gross estate of the decedent. For separate property, this same result might be accomplished through the use of a "tax basis revocable trust." This is a trust that is structured to include property of the surviving spouse in the gross estate of the first spouse to die, but without incurring any additional federal estate tax.[6]

B. Carryover Tax Basis at Death Rules Applicable After 2009

EGTRRA[7] provided for a new carryover basis regime for the income tax, scheduled to take effect for decedents dying and generation-skipping transfers made after December 31, 2009.[8] As amended by the 2001 Act, § 1014 providing tax basis step-up (or step-down) at death does not apply to decedents dying after December 31, 2009.[9] Also effective in 2010, a new IRC § 1022 provides that except as provided within this section, property acquired from a decedent will be treated as if acquired by gift, and recipients of such property will receive a basis equal to the lesser of the decedent's adjusted basis in the property or the fair market value of the property on the date of the decedent's death.

When effective, IRC § 1022 exempts from this general rule an increase in the tax basis of the assets transferred, as determined on an asset-by-asset basis, by (i) up to a total of $1.3 million and (ii) the amount of the decedent's unused capital losses, net operating losses, and certain built-in losses.[10] This section also exempts up to an additional $3 million increase to the basis of "outright transfer" property and "qualified terminable interest property" which is transferred to a surviving spouse.[11] Nonresidents who are not U.S. citizens may increase the basis of property by up to only $60,000.[12] In no case, however, may the tax basis of an asset be adjusted above its fair market value in the hands of the decedent as of the time of the decedent's death.[13] These amounts will be adjusted for inflation after 2010.[14]

C. Gifts *to* a Decedent Within One Year of Death

1. Rules Applicable Before 2010

Currently, IRC § 1014 stepped-up-basis-at-death rules apply regardless of the date at which the decedent acquired the property or the manner of acquisition (except in the year 2010). Consequently, absent some limiting rule, an heir could transfer appreciated property to a decedent immediately prior to death, anticipating the return of the property at the decedent's death with a higher, stepped-up tax basis resulting at death. The donor-heir might be required to pay gift tax on the fair market value of that gift unless it qualifies for the marital deduction or is within the donor's unified credit or the annual donee exclusion.

Where the donee-decedent bequeaths the property back to the heir, the heir would receive the property with a stepped-up tax basis equal to its fair market value at the decedent's death. The result is that all of the built-in appreciation in the property will have permanently escaped from the income tax base. The unlimited marital deduction and the unified credit could provide significant incentives for such deathbed transfers, because the gift tax can be avoided on transfers eligible for these benefits.

These stepped-up-basis-at-death rules of IRC § 1014 are made inapplicable, however, where (1) appreciated property is acquired by a decedent through a gift transfer within one year of death, and (2) that property passes at death from the decedent to either the original donor or to the donor's spouse.[15]

This denial of a stepped-up basis applies where the donor receives the benefit of the appreciated property regardless of whether the bequest by the decedent to the donor is a specific, general, pecuniary, or residuary bequest.[16] In the situation where appreciated property is sold by the decedent's estate or by a trust to which the decedent was the grantor, and the donor or the donor's spouse is entitled to receive the proceeds of this sale, similar rules apply. The estate does not gain a stepped-up basis.[17]

The denial of a stepped-up basis applies only to the extent that the donor-heir or his or her spouse is entitled to receive the value of the appreciated property. If the heir or his or her spouse is entitled to only a portion of the property (e.g., because the property must be used to satisfy debts or for administration expenses), this tax basis adjustment limitation rule applies only on a pro-rata basis.

This basis rule does not apply if the property transfer is made at death by the decedent to someone other than the original donor or the donor's spouse. For example, if (i) the transfer is first from a donor to the donor's parent and (ii) the subsequent transfer at the death of the parent is to the original donor's children (the parent/grandparent donee's grandchildren), this basis adjustment limitation rule would not apply. Obviously, this type of planning must now consider the effect on the donor's estate planning, use of their exemption, noting that lifetime gifts are limited to a $1 million exemption and the annual exclusion amount, before a gift tax has to be paid. In addition, the estate plan of the parent must be considered; if the parent is in poor health and has a large estate then an additional estate tax may be incurred and, when combined with any gift tax effect of the transfer to the parent, may make the income tax consequences less important. If the parent does not have a large estate, the transfer of additional assets to them may affect their eligibility for government benefits, or make them subject to the parent's creditors; again, either result may be more significant than the income tax benefits. In the planning context, very careful analysis of the gift, income and estate tax is balanced together with all the parties' goals and estate plans.

2. Rules Applicable After 2009

These rules are continued for property inherited after 2009, with some significant changes. The first significant change deals with the time period by extending the one-year period to a three-year period.[18] So any donor who gifts property to a decedent within three (3) years of the decedent's death, and receives it back, will not receive a step-up in basis. *Observation:* Even though this section does not take effect until after 2009, the three-year period obviously applies to transfers prior to 2010. For example, a transfer is made to the decedent in August of 2008 with the hope the decedent will live at least one year and then upon their death will be returned to the donor. If the decedent does not die in 2009, the one-year period under IRC § 1014 is automatically extended, under IRC § 1022, to a three-year period and the decedent will now have to live until August 2011.

The second change under IRC § 1022 is that the asset no longer needs to return to the original donor. So, it no longer matters, with the exception for spouses discussed below, who inherits the gifted property on the death of the decedent. The statue says the denial of step in basis ". . . shall apply to property acquired by the decedent by gift or by intervivos transfer for less than adequate and full consideration in money or money's worth . . ." unless it passes the statute's three-year period, discussed above

The third change under IRC § 1022 is the addition of an exception for spouses. For estates prior to 2010, IRC § 1014 has no exception for spouses, and so any asset transferred by a spouse and returned upon death of the donee, with the one-year time period, to the spouse did not receive the adjustment to basis. However, under IRC § 1022(d)(1)(C)(ii), effective for estates in 2010,

any property acquired by the decedent from his or her spouse will be available for the adjustment in basis, unless the *spouse*, during the three-year period prior to the decedent's death, acquired the property in whole or in part by gift or by intervivos transfer for less than adequate and full consideration in money or money's worth. Apparently, Congress was all right with spouses transferring assets to their spouse and requiring it from their spouses estate, without regard to a time period, but did not want the spouse to be a straw person for others (e.g., child transfer to mother who transfers to father who dies imminently thereafter and the child who originally transferred the property to the mother, or the mother, requires it from the decedent). *Planning note*: This actually creates planning opportunities for a spouse. If one spouse is imminently in peril of dying, perhaps the transfer of all appreciated assets to them, to be returned to the surviving spouse, would be appropriate, subject, of course, to the limits of the amount of property that may be stepped up.[19]

Conclusion

Estate planning must take into account many issues, none of which is necessarily more important than another. Tax basis planning of an inherited asset has played a major part of our planning process over years past and will continue to do so. Currently, the analysis regarding basis issues and estate tax planning opportunities has been limited to paying the lower of the estate tax and income tax. Based upon the laws as they are set to go into effect in 2010, repeal of the estate tax no longer presents this planning choice. However, as the Congress addresses the 2010 estate tax we must look into the belly of the beast and focus on the basis of inherited assets as well as the estate tax itself and the exemption amounts.

Endnotes

1. P.L. 107-16.
2. Internal Revenue Code (hereinafter referred to as IRC) § 1014(a). Note, however, there are some exceptions to this rule, i.e. IRC § 1014(c) exception for "income in respect of a decedent."
3. Note there are other "related parties" defined in IRC § 267 that will also prevent the use of the loss.
4. *See* IRC § 1014.
5. IRC § 1014(b)(6).
6. *See* TAM 9308002; PLRs 200210051, 200101021.
7. P.L. 107–16.
8. IRC § 1022. This is similar to the treatment under the Tax Reform Act of 1976 under which the income tax basis of most property acquired from or passing from a decedent who died after 1976 was not to be stepped up (or down) to reflect its fair market value on the date of death. In general, the tax basis of carryover basis property acquired from or passing from a decedent dying after Dec. 31, 1976, was to be the decedent's basis immediately before his or her death, subject to certain adjustments. Former IRC § 1023 was enacted to provide rules for determining the basis of such "carryover basis property." In the Revenue Act of 1978, the effective date of IRC § 1023 was postponed to make the "carryover basis rules" apply to estates of persons dying after 1979. These carryover basis rules were retroactively repealed in the Crude Oil Windfall Profit Tax Act of 1980. Under § 7401(d) of that Act, however, executors of estates of decedents dying after 1976 and before Nov. 7, 1978, were granted an irrevocable election to have the tax basis of all property of the decedent determined under the carryover basis rules.
9. *See* EGTRRA § 541. This provision is subject to EGTRRA's "sunset" rule.
10. IRC § 1022(b)(2)(B), (C).
11. IRC § 1022(c).
12. IRC § 1022(b)(3).
13. IRC § 1022(d)(2).
14. IRC § 1022(d)(4).
15. IRC § 1014(e). *See* TAM 9308002 (stepped-up basis disallowed where surviving spouse contributed property to joint spousal revocable trust within one year of his spouse's death). Similarly, see PLRs 200210051 and 200101021.
16. It is unclear whether or not a trust for the benefit of a spouse or original donor beneficiary would be impacted the same. For example, if the property were to pass to a § 2057(b)(7) QTIP trust, § 2044 would include the property in the surviving donor spouse's gross estate, but the surviving donor spouse is not the owner of the property for income tax purposes, and it is an income tax attribute with which § 1014(e) is concerned.
17. IRC § 1014(e)(2)(B).
18. IRC § 1022(d)(1)(C).
19. *See* note 10, *supra*.

David R. Okrent, Esq., CPA is Managing Attorney at the Law Offices of David R. Okrent, which has been handling elder law, special needs and estate planning and administration matters for over 24 years. Mr. Okrent was designated one of Long Island Alzheimer's Foundation's "Angels of Spirit." He has served as the past Co-Chair of the Suffolk County Bar Association's Elder Law Committee, Chairman of its Tax Committee, is an advisory member to its academy of law and a member of the National Academy of Elder Law Attorneys, and is currently the Vice-Chairman of the New York State Bar Association's Elder Law Section, Estate and Tax Planning Committee. He is also the past long-time Chairman of the Long Island Alzheimer's Foundation's Legal Advisory Board. Mr. Okrent is the 2005 recipient of the Long Island's Coalition on Aging "Man of Spirit" award. A former IRS Agent, Mr. Okrent is also a CPA. For more information visit http://www.davidrokrentlaw.com or call (631)427-4600.

The Treatment of Joint Accounts in an Article 81 Guardianship Proceeding

By Anthony J. Enea

The existence of joint bank or brokerage accounts has become ubiquitous in 21st century America. It is particularly common for married couples and seniors to have joint bank or brokerage accounts with their spouses, children, sibling(s) or other third parties. There are numerous legitimate and logical reasons for the creation of a joint account. For example, the joint account may have been created because the parties to the joint account contributed the funds or assets comprising the account, or acquired said funds during their marriage. They may also want the account holders to have full and unfettered access to the account during their lifetimes (especially helpful if there is a subsequent disability) or upon the death of a joint tenant, irrespective of whether or not they have all made equal contributions to the account. Joint accounts are also commonly utilized and recognized as an effective wealth transfer vehicle, which permits the transfer of assets from one party to another upon death without necessitating the probate of a Last Will and Testament or the creation of a Trust. Joint accounts ("totten trusts"), or what are known as "transfer on death accounts" for brokerage or security accounts, pass by operation of law to the surviving joint tenant(s), and in most instances only require the presentment of an original death certificate to the bank or financial institution by the surviving joint tenant(s) to allow them to have access to the funds in the account(s).

Relevant Statutory Provisions for Joint Bank and Brokerage Accounts

The right to receive by operation of law the joint account upon the death of a joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated by § 678 of the New York Banking Law. Section 678 provides that when a deposit of cash, securities or other property has been made, or shares shall be issued in or with any banking organization or foreign banking corporation transacting business in this state, in an account in the name of the depositor and another person and in the form to be paid or delivered to either "for the convenience" of the depositor, the making of such deposit or issuance of shares shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.

Section 678 of the Banking Law specifically gives the depositor the ability to have two signatories on an account who can withdraw funds from the account, but not make a gift of half of the funds in the account, and not bestow any survivorship benefits upon the joint account title holder. The above stated is clearly contrary to the presumptions created for joint accounts under § 675 of the Banking Law, which will be addressed herein. In order for the provision of § 678 of the Banking Law to apply, the words "for the convenience "or similarly" for convenience only" must appear on the title of the account. If the aforesaid words do not appear the presumptions created by § 675 of the Banking Law will be applied.

Section 675 provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is *prima facie* evidence that the depositor intended to create a joint tenancy, and that where such a deposit is made, the burden of proof is on the one challenging the presumption of joint tenancy. Under § 675 three (3) rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (ii) that there has been a irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in said entire joint account upon the death of the other joint tenant.

Section 675(b) of the Banking Law provides that the burden of proof is upon the one challenging the presumption of joint tenancy. In *In re Camarda,* 63 A.D. 2d 837, and *In re Coddington,* 56 A.D. 2d 697, the Court held that the presumption of joint tenancy created by § 675 may only be refuted by "direct proof or substantial circumstantial proof, clear and convincing and sufficient to support an inference that the joint account had been opened as a matter of convenience or by proving undue influence, fraud or lack of capacity." *See Kleinberg v. Heller,* 38 N.Y. 2d 836, 841.

With respect to securities accounts or brokerage accounts in joint names, the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have. The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL 13-4.1 through 13-4.12. Under EPTL 13-4.2 a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, evidence of its creation is the usage of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" or "POD." (EPTL 13-4.5). However, under EPTL 13-4.4, evidence of the establishment of the account is the opening documentation that indicates that the beneficiary is to take ownership at the death of the other owner(s).

The Potential Problems Caused by Joint Accounts in a Guardianship

Recently it has been my experience that some courts in New York, when dealing with the existence of joint accounts in a Guardianship proceeding under Article 81 of the Mental Hygiene Law (MHL), have not fully analyzed the ramifications of the use of a joint account(s) by the incapacitated person.

For example, some courts as part of their practices and procedures have in their proposed form for the Findings of Fact, Conclusions of Law and Judgment included an outright prohibition against the Guardian maintaining any joint accounts as part of the Guardianship estate. The taking of such a position by the court requires the attorney for the Petitioner to be cognizant of such a position, so that he or she may be able to take the appropriate measures and seek the appropriate and necessary relief as to the joint account(s) in the Petition. If the court maintains a policy that joint accounts cannot be maintained by the Guardian, it will be necessary for the Petitioner to assess how the joint tenant(s)' one-half interest and rights of survivorship in said joint account(s) will be impacted by the appointment of a Guardian of the property, and whether the joint tenant will lose his or her rights to access the funds in the joint account as well as his or her survivorship interest.

Additionally, it requires an assessment and review of how and why the joint account(s) was created and who is entitled to notice of the relief being sought and his or her right to be heard. Irrespective of what the court's proposed form Judgment states, the survivorship rights of a joint tenant(s) cannot and should not be terminated or modified without the joint tenant being given notice of the proposed change and an opportunity to be heard. To accomplish this, it is necessary that the Petitioner undertake a thorough investigation of the account(s) in issue and specifically delineate what is being proposed with respect to the joint account(s).

Identifying the Joint Accounts in the Petition

Section 81.08 of the MHL specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person in the Petition for the appointment of a Guardian. It is incumbent upon the Petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his or her name alone or holds jointly with others or is the beneficiary of, and to disclose same in the Guardianship Petition.

In doing so with respect to any bank or brokerage accounts, the Petitioner should specifically identify any jointly held bank or brokerage account(s), and whether said joint account(s) are joint accounts entitled to the presumptions of § 675 of the Banking Law, or are "for the convenience" accounts under § 678 or "transfer on death" accounts with respect to any brokerage account pursuant to the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12. The Petition should specifically identify any person who has an interest in the account, the extent of his or her interest and whether or not he or she has a right of survivorship in the account.

In most cases this should not be problematic if the joint account holder is the spouse of the alleged incapacitated person (AIP), and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the Petitioner should obtain copies of the account signature cards and any other bank or financial institution record which may describe whether or not the account is a joint account with rights of survivorship that is entitled to the presumptions of § 675 or is a "transfer on death" account under EPTL 13-4.1 through 13-4.12, or merely a "for the convenience" account under § 678.

Specifically Delineate Your Proposal as to Any Joint Account(s) in the Guardianship Petition

The Guardianship Petition should contain a clear and concise description of the relief sought by the Petitioner with respect to any joint bank or brokerage account(s). If a transfer of the title of the joint account from the AIP to the other named joint account holder

is being sought, it is necessary that same be specifically delineated in the Petition. The Petition should also specifically identify the account by its account number, name of bank or brokerage firm, as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the Guardian, or whether an apportionment of the account or outright transfer to the other named account holder is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the Petition and your proposal with respect thereto.

If the potential exists that the AIP may need Medicaid (either nursing home or home care) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility) it is more likely that the Guardianship Court will approve a transfer of the AIP's interest in said account(s) to the other named title holder without any apportionment to the AIP. This is also true if no objection to the proposed transfer is made by any other interested party to the Guardianship proceeding, and the AIP's testamentary scheme, as reflected in any Last Will and Testament or Trust, is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether the child, family member or friend contributed any of the funds in the joint account(s), and whether or not the proposed transfer will create the five-year look-back period and a period of ineligibility for nursing home Medicaid purposes (Does it qualify as an exempt transfer to a spouse, blind or disabled child?). There will also be the issue of whether or not the other interested parties to the Guardianship will consent to the transfer, and if the proceeds of the account are to be apportioned by and between the account holders, how will title to each apportioned account be held, and what impact will the apportionment have on the survivorship interest of each joint tenant. Whether it be in the new Guardianship account created or the other account, the protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be held "in trust for" the incapacitated person? This could be problematic if the incapacitated person is a potential candidate for Medicaid, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event, it would be appropriate to title the account of the non-incapacitated party "in trust for" the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder it may be necessary to seek that the account marshaled by the Guardianship be titled "X as Guardian of his or her property of Y in trust for Z" so as to protect his or her survivorship interest.

Conclusion

There are a multitude of differing and complex scenarios that could arise when dealing with joint accounts within the context of a Guardianship proceeding. However, irrespective of the scenario it is necessary that the Petition address the issue of the joint account(s) head-on and clearly articulate the relief sought and the basis for the position being taken.

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Post DRA Planning: "Viable" Unpaid Spenddown Amount Reduces NAMI

By Deepankar Mukerji

An unwelcome wrinkle which can arise in promissory note planning under the Deficit Reduction Act of 2005 (the "DRA") is when a nursing home bill is incurred prior to the commencement of the penalty period. Since the promissory note is solely intended to pay for the bills incurred during a penalty period, the monthly income stream cannot be applied to this previous bill. While it may be an easy enough matter to use transferred funds or a portion of the client's resource allowance to pay outstanding bills, if the transfer is relatively small, there may not be an abundance of funds to tie up loose ends.

In a recent Fair Hearing decision, *In re the Appeal of TL*,[1] New York State allowed for a nursing home bill incurred between the date of the transfer, with a promissory note, and the commencement of the penalty period for institutional care, to be paid prospectively through the reduction of Net Available Monthly Income (NAMI). Since this decision represents an opportunity for elder law practitioners to maximize coverage with post-DRA Medicaid planning, it is worth taking a closer look at the policy and regulations behind the state's ruling.

In this matter, TL was a resident of a New York City nursing home who had been discharged from a hospital and was receiving Medicare. Medicare coverage ended on June 4, 2007 and she transferred $40,000 on June 9, 2007—$23,000 outright and $17,000 pursuant to a DRA-compliant promissory note.[2] A Medicaid application was then submitted on June 24, 2008 requesting a July 1, 2007 pick-up. In October 2007, the Medicaid application was approved by the New York City Human Resources Administration (HRA) with a September 1, 2007 pick-up date for institutional care, with a penalty period imposed for the months July and August 2007.

In November 2007, a request was made to HRA pursuant to 18 N.Y.C.R.R. § 360-4.9, which governs post-eligibility utilization of income, to reduce TL's NAMI for the purpose of paying outstanding bills from the skilled nursing facility from the period from June 9 through June 30, 2007. This request was denied in December 2007, and the penalty period was then adjusted to begin on June 1, 2007 instead of July 1, so that August 1, 2007 became the new Medicaid pick-up date, with a significant spenddown covering almost the entire month because of the promissory note payment. The request for the prospective reduction in NAMI was also denied, and a determination was made by HRA that the unpaid June bill was not a "viable bill" because it was incurred during the month when a transfer of assets occurred and—since TL had assets in excess of the Medicaid limit at the beginning of the month--no portion of the bill could be covered.

A Fair Hearing request was made and the issue was heard on May 7, 2008. HRA requested an opportunity to respond to the Memorandum of Law submitted on TL's behalf, and the Hearing Officer kept the record open for an extra 30 days. In their response to the Memorandum of Law, HRA conceded that the July 1, 2007 start date for the penalty period was correct; however, HRA continued to assert that, in accordance with New York State Department of Social Services Administrative Directive 91-ADM-17, the nursing home charges for June could not be considered a viable bill. On July 22, 2008, New York State reversed HRA's determination, allowing for the use of prospective NAMI to pay the unpaid nursing home bill.

Under the regulations for Post-Eligibility Utilization of Income,[3] once an institutionalized individual is receiving Medicaid, all available income must be paid toward the cost of care, with certain limited exceptions, which are listed in this regulation. In particular, there is the following:

> (4) An amount will be deducted to cover any expenses incurred for medical care, services, supplies, or remedial care for the institutionalized individual not subject to payment under this Title or by a third party.[4]

This regulatory provision has long been used by health care providers to cover unpaid bills prior to Medicaid eligibility for institutionalized individuals. The unpaid bills are deducted from the NAMI on a prospective basis; however, there must not have been excess resources at the time the charges were incurred which could have been used to pay the bill. In addition, no payment will be available, for obvious reasons, for charges incurred during a transfer penalty. HRA regularly distributes a notice entitled Nursing Home Alert[5] with its Medicaid forms to institutional providers outlining the following requirements for payment of bills:

> [T]he bills:
>
> Must not have been incurred during a transfer of assets penalty period.
>
> Must be for medical expenses only. Non-medical expenses, such as legal fees, cannot be accepted.

> Must not have been paid by any third party, nor be covered by third-party health insurance. A bill paid by a third party who is seeking compensation cannot be used.
>
> Must have the nursing home still actively seeking payment for it.[6]

In *In re TL*, all of these conditions were met, and this formed the basis of the Administrative Law Judge's decision. While, HRA's initial position was that the bills were incurred during a transfer of assets penalty period, and in fact changed the pick-up date to reflect that position, it later correctly stipulated that the penalty period under 06 OMM/ADM-5 correctly begins the month after a transfer has occurred.[7] After transferring her assets to below the Medicaid level, TL was in fact eligible for Medicaid on June 10, and there was no third party who could be made responsible to pay the bill. There may be a question of whether, in a spousal case, the presence of a community spouse with excess assets would preclude payment of the bill, notwithstanding the spouse's refusal.

Central to HRA's opposition to the treatment of the bill as a viable bill was the fact that TL had assets at the beginning of June, but not after June 9. It was argued that, since she had sufficient funds prior to the transfer, those funds were being used to establish eligibility. This line of reasoning was based on an administrative directive, 91 ADM-17, which addresses the issue of a "spenddown" to establish eligibility. Under this directive, if an applicant has excess resources within three months of the application, those resources can be offset by incurred medical expenses which exceed those resources.[8]

HRA erroneously cited § 360-4.8 of the regulations, which relate to spenddowns and argued that the assets TL transferred were used to establish her eligibility for Medicaid, when, in fact, she was eligible because she had no excess resources. It was commented that she could have used those excess resources to pay the nursing home bill in June, but she chose to transfer them. However, we successfully argued at Fair Hearing that, in effect, this was extending the penalty beyond the regulation. Since there was no penalty in effect for June, the bills could not be barred. The assets were transferred and unavailable to pay the bill, rather than used as an offset. Since the regulations provide a penalty for transfers to begin on the month following the transfer, to bar Medicaid eligibility for a period before the penalty has the effect of creating a second penalty period.

We also countered that 91 ADM-17 simply defines a viable bill as one for which the provider is still seeking payment, and noted that, the ADM states "[i]f the viable bills at recertification had not been used in offsetting a resource or income liability, they must be evaluated to offset excess income prospectively."[9]

The Fair Hearing Decision found that the Nursing Home Alert dated October 20, 2000, "provides that under the provisions of 91 ADM-17, viable medical bills incurred before the three month retroactive period may be used to reduce an institutionalized individual's Net Available Monthly Income (NAMI)."[10] Consistent with the limitations previously discussed, the nursing home bill, at a private pay rate, was reimbursable for the period prior to the Medicaid pick-up date. A zero NAMI was directed on a prospective basis until the bill is paid.

It must be noted that there are limitations on this method to fill a gap in Medicaid coverage, since it will only work for a relatively short penalty period. The Medicaid payment system does not accept bills that are more than two years old,[11] and providers will also not appreciate having to the carry a large receivable for an extended period. In this case, the outstanding bill to be paid was approximately $7,500; and by applying TL's NAMI of $2,578 toward the outstanding bill, it was paid off over three months. In cases where there is a large viable bill and little income to pay it, nursing homes understandably will not consider this a great solution.

However, in consideration of the fact that the month of a penalty-causing transfer is problematic with promissory note planning, and because of the use of equal payments, one cannot account for the termination of Medicare in the initial month of transfer. The technique outlined above, for use with promissory note planning over a short penalty period, can be useful in protecting additional assets for your clients.

Endnotes

1. New York State Office of Temporary and Disability Assistance Fair Hearing #4986444Z. The full text of the Fair Hearing is *available at* wnylc.net (registration required).
2. In accordance with NYS Dept. of Health 06 OMM/ADM-5, page 24, the note was non-negotiable, non-cancelable, actuarially sound, and provided for equal payments over its repayment term.
3. § 360-4.9, Title 18 of the Official Compilation of Rules and Regulations of the State of New York (hereinafter 18 N.Y.C.R.R.).
4. 18 N.Y.C.R.R. § 360-4.9(a)(4).
5. *Nursing Home Alert*, Oct. 20, 2000.
6. *Id.*
7. *See* NYS 06 OMM/ADM-5, page 15.
8. 91 ADM-17, pp. 3-4 provides a summary on the treatment of spenddowns and viable bills.
9. 91 ADM-17, at page 10.
10. FH #4986444Z, p. 8.
11. 18 N.Y.C.R.R. § 540.6 (a)(3).

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New Web Resources and New State Prescription Drug Subsidy for People Under 65

By Valerie J. Bogart

1. Selfhelp Launches New Health Advocacy Web site

Selfhelp Community Services, Inc., in a joint effort with the Empire Justice Center and The Legal Aid Society, has launched a new Web site for health advocates. Attorneys and advocates at these organizations have authored or collected this information to help professionals, consumers, and caregivers navigate public health insurance programs in New York State. While final design changes are still being made, and more content is being uploaded, the site is now useable and already has extensive content that would be helpful to elder law attorneys. The home page can be reached either at http://wnylc.com/health or http://nyhealthaccess.org. The site is hosted by the Western New York Law Center (WNYLC), the same organization that hosts the searchable Fair Hearing Database on its Online Resource Center. If you are new to the confusing world of public benefits, click on the links for Getting Started. Otherwise, click on one of the general subject headings on the left to find relevant articles. This site is made possible in part by grants from the New York State Office for Aging and the New York Community Trust. This site, when complete, will replace the Health Advocacy Web pages hosted by Selfhelp and WNYLC at http://onlineresources.wnylc.net/healthcare/health_care.asp. All information from those pages, including information on supplemental needs trusts, including the NYSARC trust, is being moved to the new site.

The main subjects covered on the site are:

Medicaid—

- Financial Eligibility (including community and institutional eligibility, the spend-down program, etc.
- Medicaid Managed Care
- Home Care and Other Covered Services
- Supplemental Needs Trusts
- Medicare Part D
- Medicare Savings Program
- Medigap
- EPIC
- Family Health Plus
- Child Health Plus
- Long Term Care Insurance
- Uninsured
- HIPAA
- Immigrants / Citizenship
- Limited English Proficiency

2. The New York Prescription Saver (NYPS) Card

The cost of prescription drugs is a huge burden for everyone, especially people with chronic illness. New Yorkers age 65 and over of moderate incomes have access to the EPIC program, which fills the gaps in the Medicare Part D program, as a secondary payor.[1] With EPIC, a person over age 65 has no Part D coverage gap or "doughnut hole," and can access drugs that may not be on the limited formulary of the private Part D plan. EPIC also subsidizes the Part D copayments and premiums.[2] However, people under age 65 are not eligible for EPIC. Those with the lowest incomes—under the Federal Poverty Line—may qualify for Medicaid or Family Health Plus.[3] But above the Federal Poverty Line, the only public drug coverage until now had been Medicare Part D for those who are disabled and have Medicare; even for them, unless they are very poor and eligible for "Extra Help," a/k/a the Low Income Subsidy,[4] their out- of-pocket costs under Part D are high. Those who receive disability benefits but are in the two-year waiting period for Medicare are in even worse shape.

To address the gap in access to prescription drug coverage for people under age 65, the state enacted a new "Prescription Drug Program" in the 2008 New York State budget. This program was just implemented in April 2009 as the **New York Prescription Saver (NYPS) Card**. It provides discounts on prescription drugs for people who meet the income limits for EPIC ($35,000 for singles/ $50,000 for couples) and who are either (a) age 50 up to 65, or (b) who have "been determined to meet the disability criteria in 20 C.F.R. Sec. 404.1505."[5] They may not be eligible for Medicaid.

Elder and disability lawyers should know about the NYPS program for clients or their family members who:

- Are age 55–65, or
- Who are under age 55 and on Social Security disability benefits, whether or not they are

eligible for Medicare. Those in the two-year Medicare waiting period will find it especially useful. Even those who have Medicare can benefit by joining this program as secondary coverage to Medicare Part D.

Unlike EPIC, the new New York Prescription Saver (NYPS) Card does not actually PAY for the drug. It simply gives the consumer the benefit of the same discounted price that EPIC negotiates for its members. It can lower the cost of prescriptions by as much as 60 percent on generics and 30 percent on brand name drugs. Anecdotal reports received by clients counseled by Selfhelp Community Services confirm that the discounts are substantial. As of June 4, 2009, over 6,500 people have been approved for the NYPS Card.[6]

There is a growing network of pharmacies participating in this program, including a large percentage of independent drug stores and all major chain stores. The pharmacy and manufacturer have agreed to accept a discounted price negotiated by the state.

The application, rules and FAQs for the NYPS Card are posted online at https://nyprescriptionsaver.fhsc.com/default.asp. Applications can be filed online at that site or printed out and mailed in. These rules have clarified some ambiguities in the statute, but also pose some potential issues. Processing time for applications is reportedly only two weeks.

Income

The statute sets the income limits as the same ones used in EPIC:

- $35,000 annual income for a single person
- $50,000 annual income for a couple

The online FAQ clarifies that while a tax return is used as the basis for reported income, thus using income from the prior year, if there has been a reduction in income, such as in loss of a job, the current income may be used. The program reserves the right to request verification of the change. No documentation is required for the application.

Disability Status

The application asks for applicant to check DISALITY STATUS "yes" or "no" and explains, "If you have been determined disabled by the Social Security Administration, check *Yes*— otherwise, check *No*. The online FAQ specifically states that the individual must have been determined disabled by the Social Security Administration. Note that disability status is irrelevant for anyone age 50 or over, since they are eligible based on age. However, for people under 50, disability status is mandatory for eligibility.

There is a potential argument that the agency is interpreting the state statute too narrowly in requiring a determination of disability by the SSA. The statute provides that the program shall be available to "ANY RESIDENT OF ANY AGE WHO HAS BEEN DETERMINED TO MEET THE DISABILITY CRITERIA IN 20 C.F.R. SECTION 404.1505." The statute does not state that the SSA can be the sole arbiter of whether the person is disabled. The Medicaid program has long had a parallel procedure to that of the SSA for determining disability.[7] Arguably, the Department of Health should set up a procedure for determining disability to allow people who have applications or appeals pending with the SSA to qualify.

Medicaid

The statute says that an applicant may not be "in receipt of Medical Assistance." The state, on the Web site FAQ, has clarified that for people who have a Medicaid spend-down, "[i]f the member is paying for the drug in order to meet their spend-down, they can use the New York Prescription Saver card in order to pay less for the medication."[8] Note that only Medicaid spend-down recipients who do not have Medicare would benefit by using the Prescription Saver Card. Those who have Medicare automatically qualify for "Extra Help," the subsidy that eliminates much of the cost-sharing of Part D. For those without Medicare, though, this feature may be beneficial.

How the new NYPS Card could help someone with Medicare:

- People with disabilities under age 65 may use this card even if they also have Medicare Part D, to fill some of the gaps in Part D coverage.

Here's how the NYPS Card could benefit someone with a disability under age 65 who is also enrolled in a Medicare Part D plan:

- The NYPS Card can be used to purchase those drugs in categories not covered by Part D. This would include barbiturates, benzodiazepines, prescription cough-and-cold, and prescription vitamins.
- The NYPS Card can be used to purchase drugs that are not on the Part D plan formulary. While the Part D member has the right to appeal and seek an exception to the formulary, it might be easier and faster to use the NYPS card.
- The NYPS Card can be used during the gaps in Part D coverage—the deductible period or during the "coverage gap" or "doughnut hole." However, this gets complicated. During the "doughnut hole," a Part D participant must pay full price for their prescriptions. However, it is important that they still use their Part D card at this time, even though the Part D plan does not pay anything, in order to count these purchases

toward the out-of-pocket threshold required to get out of the doughnut hole and into catastrophic coverage. Once in catastrophic coverage, the Part D plan resumes paying for most of the cost of drugs. The out-of-pocket costs of drugs purchased during these periods is called "TROOP" (true out-of-pocket) costs.

If, during the doughnut hole, the member uses the NYPS Card instead of his or her Part D plan card, the amount he or she pays for drugs will still count as "TROOP" to help him or her meet your Part D deductible or get him or her out of the doughnut hole. However, the computers will not count up these costs automatically, unlike when he or she uses the Part D plan card. He or she will be responsible for submitting paper receipts of the drug purchase to the Part D plan in order to have the amount included in the true out-of- pocket (TROOP) accumulation.

For someone who is on the NY prescription saver program and soon will be eligible for EPIC, how will he/she transition into EPIC?

When a person becomes age 64 and 10 months, EPIC will mail him or her a letter with an EPIC application advising him or her that he or she will be eligible for EPIC when they turn 65.

If you apply for EPIC, you can hold onto your NYPS card, but you can only use one "discount" card at a time per drug purchase.

Does NYPS have its own formulary?

Yes, it is the same as EPIC's. https://nyprescriptionsaver.fhsc.com/asp/druglisting.asp.

The NYPS Helpline number is 1-800-788-6917.

Endnotes

1. EPIC program at N.Y.S. Elder Law, § 240-254; http://www.health.state.ny.us/health_care/epic/.
2. A manual on Part D, including how it works with EPIC and Medicaid, is posted at http://onlineresources.wnylc.com/kbbase/entry/10/.
3. Family Health Plus statute is at N.Y. Soc. Servs. L. § 369-ee; *see also* http://onlineresources.wnylc.com/kbbase/entry/51/ and http://www.health.state.ny.us/nysdoh/fhplus/index.htm.
4. For information on the Part D Extra Help subsidy and how to access it, see http://onlineresources.wnylc.com/kbbase/entry/61/.
5. The law establishing this program is at NY Public Health Law, Sec. 280, which provides:

   PRESCRIPTION DRUG DISCOUNT PROGRAM. THE PRESCRIPTION DRUG DISCOUNT PROGRAM IS HEREBY ESTABLISHED IN THE DEPARTMENT. THE DRUG DISCOUNT CARD SHALL BE AVAILABLE TO ANY RESIDENT BETWEEN THE AGES OF FIFTY AND SIXTY-FOUR, AND ANY RESIDENT OF ANY AGE WHO HAS BEEN DETERMINED TO MEET THE DISABILITY CRITERIA IN 20 C.F.R. SECTION 404.1505, WHO: MEETS THE INCOME ELIGIBILITY LEVELS ESTABLISHED [for EPIC]; IS NOT IN RECEIPT OF MEDICAL ASSISTANCE. . . . THE DRUG DISCOUNT CARD SHALL OFFER DISCOUNTS ON DRUG PURCHASES WHICH ARE NOT COVERED BY OTHER PUBLIC OR PRIVATE THIRD PARTY PAYMENT SOURCES. PROVIDED, HOWEVER, THAT PARTICIPATION BY A PROVIDER PHARMACY AND DRUG MANUFACTURERS SHALL BE VOLUNTARY AND REIMBURSEMENT TO THE PROVIDER PHARMACY UNDER THE DRUG DISCOUNT CARD PROGRAM SHALL BE ADJUDICATED AND PAID WITHIN TWO BUSINESS DAYS FOR ANY REBATES, DISPENSING FEES AND DRUG COSTS NOT PAID BY THE RESIDENT ELIGIBLE FOR SUCH PROGRAM AT THE POINT OF SALE.
6. Statement of NYS DOH representative at a meeting of the New York State Medicare Savings Program Coalition, June 4, 2009, held at the Medicare Rights Center, New York, New York.
7. *See, e.g.*, NYS DOH GIS 06 MA/005, NYS DOH GIS 08 MA/036, NYS DOH *Medicaid Disability Manual*, http://www.health.state.ny.us/health_care/medicaid/reference/mdm/index.htm.
8. https://nyprescriptionsaver.fhsc.com/Downloads/FAQsForCardholders-20090529.pdf#Section1.

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Recent New York Cases

By Judith B. Raskin

Article 81

Co-conservators sought authority to engage in a gift/promissory note Medicaid plan for their ward effective *nunc pro tunc*. Denied. *In re Ostrander*, 2009 Slip Op. 30794(U); (Sup. Ct., Wayne Co. April 8, 2009).

Co-Conservators petitioned for the authority to engage in Medicaid planning for their ward, Mr. Reeves, using a gift and promissory note to be effective *nunc pro tunc* as of August 25, 2008. The application was opposed by the Wayne County Department of Social Services.

Mr. Reeves, a nursing home resident, had approximately $90,000. The agreement with the nursing home, signed by one of the co-conservators, included a provision that Mr. Reeves would not make any transfers that would "jeopardize the Wayne County Nursing Home's ability to receive full payment."

The court denied the application on several grounds: (1) The plan might be deemed to affect the nursing home's rights under the signed contract; (2) MHL § 81.21(d) does not address gifting *nunc pro tunc*; (3) *nunc pro tunc* should be used only for ministerial errors; (4) such a plan in a court order might result in a denial of eligibility on application to Medicaid; (5) the granting of a *nunc pro tunc* order would "violate the intent of the Medicaid program, which was not designed to provide medical benefits to those who render themselves 'needy' through the use of such plans." The court did agree to authorize gifting powers for gifts made prospectively and other proper Medicaid planning.

Article 81 guardian petitioned for authority to enter into a gift/promissory note Medicaid plan effective *nunc pro tunc*. Granted with conditions. *In re M.L.*, 2009 N.Y. Slip Op. 29239, 2009 N.Y. Misc. LEXIS 1327 (Sup. Ct., Bronx Co. June 2, 2009).

The guardian of the person and property of M.L. moved for the authority to engage in Medicaid planning nunc pro tunc for his ward. Specifically the guardian proposed gifting pursuant to M.L.'s estate plan and entering into a loan agreement with the guardian under a DRA compliant promissory note. The guardian would pay the nursing home with the loan payments. The loan payments plus M.L.'s other income would be less than the facility's private pay rate. The court's concern was that the recipient of the gift would not be under any obligation to provide for the personal needs of M.L. from the gifted funds.

The court granted the motion on condition that the recipient of the gift place the gifted funds in a trust for the benefit of M.L. The trust agreement had to be approved by the court before the gift could be made.

Attorney appealed from denial of fees for his preparation of co-guardians' semi-annual accounting. Reversed. *In re Maylissa N., Juan N., et al.*, 5 A.D.3d 492; 772 N.Y.S.2d 554; 2004 N.Y. App. Div. LEXIS 2530 (App. Div., 2d Dep't March 8, 2004).

In this Article 81 proceeding, the Supreme Court, Queens Co., denied attorney fees to the co-guardians' attorney for his preparation and filing of the co-guardians' semi- annual account. The co-guardians were not accountants or attorneys. The attorney appealed.

The court reversed. The matter was remanded to the lower court for a determination of reasonable fees and a detailed explanation for the award.

In an Article 81 proceeding, the person deemed incapacitated and in need of a guardian (the IP) communicated in several ways his choice of guardian, a person whom the court evaluator and DSS opposed. IP's choice appointed. *In re Imhof*, N.Y.L.J., July 2, 2009, p. 36, col. 3 (Sup. Ct., Nassau Co.).

The Commissioner of the Nassau County Department of Social Services (DSS) brought an Article 81 proceeding for the appointment of a guardian for J.S., an alleged incapacitated person. J.S. was 80 years old and suffering from dementia with short-term and long-term memory loss. He did not understand the ramifications of his functional limitations and did not recognize his estranged former wife and his adult children. In March, 2009, J.S. executed a durable power of attorney appointing his neighbor, Mrs. Guida, as his agent, and several months before the proceeding he signed a written statement that he wanted her appointed as his guardian. DSS and the temporary guardian were opposed to her appointment, citing financial issues, inadequate care and supervision. The court found J.S. to be an incapacitated person in need of a guardian. The issue remained whether Mrs. Guida should be the guardian.

The court stated that if J.S. had been found to have capacity, the court would be obligated to appoint the nominated guardian unless the court found the nomi-

nee to be unfit for the position. Here J.S. was found to lack capacity. What weight was to be given to his nominee and was she suitable?

The court found that J.S. had relied on Mrs. Guida for many years and was very comfortable with her. He was able to point her out in the courtroom. The court examined the criteria to be considered in appointing a guardian: social relationship, prior appointments, care already provided, capability to carry out enumerated powers, conflicts of interest, ability to work with the IP. The court examined these issues and found Mrs. Guida to be a suitable guardian.

PRWORA

Aliens ineligible for SSI under PRWORA sought compensation from New York's ASP program. Denied. *Khrapunsky v. Doar,* 2009 N.Y. Slip Op. 03761 (Ct. of App. May 12, 2009).

This class action was brought by resident aliens who were aged, blind or disabled and ineligible for SSI or for state benefits under Social Services Law, § 209(1)(a)(4). Section 209 incorporated the SSI restrictions of PRWORA for non-citizens who did not become eligible in the required time period or could not have become eligible.

The plaintiffs argued that the state's failure to compensate them for their loss of eligibility through the ASP program ("additional state payments," which may be included in an SSI check) constituted a violation of equal protection under the New York Constitution.

The Court of Appeals held that plaintiffs' ineligibility under § 209, the conforming statute to PRWORA, was not created by New York as a restriction in coverage for the plaintiffs. Rather the federal government created the restrictions and New York was mandated to adopt them. New York has no obligation to make whole those persons affected by federal law.

Assisted Outpatient Treatment

Appellant sought reversal of an order directing that his assisted outpatient treatment program (AOT) include money management services. Appeal denied. *In re William C.*, 2009 N.Y. Slip Op. 04232 (App. Div., 2d Dep't May 26, 2009).

Pursuant to MHL § 9.60, the Supreme Court, Suffolk Co., directed that William C. receive assisted outpatient treatment (AOT) for six months. His program included the appointment of the Federation of Organizations to provide money management services because William C. had failed to pay certain of his bills such as his rent and Medicaid co-pays. This resulted in his loss of needed services such as his Medicaid benefits. William C. appealed from that portion of the order appointing a money manager. William C. argued that MHL § 9.60 only contemplates medical services and that an Article 81 guardianship proceeding would be required to impose financial management. The petitioner hospital argued that money management was required to assure that essential services were delivered.

Although petitioner hospital subsequently took the position that the appeal had become moot and should be dismissed because the order and judgment appealed from expired prior to the bringing of the appeal, the Appellate Division determined that the issue of the appointment of a money manager was an exception to the mootness doctrine.

The court held that the broad language of the statute to assist the person in "living and functioning in the community" encompasses the need for money management where necessary to accomplish these objectives. The petitioner offered clear and convincing evidence of William C.'s inability to manage his money and the detrimental effect that had on his ability get the attention and the services that he needed.

Nursing Home

Nursing home moved for judgment against resident Incapacitated Person with outstanding bill. *In re Mae E.M.*, N.Y.L.J., July 7, 2009, p. 29, col. 1 (Sup. Ct., Nassau Co.).

Petitioner nursing home initiated an Article 81 proceeding which resulted in the appointment of a guardian for the Incapacitated Person, Mae E.M. The nursing home then moved for a judgment against Mae M.E. for unpaid nursing home fees in the amount of $167,426 for services rendered prior to the proceeding. The nursing home received $1,289 from the resident's Social Security which it applied toward the bill each month. Mae M.E. owned a one-half interest in real property but there was no assurance the property would be sold in the near future.

The court awarded a judgment to the nursing home in the amount of the unpaid charges. This was necessary to place the nursing home in the position of a creditor with a specific prior lien in order to insure its position when the property was sold, as against Social Service agency claims which take preference over general creditors.

Medicaid

Administrator appealed from a fair hearing decision denying decedent's Medicaid application for transfer of assets. Appeal denied. *Padulo v. Reed*, 2009 Slip Op. 04813 (App. Div., 4th Dep't June 12, 2009).

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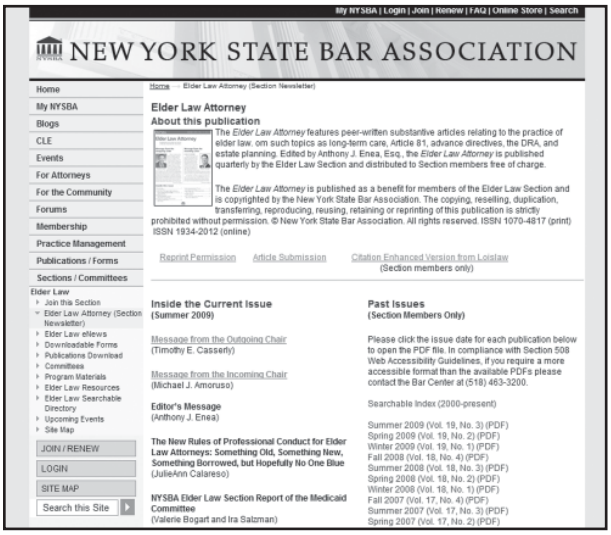

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Petitioner administrator appealed from a Fair Hearing decision denying decedent's Medicaid application. The Article 78 proceeding was transferred to the Appellate Division.

Decedent owned U.S. Savings Bonds which were titled to herself and petitioner or petitioner's child. In December, 2001, decedent transferred all of the bonds to petitioner. Decedent entered a nursing home in 2004. Between July 2004 and February 2005, petitioner cashed in all of the bonds and placed the proceeds in a joint account with petitioner, petitioner's husband and the decedent. Petitioner then distributed some of the bond proceeds to herself and her children and to pay for decedent's care.

Petitioner submitted a Medicaid application in September 2005 with an affidavit stating that when petitioner and her child were granted ownership of a portion of the bonds they had no intention of relinquishing possession. The Department of Health (DOH) did not find the statements in the affidavit credible and denied the application for transfer of assets within the look-back period. The DOH took the position that the transfer of ownership of the bonds did not occur until the petitioner transferred the funds from the joint account to herself and her children in 2004 and 2005. Petitioner did not rebut the presumption of the full ownership of the joint account by the decedent. Petitioner appealed.

The Appellate Division, Fourth Department, affirmed the Fair Hearing decision. The evaluation of the evidence and the credibility given to the evidence is the purview of the DOH. Its determination was not irrational.

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Advance Directive News: The Reasonableness Standard

By Ellen G. Makofsky

A recent case articulated the standard for determining whether a health care agent was acting pursuant to the principal's wishes. A controversy arose when a sister of a man identified as S.S. brought an action to appoint her the health care special needs guardian and guardian *ad litem* for her brother. The sister, identified as F. H., asked for the power to allow her to keep S.S. connected to a mechanical ventilator.[1] F. H. knew that her brother previously executed a health care proxy naming his wife, R.S., as health care agent, but F.H. did not agree with the health care directions given by R.S.

Legislative History and Case Law

The Court looked to the legislative history of the health care proxy to determine the appropriate standard for deciding whether the health care agent was acting according to the wishes of S.S. In 1990 when the Public Health Law was amended to provide for the health care proxy,[2] the legislative intent was to remove ambiguity from the health care decision-making process. The legislation was enacted following the Court of Appeals decision *In re O'Connor* [3] because of concern that the very stringent clear and convincing evidence standard required by the O'Connor Court was too difficult to meet. To remedy this difficulty, the health care proxy law "was enacted to fill what was believed to be a 'critical gap' in the statutory framework governing health care decisions in New York."[4] With passage of the health care proxy law, the legislature rejected the clear and convincing evidence standard and instead adopted a reasonableness standard.[5]

Almost 20 years have elapsed since the passage of the health care proxy law and there are relatively few published cases interpreting and applying Public Health Law § 29-C. What this means is that the health care proxy law does what was intended, which is to remove uncertainty in regard to an individual's health care wishes. The Court in *S.S.,* however, noted that some courts were incorrectly applying the clear and convincing evidence standard in situations where a health care proxy existed[6] and this incorrect application of the law continued the "legacy of confusion and legal uncertainty" that the health care proxy law was meant to avoid.[7]

Determining that the reasonableness standard was appropriate, the Court looked to determine S.S.'s reasonably known wishes by reviewing the written instructions included in his health care proxy and his oral declarations describing his health care wishes. At first blush, the written directive appeared to contradict the verbal statements. Once the Court determined what S.S's reasonably known health care wishes were, it then examined whether the agent was acting in good faith in implementing those reasonably known wishes.[8]

The Facts

S.S. was a man who enjoyed his life. He suffered from obesity, which eventually limited his ability to breathe. In November 2006 S.S. was brought to the emergency room with elevated carbon dioxide levels. S. S. was hospitalized and required a tracheotomy and was placed on a mechanical ventilator. S.S. was eventually weaned off the ventilator and he returned home. In a subsequent visit to his physician, Dr. A. counseled S.S. about his ongoing treatment alternatives. A discussion ensued and S.S. stated that "he did not want a mechanical ventilator or artificial nutrition."[9] According to R.S., her husband often complained about his trache and repeatedly tried to have it removed, stating, "This is no way to live."[10]

Testimony during the trial shed further light on S.S.'s wishes.

> S.S. spoke about the people he saw while he was in ICU and "rehab", dependent on tubes to live and was very animated and emphatic that he was willing to die rather than live like that. This was so, despite having already benefitted from the type of devices he was now rejecting, i.e., the NG (naso-gastric feeding) tube and respirator during the November 2006 hospitalization.[11]

In response to S.S.'s clearly articulated wishes, Dr. A. provided S.S. with a statutory health care proxy form and suggested that he fill it out. R.S., at her husband's direction, actually filled out the form for S.S.'s signature. The health care proxy was signed in January 2009. The statutory form provides a space to write

in optional instructions. When preparing health care proxies for clients, attorneys tend to be very careful to provide unambiguous instructions about health care wishes. S.S. did not have the benefit of counsel and the language used in the proxy became problematic. Although S.S. clearly stated to his doctor and to his wife that he did not want to be dependant upon a respirator or artificial nutrition, in the portion of the form allowing for optional instructions, S.S. directed his wife to write, "I wish to live."[12]

Shortly after executing the health care proxy S.S. was again admitted to the hospital and he was connected to a mechanical ventilator. It was at this point that F.H., sister of S.S, petitioned the Court. F.H. alleged that her sister-in-law, R.S., was not following the wishes of S.S. because he "wish[ed] to live" and furthermore the health care agent was motivated to remove the ventilator because she faced financial ruin if forced to continue paying for S.S's health care.[13] F.H. further alleged that R.S. was not acting in the best interest of S.S. because as health care agent "she had not agreed to the insertion of a PEG tube."[14]

F.H. is an Orthodox Jew whose religious belief was to prolong life no matter what the circumstance. S.S. was raised as an Orthodox Jew but had not been observant for decades.[15] The statement "I wish to live" was in sharp contrast to the extensive conversation S.S. had with his physician, advising Dr. A. that he wanted to live his way and on his terms, independent of machines. The written words juxtaposed with the verbal directions left the Court to "reconcile those seemingly incongruent and impossible desires to determine the principal's wishes and whether the agent . . . [was] acting in accordance with those health care wishes."[16]

The Court examined S.S.'s religious beliefs to be certain the decision arrived at would not substitute the sister's beliefs for those of S.S. S.S. chose his health care agent carefully. Although evidence showed he was close to his sister, he did not name her as substitute agent nor did he discuss his health care wishes with her. S.S. chose his wife as his agent because he felt she knew what he wanted and it was unlikely that she would substitute her wishes for his.

The Decision

The Court relied on the reasonableness standard to determine S.S.'s wishes. It reviewed the written instructions of the health care proxy and the substantial conversations of S.S. concerning his health care wishes. The Court reviewed the evidence submitted and found that the verbal directions given to Dr. A. and R.S. demonstrated that although S.S. "indicated his desire to live life to the fullest . . . he did not want to be on a respirator . . . he did not even want the trache, a less burdensome form of treatment."[17] The Court looked at the totality of the evidence and did not solely rely on the static written words inserted into the statutory health care proxy form. It looked at the written words in the context of S.S.'s life and lifestyle and gave great weight to his oral declarations. After analyzing the evidence presented the Court determined that S.S.'s reasonably known wishes were not to be hooked up to a mechanical ventilator or receive artificial nutrition.

Accordingly the Court found S.S.'s health care proxy a valid document and that R.H. was acting consistent with her husband's reasonably known wishes. As there was no proof offered by F.H. to override the health care decisions of R.S. or that the decisions were made in bad faith or that the decisions were not made in accordance with the health care proxy law, the Court decided that there was no need for a guardian of the person or property and dismissed the Petition.[18]

Conclusion

Had the Court reviewed the evidence using the clear and convincing standard set by the O'Connor Court, it is unlikely it could have arrived at the decision it did. S.S. included the statement "I wish to live" in his document and the evidence produced at trial did indicate that he was an exuberant lover of life. The statement was in sharp contrast to other evidence introduced at trial, his verbal declarations about what kind of life was acceptable to him. The statement "I wish to live" created an ambiguity which most likely would have been fatal to giving effect to S.S.'s apparent intent if the clear and convincing evidence standard were employed to determine S.S.'s wishes in regard to end-of-life decision-making.

The use of the reasonableness standard to determine S.S.'s health care wishes allowed the health care proxy to do what was intended when the legislation was first envisioned. It permitted the selected health care agent to make health care decisions based upon her broad knowledge of her husband's wishes in the context of his medical situation and prognosis.

The health care proxy is a powerful tool to assure that an individual's health care wishes are respected. The health care agent must reasonably know the principal's wishes. The S.S. case demonstrates that where some ambiguity exists it is the totality of the evidence that eventually will demonstrate a person's reasonably known wishes. The S.S. decision reinforces the importance of directing clients to fully and explicitly discuss with others their health care wishes. This is often a distasteful and difficult task for clients but as Elder Law Attorneys we need to encourage the dialogue.

Endnotes

1. *S.S. v. R.S.*, 24 Misc. 3d 567, 877 N.Y.S.2d 860 (N.Y. Sup. Ct. 2009).
2. N.Y. Pub. Health Law § 29-C (Consol. 2009).
3. *In re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (N.Y. 1988).
4. *S.S.*, 877 N.Y.S.2d at 863.
5. *Id.* at 863 (citing Governor Cuomo's Memorandum of Approval of the health care proxy law, "If the patient's wishes **are not reasonably known**, the agent must decide based on a judgment about the patient's best interests." Highlighting another safeguard, the Governor noted that a health care agent can decide against the provision of artificial nutrition and/or hydration only when the decision reflects the **patient's reasonably known wishes**.).
6. *Id.* at 863 (citing *In re Univ. Hosp. of the State Univ. of New York Upstate Medical Univ.*, 194 Misc. 2d 372, 754 N.Y.S.2d 153 (Sup. Ct., Onondaga Co. Nov. 12, 2002); *in ref Balich*, 2003 N.Y. Slip Op. 51080(U) (Sup. Ct., Suffolk Co. July 10, 2003); *Borenstein v. S. I. son*, 8 Misc. 3d 481 797 N.Y.S.2d 818 (Sup. Ct., Queens Co. March 30, 2005).
7. *Id.* at 862.
8. *Id.* at 863.
9. *Id.* at 864.
10. *Id.*
11. *Id.*
12. *Id.* at 865 (This statement was followed with three exclamation points. R.S. testified that the exclamation points were not added at S.S.'s direction but rather were added of her own volition as it was her habit to add the emphasis of exclamation points.).
13. *Id.* at 865.
14. *Id.*
15. *Id.* at 864.
16. *Id.* at 863.
17. *Id.* at 864.
18. *Id.* at 866.

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Supported Employment for Individuals with Disabilities

By Adrienne J. Arkontaky

July 2009 marked the 19th anniversary of the passage of the Americans With Disabilities Act of 1990 (the "ADA"). The passage of the ADA, along with society's awareness that given the right supports, persons with disabilities are able to actively participate in the workforce, has allowed families, advocacy organizations and potential employers to join forces and offer persons with disabilities more autonomy and empowerment than ever before in the area of employment options. This column is dedicated to giving practitioners an overview of supported employment options in New York State.

In August 2005, I was fortunate enough to join a firm that supported the idea of employment for consumers with disabilities. We contacted Westchester ARC, located now on Saw Mill River Road in Hawthorne, New York, and asked if they might be able to assist us with our search. Westchester ARC has a division dedicated to helping consumers secure employment through a variety of innovative programs, each tailored to the needs of the consumer.

We met with representatives from Westchester ARC and described the position as we envisioned it. Based on our meeting, Westchester ARC set up an interview with a prospective candidate. Within a few weeks, we hired a young woman who had recently graduated from the New York Institute of Technology's VIP program. She had developmental disabilities and learning challenges. "Deepa" arrived with a job coach who trained her on every aspect of her position. Westchester ARC advised us that the job coach was available as long as we needed her to be on site. In addition, the job coach would make visits on a regular basis to be sure everything was going well during the duration of Deepa's employment. Deepa assists with our marketing efforts, greets clients, delivers mail, scans documents and fills in wherever she is needed. She is now celebrating her fourth year with the firm and we are celebrating four years of a great relationship. The firm has been honored for our dedication to the program and Deepa's family is eternally grateful for the opportunities Deepa has enjoyed here. When I speak with her parents, they indicate that Deepa is so content and happy to come to work every day. She is confident and feels that she is truly treated as an equal at Littman Krooks. We feel that she is a great employee who has proved that she is far more capable than we expected.

I had the opportunity last year to visit a workshop where a gentleman was able through assistive technology to use a mouthpiece to compose poetry. His work has been featured in many publications and the agency has assisted him in promoting his pieces. This is his "career," and with the assistance of the agency, perhaps a lucrative one. These are only two of the many stories that reflect the endless opportunities available to persons with special needs in the employment arena.

Many clients arrive at our offices ready to plan for the future of their loved ones with disabilities. In addition to the questions regarding estate planning and protecting public benefits, families are always asking about opportunities for their family members with disabilities to join the general work force. I believe that practitioners should be aware of options available and how to access such services. The ability to be able to at least discuss this type of support with clients adds enormous value to our practices. Also, this type of arrangement is an incredible resource for potential employees, which I hope you will at least explore. I have named only a few agencies in this article, but I assure you if you Google "Supported Employment for Persons with Disabilities" the resources are infinite.

Every day we see clients who are searching for more resources for their loved ones with disabilities. Many individuals with special needs, who are able to work, whether it may in a supported employment environment, a sheltered workshop or perhaps a subsidized employment program, yearn for the day when they can join the mainstream workforce. In addition, a person with disabilities (sometimes referred to as a "consumer" for the purposes of this article) may achieve better self-esteem, more independence, and better life skills as a result of a supported-employment arrangement.

Supported employment is paid competitive service that offers consumers the opportunity to work by providing on-going support and guidance in appropriate settings depending on the individual's unique needs. The amount of employment and support may be full-time or part-time based on the abilities of the individual.

In New York State, there are many agencies, both public and private, that have developed programs to support the efforts of persons with disabilities who would like to enter the workforce. The Office of Vocational and Educational Services for Individuals with Disabilities (VESID) has developed several programs focused on supporting persons with disabilities in the workforce. Their model represents just one of many programs available. Advocacy agencies such as Westchester ARC and Cerebral Palsy of Westchester also offer various programs tailored to meet the different needs of consumers with disabilities.

Many programs start by assessing the needs of the consumer and what types of supports are needed to assist the individual to succeed in the workplace. The agency may look at whether the person will be better served in a sheltered workshop or in the mainstream workforce with appropriate accommodations and/or support. The agency will assess the limitations and the skills that the consumer possesses at the present time. They may also assess what skills the agency will be able to teach the consumer. The agency will no doubt measure the level of disability also.

Many supported-employment programs try to integrate workers with disabilities with non-disabled peers and co-workers, even if it is for a limited time. I have found that everyone benefits from this type of arrangement. It breaks down many of the perceptions of the mainstream workforce that consumers with disabilities are unable to sustain employment. Another mandate of supported-employment programs is usually that the individual be paid a competitive wage. The employer, in accordance with the Federal Fair Labor Standards Act and the New York State Department of Labor Minimum Wage Order Guidelines, may not pay a worker less than a non-disabled worker because of his or her disability. The number of hours should be set according to the individual's unique needs. The agency and the employer must pay close attention to any government benefits the individual is receiving when considering the number of employment hours and wages. The agency should also pay close attention to any barriers to employment and also consider the expectations of the employer and the prospective employee.

Agencies who assist individuals with disabilities locate employment offer intervention strategies focused on securing and maintaining employment. The agency may help the individual with interviewing, dress code expectations, proper workplace etiquette, and even how to manage a paycheck. Another important issue is travel training. Many agencies either arrange transportation or assist the consumer in navigating public transportation.

Agencies usually conduct an individual assessment and develop an intensive service plan for the consumer. The agency should always include in the assessment a discussion with the consumer of the consumer's interests and the consumer's concerns about working. The agency may explore other sources for assisting the client such as the Office of Mental Retardation, the Office of Mental Health, and the Social Security Administration (discussed below). These agencies may be able to coordinate services to provide additional supports to the consumer, maximizing the chance for the consumer to succeed in the workplace. Many agencies will even act as the employment coordinator so that if the consumer cannot continue to work, they will help find a replacement, or in the event of a short-term problem, send in a temporary employee to fill the position.

There are agencies that even provide seasonal employees depending on the needs of the employer and the needs of the consumer. These arrangements work when the consumer is able to understand and appreciate that the work arrangement may be short term. It is very important for the consumer to understand the expectations to the best of his or her ability. When there is a mutual understanding between the parties, the chances of success are much greater.

Another option is outsourcing of work to agencies with off-site facilities to handle certain tasks such as shredding or scanning. We have had the opportunity to use Westchester ARC for our shredding needs. It has been an incredible resource.

I have found that agencies that actively involve the consumers and their families in the planning process enhance the chances of success. The process of helping families of consumers locate employment should be started as early as possible. The Individuals With Disabilities Education Act (the "IDEA") mandates that school districts prepare children for post secondary education and independent living. It is important that families recognize the obligation of their local school districts to assist in exploring post- high school options and also to create a plan for the child with special needs which includes transition planning. More and more school districts are reaching out to private advocacy organizations to help them fulfill their obligations.

One of the final concerns about supported employment is the effect employment will have on the consumer's access to public benefits. We hope that the days when a consumer is sentenced to a life void of employment because he or she does not want to jeopardize his or her Medicaid and/or Supplemental Security are coming to an end. The Social Security Administration and other government agencies are working to support the efforts of consumers to find employment and still maintain their necessary benefits.

The Social Security Administration (SSA) has developed several programs that provide employment

supports for persons with disabilities. The "Ticket to Work" Program is a recent program for individuals with disabilities who desire to join the workforce. The program provides a "ticket" to access vocational rehabilitation services and other support services to help consumers engage in employment. It is a free and voluntary service and families should explore the use of this program. The program is available in every state. Recipients of Supplemental Security Income (SSI) and Social Security Disability (SSDI) are eligible to use the program. Recipients can use Employment Networks (ENs), which are private organizations, or other agencies that work with the Social Security Administration to help consumers develop a plan to return to work. Use of these programs may allow consumers to maintain benefits while they work, even for a limited time. The plan must be approved by the Social Security Administration.

There are even supports or subsidies that will be exempt from a consumer's gross earnings when the SSA calculates a consumer's monthly benefit. These costs are Impairment-Related Work Expenses (IRWE). For example, modifications to a vehicle used to travel to work, or the cost of transportation to and from work, are usually expenses that can be deducted. All expenses should be approved by the SSA.

Another program developed by the SSA is the Plan to Achieve Self-Support (PASS). PASS is a program that allows a consumer to set aside income or resources to reach a work goal. Funds set aside in a PASS account will not count against the resource limit of $2,000 for an individual or $3,000 for a couple under the SSI limits. The plan must be approved by SSA. The plan must be in writing and anyone can assist consumers write a PASS. It is important to fully evaluate the rules regarding the effect employment has on benefits, so I encourage you to visit the Social Security Administration's Web site at www.socialsecurity.gov for details on each of these programs.

In conclusion, these types of supports are only a few of the programs currently available to empower an individual with disabilities. We are so fortunate today that our communities recognize that individuals with disabilities deserve and are entitled to a full scope of opportunities, including the opportunity to work and live as independently as possible. In my next column, we will explore housing options available to persons with disabilities.

Adrienne J. Arkontaky is an attorney with Littman Krooks LLP with offices in New York City, Westchester and Dutchess counties. Adrienne's areas of practice include Special Needs Planning, Special Education Law and Guardianship. She represents parents of children with special needs throughout New York State in Special Education advocacy matters. She is a member of the New York State Bar Association, Westchester Bar Association and Westchester Women's Bar Association. She is also a member of the Council of Parent Attorneys and Advocates (COPAA). Adrienne lectures to parents and organizations throughout New York State on issues affecting families of loved ones with special needs.

Guardianship News: The Guardianship That Wasn't Filed

By Robert Kruger

This is a story of a guardianship that wasn't filed because I talked the family out of proceeding.

The family consists of a father in his 70s, his wife—just 70, and three grown and successful children. It is the father who is the AIP; I became involved when he was hospitalized—in a psych hospital—because he was hallucinating. This was not new. He had been hallucinating for several months.

I met him, quite briefly, in the psych ward. I learned that he had Parkinson's, that there was some concern about mild dementia, and frankly, he did not look like he had it together, not at all. I had learned earlier that he has a companion for 12X7, that he was wheelchair-bound and incontinent. This did not look like a problem case, not with these facts.

"If we pushed ahead with the guardianship, the judge would, I believe, look at the family, and at me, as attempting to railroad this man into a nursing home."

Of course, there is more to the story. He is a lawyer and, wheelchair-bound or not, he went to his office daily. While his practice was close to dormant, within the past month, he had negotiated a renewal lease for his office. It sounds strange but, when he wasn't hallucinating he appeared to be functional. He was his normal self, demanding, bullying (to his wife) and extremely controlling. He was not in the least cooperative. He would not sign a power of attorney or health care proxy. Moreover, most of the couple's assets were in his name alone; his wife had some money but relatively little.

The children's loyalties ran to their mother. There was minimal affection for their father. They wanted to protect her and extract her from her role as caregiver. It was a role that she found suffocating and, given his uneven sleeping habits, and his domineering ways, exhausting. They wanted him out of the house and placed in a long-term residential care facility.

Now the obstacle to placing him in a nursing home was also the obstacle to the appointment of a guardian. He was found to be competent by the treating physician at the psych hospital. At first, I thought the doctor was attempting to facilitate a speedy discharge. So I discounted this doctor's opinion.

Thanks to a very cooperative psychiatrist from another medical institution, he was not, however, discharged home. He was admitted to another facility largely because this psychiatrist believed that he needed to be watched more closely with respect to his hallucinations (he had a rather convenient hallucination just prior to scheduling the discharge).

When the second facility, a few days after admittance, opined that he was competent, I stepped back. I believed that he was not able to be placed in a nursing home, nor a fit subject for guardianship, because he would appear normal, indeed super normal, at critical times. For example, when interviewed by a court evaluator, or even worse, by Mental Hygiene Legal Services, he would be the very picture of mental health. He would oppose the guardianship and demand his release from the nursing home. And, this being a case venued in New York County, he would succeed.

If we pushed ahead with the guardianship, the judge would, I believe, look at the family, and at me, as attempting to railroad this man into a nursing home. There was no way, in my judgment, that we could persuade a judge to appoint a guardian. To recycle a bad joke, we would have asked the judge: "Who do you believe? Me, or your lying eyes?"

If the family had insisted on pursuing a guardianship, and they can certainly change their mind on this, I was prepared to resign. I think he has to decline further before we stand a decent chance of appointing a guardian for him. Until that day comes, he has returned home with a round-the-clock companion.

The wife has stated that she won't continue to reside with him. If she holds to this position, the willingness of the companion to continue to work under these conditions is critical because what does the family do if she quits? How do they make him compliant? How do they convince this man that he needs his family more

than they need him? They should not, despite decades of being conditioned by his bullying, jump when he calls. Conversely, they really don't want to leave him wheelchair-bound, in soiled clothing and with minimal food in the house. They can, obviously, attempt to replace the companion, but will the replacement last? Looking for leverage, I asked the children whether the good opinion of his children mattered to him. They all doubted it.

Shifting the balance of power in this family is both difficult and no panacea. If he were even a little cooperative, it would/could go a long way with respect to the family's patience and tolerance toward him. I don't like to quit on an otherwise good case, but, in this matter, I am quite comfortable with the position that we should pull back so that we can live to fight another day.

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

Scenes from the Elder Law Section

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