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Elder and Special Needs Law Journal

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

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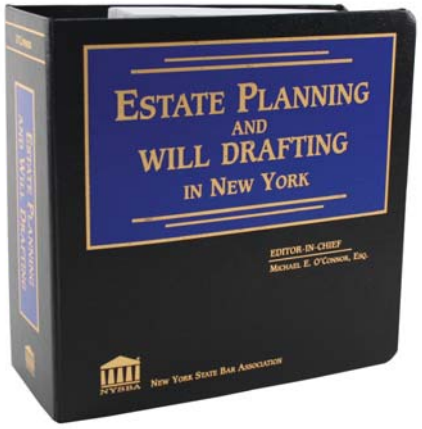

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Message from the Chair

"Damocles had his sword, and we, as Elder Law attorneys, have had the sword of Expanded Estate Recovery hanging over our heads during the past year."

The above quote is how I started my "State of the Section" address at our Annual Meeting in New York City. It reflects for me the over-arching issue that has caused great anxiety and confusion among our members, inhibited our ability to confidently counsel our clients, and consumed my term as Chair.

After taking office on June 1, the regulations effecting Expanded Estate Recovery tracked the following timeline:

June 8—Section representatives were presented with draft emergency regulations for comment;

June 15—Section submitted a memorandum in opposition to the draft;

Mid-June to September—Anxious waiting and speculation as to the content of final regulations, including in-depth analysis at the Summer Meeting, based on what we knew;

September 8—Emergency regulations promulgated and intense analysis pursued, as did a letter writing campaign by Executive Committee members;

October 14—Section representatives met with staffs of the Dept. of Health and concerned Senators in Albany;

October 31—Section webcast provided comprehensive educational program for members, in addition to that provided at the Fall Meeting session;

December 8—Emergency regulations allowed to lapse;

December 20—Section representatives met with the Dept. of Health and legislature staffs regarding proposed revised final regulations;

January 6—Section submitted opposition memorandum to proposed revisions;

Mid-January—Senator Hannon submitted bill to repeal Expanded Estate Recovery, followed by Assemblyman Gottfried;

February 14—Section representatives lobbied legislators in Albany to advocate in favor of repeal, and also to oppose the Governor's 2012 Budget Bill provision eliminating "spousal refusal" in home-based Medicaid, which the Governor later attempted to make retroactive.

Mid-March—The legislature presented a one-house bill rejecting the elimination of spousal refusal for home-based Medicaid and repealing the expansion of Estate Recovery. We awaited the vote.

March 27—Word came from Albany that the Senate, Assembly and Governor have agreed to repeal Expanded Estate Recovery and reject the elimination of "spousal refusal" for home-based Medicaid.

March 30—The legislation is passed within the 2012 Budget Bill and the Governor signs on.

THE SWORD HAS BEEN REMOVED! Our lobbyists pronounced this one of the most significant legislative victories in the history of our Bar Association. **"Free at last,"** at least for now.

It's been quite a long, demanding journey. You can take great pride in our Section's wonderfully talented and indomitable members, our Bar's governmental relations department, and our professional lobbyists, all of whom have worked tirelessly and selflessly to succeed in this epic event in order to protect our elderly and infirm constituencies.

Annual Meeting

Kerry Archer and **Bob Mascali** did a truly marvelous job putting together the program for the Annual Meeting, and it was a great success, both in terms of content and registration, with over 500 attendees.

During the business portion of the meeting, Immediate Past Chair **Sharon Gruer** gave the report of the Nominating Committee, and upon unanimous vote the Section elected the following Officers and Delegates:

Officers:
Chair—Anthony Enea
Chair-Elect—Fran Pantaleo
Vice-Chair—Richard Weinblatt
Secretary—JulieAnn Calareso
Treasurer—David Goldfarb

District Delegates—3 year terms:
2nd District—Fern Finkel
5th District—Jeffrey Rheinhardt
8th District—Charles Beinhauer
12th District—Joy Solomon
13th District—Anthony Lamberti

Also, the Section honored three of its members, who have had a significant role in our continuing efforts to interdict the expansion of estate recovery and our success of last year in blocking the elimination of spousal refusal. They are:

Amy O'Connor, Co-Chair of the Legislation Committee, who has energetically organized and coordinated all our efforts, keeping us focused and on track;

David Goldfarb, Co-Chair of the Legislation Committee, who has been the "go-to-guy" in crafting the numerous memoranda and other responses required to counter the DOH draft regulations, and to educate our legislators regarding the detrimental consequences of eliminating spousal refusal. David is a remarkable Section resource; and

Jeanette Grabie, whose initial, well-drafted letter to her Senator, explaining the unfairness of the emergency regulations, provided much-needed traction on this issue, leading to Senate intervention opposing the regulations.

The business meeting was followed by a most informative CLE Program. In addition to the usual Elder Law Update were detailed presentations on the new decanting statute and proposed Uniform Guardianship Act, plus panel presentations on various issues affecting Special Needs families and expanded estate recovery.

We received many compliments concerning the day's events and the benefits of the program. Our thanks to Bob and Kerry for a job well done.

Section Highlights

Mentoring: I am proud to report that in January we launched our Mentoring Program, Chaired by **Joan Robert** and **Tim Casserly**, with the able assistance of Vice-Chair **Anne Dello-Iacono.** The program now has 40 mentees paired with their mentors. This initiative should encourage Section membership, and make it so much easier for our new members to become comfortable with the demands of an Elder Law practice. However, we have many more requesting mentees than mentors, and I am asking that you try to find it within your capacity to volunteer for this program. It is just a one-year commitment that will be as rewarding for you, as it will be for your mentee.

The *Elder and Special Needs Law Journal*: We are very grateful to **Adrienne Arkontaky** and **David Kronenberg** for taking on the responsibilities as Co-Editors of the *Journal*. As you can see from the quality of this issue, and the previous Winter edition, the transition has been seamless. This is reflective of the tremendous effort of Adrienne and David to get quickly up to speed, but also the very generous assistance of **Andrea Lowenthal** and **David Okrent** in staying involved through the transition process. I would ask that you keep in mind that Adrienne and David will need our assistance going forward, so please consider contributing an article for publication. It can be on a legal issue or an interesting case that you've experienced.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act ("Act"): Under the leadership of **Ron Fatoullah** and **Bob Mascali**, and the exceptional drafting efforts of **Ira Salzman**, the Executive Committee approved the Act, which has been sent to the Bar Association to become part of its legislative priorities. This important legislative initiative from our Section is to address guardianship jurisdictional issues that arise across state lines. Wards frequently travel to other states for many purposes, and this can raise issues as to the authority of the guardian in a foreign state, causing great distress, and a waste of time and money. At this point, 29 other states and the District of Columbia have passed similar legislation, and it is important for New York to become part of this solution.

Medicaid Benefits Committee: While expanded estate recovery has received most of the attention arising from the 2011 Budget Bill, a lesser known, but just as serious, provision is the requirement that all community–based long-term care be provided through **Managed Long Term Care (MLTC). Valerie Bogart**, Co-Chair of the Medicaid Benefits Committee, is spearheading the effort to bring us up to speed on all the implications of its implementation, which was due to begin in April 2012, but which has been postponed due to a delayed approval by CMS. There are serious concerns about turning over this program to the private sector and still maintain the rights and protections that should remain available to those needing these services. The most serious of these concerns are that the private sector will have financial incentives for reducing services, and that there are insufficient safeguards for due process and for providing "aid-continuing" to protect those affected during that process. These concerns are particularly serious because there are no safeguards assuring access to community-based care, and MLTC has been given complete discretion as to when nursing home services are to be utilized.

(continued on page 7)

Message from the Co-Editors in Chief

As this issue of the *Journal* goes to press we want to acknowledge the incredible work of colleagues in our Section for their tireless efforts to convince the legislature to repeal the recently enacted laws regarding expansion of estate recovery. This was no small task. On behalf of our clients and our individual practices, we all owe a tremendous amount of gratitude to these individuals. There is no question that the repeal of these laws allows us as practitioners and advocates to offer our clients more options when it comes to planning for their long-term care. Accordingly, in coming publications we intend to highlight the fine work of the Legislation Committee in this endeavor and publish articles that will inform our community of readers regarding the state of the law *after* the repeal. Additionally, as demonstrated in the last issue (Winter 2012) with our publication of the Advocates' Letter to Centers for Medicare and Medicaid Services and the Memorandum on Proposed Regulations on Medicaid Estate Recovery, we will continue to include examples of written advocacy so that our readers can better understand the complexity of the issues and appreciate the outstanding work of our colleagues.

With that being said, we continue to encourage Elder Law Section members to contribute to the *Elder and Special Needs Law Journal*. In fact, we believe that all practitioners in the area of Elder Law and Special Needs have a duty to the community at large to educate, advocate and share ideas with each other. There is no better way to accomplish this than contributing to this *Journal*. We welcome all submissions and ideas. Now let's get to our Spring 2012 issue.

We begin in this issue with a fascinating guardianship article, co-written by Peter J. Strauss, Esq. and Kim F. Trigoboff, Esq., entitled *"Freely and Independently": Diluting the Right of an A.I.P. to Retain Counsel in an Article 81 Proceeding*, which examines the question of who will represent an alleged incapacitated person in an Article 81 proceeding. We then delve into aspects of end-of-life discussions often overlooked by practitioners, written by Jim D. Sarlis, Esq. and Lori R. Somekh, Esq., entitled "*Beyond the Routine Advance Directives.*" Next, we include an article by Joan Lensky Robert, Esq. entitled *Administering Supplemental and Special Needs Trusts: What the Trustee of an SNT Needs to Know About SSI and Medicaid*, which provides extremely practical advice to trustees who must negotiate the complex relationship between SNTs and these vital benefits.

We include two articles regarding specific Medicaid topics. First, an article by Daniel S. McLane, Esq. entitled *Medicaid Fair Hearings and the "Continuum of Care" from a Government Perspective,* which describes the Consumer Directed Personal Assistance Program and Personal Care Programs and issues related to adjudicating those types cases through a Fair Hearing. We then include an article by Regina Kiperman, Esq. on a recent "hot topic" in Medicaid entitled *But—Officer—My Transfer Was Not for Medicaid Purposes!* This article is a great follow-up to recent Fair Hearing decisions that held that transfers were made for a purpose other than to qualify for Medicaid and therefore incur no transfer penalty. Ms. Kiperman offers very useful guidelines to advocates to consider for their cases.

In the area of Special Needs we include three articles on diverse topics of interest. An article by Elana Krupka, Esq. entitled *Revision of EPTL 10-6.6 and Its Implications for Special Needs Estate Planning* provides an excellent explanation of how the recent legislation provides new options for special needs and estate planning practitioners. Next, we include an article by Anthony Enea entitled *Drafting Special Needs Trusts That Are Tailored to the Needs of the Beneficiary: A Primer*, providing a comprehensive overview of Supplemental Needs Trusts, including drafting tips.

Then we have an article by Tracey Spencer Walsh, Esq. entitled *Bullying and a Discussion of T.K. and S.K., Individually and on Behalf of L.K. v. New York City Department of Education* that examines this recent decision on a most timely topic. This case is still being litigated and we will continue to track its course and update our readers accordingly. In addition, we have an article by Susan Mills Richmond, Esq. entitled *Impartial Hearings—Practical Tips for Preparing and Conducting Them* providing a concise primer with practical tips for representing clients at a Special Education Impartial Hearing. And finally, we have an article by Andrew Cuddy, Esq. and Michael J. Cuddy, Jr., Esq., outlining the current landscape of the practice of special education law, *Representing Parents in Special Education Hearings Under the IDEA: New Opportunities for the Special Needs/Elder Law Attorney*, detailing the field's present prospects.

In addition to these articles, we continue to report our very informative regular columns, including Recent New York Cases, by Judith B. Raskin, Esq.; and Advanced Directive News, by Ellen G. Makofsky, Esq. Finally, we include *Results of Practice Management and Technology Committee's Survey* by Ronald A. Fatoullah and Robert J. Kurre, Esq., with some quite surprising findings. Looks like many of us can tighten up our practices to be more efficient and productive. And we have a quick note on Poll #3, an ethics poll e-mailed to all Elder Law Section members, posing a hypothetical question regarding the Rules of Professional Conduct, reviewing the answers received, and the correct course of action.

In closing, we thank all of the authors for their submissions. We are grateful for their commitment of time and energy. Also, we are thankful to our editorial board, production editors and student editors who continue to volunteer their time. Most importantly, we thank you, our readers, for continuing to support the *Elder and Special Needs Law Journal*. After all, this is *your Journal*. Please feel free to contact us if there is a topic or concern you would like us to address.

Good reading!
Adrienne and David

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The Editors would like to thank our student editors David Durso (3L, St. John's University School of Law), Sarah Duval (3L, SUNY Buffalo School of Law), Jessica Hoffman (3L, Brooklyn Law School), Joseph Hasenkopf (3L, Albany Law School), Sofiya Nozhnik (3L, New York Law School), Jonathan Placito (3L, SUNY Buffalo School of Law), and Benjamin Pomerance (2L, Albany Law School) for editing the Winter 2012 and Spring 2012 issues of the *Elder and Special Needs Law Journal,* as well as prior issues**.** We appreciate these students' dedication, and certainly wish each of them our best, especially to those who are graduating and will be continuing careers in the law.

Message from the Chair *(continued from page 5)*

While the state awaits approval by CMS, be alert for clients being pressed to make a decision now to select a private provider to administer their program. This is not a decision they need to make at this time, and the factors that go into such a selection are complicated. We will make every effort to develop educational programs to provide you with the necessary information to counsel your clients and to deal with all facets of this new program.

Pro Bono Clinics: Our Section has continued to conduct outreach clinics across the state for both seniors and, more recently, for families dealing with special needs. These clinics are the project of our section delegates and the Special Needs Planning Committee, and are a very important resource for those not knowing where to turn in their time of need. Please consider connecting with one of these clinics to do your part in making these outreach efforts a success.

Financial Planning and Investments Committee: Co-Chairs Donna Stefans and **William Pfeiffer** are conducting Financial Planning "Hot Topics" teleconferences for our members. In November the first in the series was "The ABCs of Municipal Bonds & the Benefits to Our Clients." They plan to have these programs throughout the year with the goal of providing information at a level only normally available to financial advisors. Be alert for the announcement of their future conferences.

Conclusion

Ours is a very active Section that takes a leading role in all issues affecting our practice. It reflects the dedication, energy and talent of those willing to devote their time to its service. Certain of those dedicated members are mentioned in these messages from the Chair, but so many more are at work to maintain this as a Section of which you can be proud. Please give every consideration to joining a Section committee to dedicate your energy and talent to our continued improvement.

And that's the news from the practice of Elder Law, where all the paralegals are strong, all the attorneys are good looking, and all their clients are no longer concerned about Expanded Estate Recovery.

T. David Stapleton

"Freely and Independently": Diluting the Right of an A.I.P. to Retain Counsel in an Article 81 Proceeding

By Peter J. Strauss and Kim F. Trigoboff

Consider the case of a woman who has just been served with an order to show cause in a New York Mental Hygiene Law Article 81 (Article 81) guardianship proceeding. She visits an attorney seeking counsel to object to the appointment of a guardian. The attorney (referred to in §81.09 as the "retained attorney") has a private meeting with the woman (the "alleged incapacitated person," hereinafter the A.I.P.) and accepts the woman as a client; a written retainer agreement is signed. Although the woman was brought to the lawyer's office by her son, who is not the petitioner in the proceeding, the lawyer has no reason to think that client has not willingly retained his services. He calls the court-appointed attorney to advise her of his retention and asks her to withdraw, which prompts a statement of "I'm not withdrawing my representation. Besides, your client doesn't have the capacity to retain counsel." At a conference with the judge, the client says, much to retained counsel's surprise, that she doesn't recognize retained counsel and has never met him. The judge—who will preside at the Article 81 hearing—decides at the conference that the retained counsel should be discharged, on the ground that the A.I.P. lacks capacity to retain counsel.

As shown by the above story, problems can arise as to who will represent an alleged incapacitated person in an Article 81 proceeding. The order to show cause commencing the guardianship proceeding may appoint counsel to represent the A.I.P.,[1] and the A.I.P. may then subsequently retain his or her own counsel. Alternatively, if the court evaluator conveys an A.I.P.'s opposition to the appointment of a guardian to the court, the court will appoint counsel to represent the A.I.P., as required by §81.10(c), while the A.I.P. can also decide to retain his or her own counsel.[2] Either situation can lead to the two-counsel problem: *retained counsel and appointed counsel*. According to §81.10(a), in such a situation appointed counsel continues to serve until the court determines that retained counsel has been "freely and independently" chosen. This article will discuss the meaning of this section and attempt to provide guidance as to what standard should be used in determining who shall serve as counsel for an A.I.P.

Section 81.10(a) of Article 81 provides:

> Any person for whom relief under this article is sought shall have the right to *choose* and engage legal counsel of the person's *choice*. In such event, any attorney appointed pursuant to this section shall continue his or her duties until the court has determined that retained counsel has been *chosen freely and independently* by the alleged incapacitated person (*emphasis added*).[3]

Disqualifying an A.I.P.'s retained counsel depends upon how the court defines "*freely and independently*." The court should determine whether the statutory standard—basically an undue influence standard—has been met, without depriving the A.I.P. of the due process right to choose his or her own counsel by disqualifying retained counsel based on its pre-hearing determination of the "capacity" of the A.I.P. The question of an A.I.P.'s capacity to retain counsel should not be the sole basis of a court's decision; to do so would be a misapplication of the terms of the statute. In addition, there is a presumption of capacity, and the capacity of the A.I.P. is the very issue to be adjudicated at the Article 81 hearing.

If the meaning of "freely and independently" is not to be based upon the capacity of the A.I.P. to retain counsel, how should "freely and independently" be defined and applied? The authors submit that the court should respect the A.I.P's choice of counsel as having been made "freely and independently," unless there is evidence of disqualifying factors involving fraud, a conflict of interest, or undue influence brought to the court's attention by appointed counsel, the court evaluator, or upon the court's own inquiry. Of course, the A.I.P.'s mental status may affect his or her susceptibility to these factors, but it should not be capacity per se that forms the basis of the court's determination. Even if there has been a prior adjudication of lack of or diminished capacity in another proceeding (for example, the current proceeding might be an application to terminate the guardianship or a modification of pow-

ers), such prior determination should not necessarily, rule out the A.I.P.'s choice of counsel in the subsequent proceeding.[4]

The A.I.P.'s choice of counsel should be respected by the court in the same manner as other decisions and choices even in cases where the A.I.P.'s capacity may be questionable, such as when the A.I.P. gives consent to a "settlement" which includes the appointment of a guardian, or when the A.I.P. is asked to express a choice as to who should serve as guardian even where there has been a determination of capacity at a hearing. The Article 81 statute expresses a preference for

> the least restrictive a form of intervention which assists (incapacitated persons) in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable…in a manner tailored to the individual needs of that person, [and] which takes into account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination.…[5]

A. Due Process, Choice, and the Retention of Counsel

1. Legislative Intent

In designing the Article 81 statute the legislature was clearly concerned that an A.I.P. be accorded fundamental due process rights, including the right to counsel, whether retained or appointed. Indeed, §81.10(c) enumerates several circumstances where the court must appoint counsel,[6] "unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own *choosing*" (*emphasis added*).[7] The legislature also directed that each order to show cause include notice to the A.I.P. that "you are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you."[8] In a 2007 Appellate Division decision, the legislative intent with respect to counsel in Article 81 matters was characterized as follows: "The needs of an A.I.P. are best met by assuring that the A.I.P. has a legal representative to advocate for the A.I.P. if necessary."[9] Certainly, the right to choose one's counsel is supported by the common law presumption of capacity,[10] which would include an A.I.P.'s right to retain counsel. Thus, there is a statutory basis for retention of counsel of the A.I.P.'s choice as part of an Article 81 proceeding, and the legislature appears to have intended that the A.I.P.'s right to retain counsel be fully realized.

2. Statutory Basis for Retention of Counsel by an A.I.P.

The court's authority to question whether an A.I.P. in a guardianship proceeding has retained counsel "freely and independently" is found in §81.10(a), quoted above.

This section does not mention capacity. According to Law Revision Commission Commentaries, "the alleged incapacitated person has the right to engage counsel even if the court has already appointed counsel, but the court should satisfy itself that the retained counsel is truly independent before discharging appointed counsel."[11] The implication is clear: dual representation is not prohibited, nor should the question of the A.I.P.'s alleged lack of capacity be the primary basis of the court's decision not to allow retained counsel to represent an A.I.P.

3. Due Process Implications and the Role of Counsel

Why should the decision of an A.I.P. to retain counsel of his or her choice be honored by the court, absent other disqualifying factors? Due process is defined as fundamental fairness;[12] it is a necessary component of guardianship proceedings because of the A.I.P.'s potential loss of civil rights and autonomy.[13] The importance of counsel in ensuring such fundamental fairness is illustrated by the comments of the Appellate Division in *Matter of Aida C* (known more familiarly as *Heckel*). After refusing to vacate the appointment of the court evaluator, the Fourth Department stated that

> because a guardian may be granted the authority to make decisions affecting [the A.I.P.'s] most basic rights, including whether she will reside in her own home or be placed in a facility, "her constitutionally protected liberty interests [a]re at stake in (a guardianship) proceeding."[14]

It should be noted that "the imposition of a guardianship deprives the ward of the ability to make certain *choices*, or to express his or her opinion, of the right to liberty and to manage property" (*emphasis added*).[15] Furthermore, if a court determines that a guardianship is warranted, the A.I.P.'s "physical liberty is at stake, as well as the right to vote, marry, contract, determine where he or she will live, choose the kind of health care he or she will receive and decide how to manage his or her assets, and whether the A.I.P. may travel or drive."[16] The opportunity to make such decisions by and for oneself is the essence of autonomy. Thus, the protections afforded by due process are meant to protect the A.I.P. from unwarranted loss of the ability to make choices about these and other fundamental issues

in his or her life, choices which are necessarily implicated by the appointment of a guardian.

To protect these rights a hearing is required, at which the A.I.P. has the right to 1) present evidence; 2) call witnesses, including expert witnesses; 3) cross examine witnesses, including witnesses called by the court; and 4) be represented by counsel *of his or her choice*,[17] each of which is a key component of due process. It is the presence of counsel which enables each of the other due process rights to be realized. The United States Supreme Court in *Lassiter v. Dep't of Social Servs. of Durham County* concluded that an "indigent" has a right to appointed counsel when the "litigant may lose his [or her] physical liberty if he [or she] loses the litigation."[18] Therefore, "the right to have an attorney appointed for her, to advocate for her, and to explain to the court how she manages her care at home is essential to the concept of 'fundamental fairness.'"[19] The presence of an advocate for the A.I.P., whether appointed by the court or retained by the A.I.P., is essential to the realization of the due process rights of the A.I.P.

Even if it appears that an A.I.P. is "obviously" in need of protection, it is the presence of counsel that may help the court and the parties to the action see that "what is 'obvious' may not necessarily be the case."[20] Certainly, decisions regarding all aspects of guardianship, including right of A.I.P. to retain counsel, cannot be made on basis of appearance alone, and in this way an A.I.P.'s retained counsel helps protect the A.I.P. from decisions about capacity based upon appearances.[21] By preemptively disqualifying the A.I.P.'s choice of counsel because of the allegation or even appearance of lack of capacity, the court abrogates a key aspect of the A.I.P.'s due process rights. This can translate to the unnecessary appointment of a guardian or to a scope of guardianship which is overly restrictive. This is especially the case when disqualification impacts the degree and quality of due process afforded to the A.I.P. during the proceeding, as well as abrogating a choice (that of counsel) made by the A.I.P. Such a decision takes place before there is any adjudication of his or her capacity to make other choices fundamental to everyday living, including many aspects of life which are subject to the oversight of a guardian. Therefore, a decision by a court to disqualify an A.I.P.'s chosen counsel made without strict compliance with the "freely and independently" mandate improperly deprives the A.I.P. of due process.

Does court-appointed counsel provide the required due process protection? In most cases, probably. But retained counsel may more likely have the trust and confidence of the A.I.P., enabling the A.I.P. to have a better prepared and informed advocate. Further, retained counsel may be in a better position to perform an important responsibility, counseling the client, which could lead to the adoption of alternate solutions to the needs of the A.I.P. It may lead to a less adversarial process. Finally, and perhaps most importantly, the proper level of advocacy will be assured because the A.I.P.'s lawyer's advocacy is less likely to be tempered by his or her concern about advocating for what is viewed as a "harmful choice."[22]

B. Due Process and the Role of the Court Evaluator

While not explicit, and recognizing the primary advisory and "best interests" role of the court evaluator, the statute also gives the court evaluator a role in protecting the A.I.P.'s due process rights, which is particularly important when the A.I.P. does not have counsel. The court evaluator, who is appointed by the court when the judge signs the order to show cause commencing an Article 81 guardianship proceeding, is often referred to as the "eyes and ears" of the court.[23] Under §81.09, the court evaluator is mandated to report to the court whether the A.I.P. wishes to retain counsel or not, or to consent to the guardianship or not, among other responsibilities.[24] The court evaluator walks a fine line between being an impartial investigator, charged with assisting the court in determining the capacity of the A.I.P., a "best interests" role, and empowering the A.I.P. by insuring that the A.I.P.'s choices about his or her life are made known to the court, particularly the choice of an attorney, a choice critical to insuring due process.

C. What Does Lack of "Free and Independent" Retention of Counsel Look Like?

What should be the basis of a determination that counsel was not chosen "freely and independently," that is, not dependent primarily upon a determination of capacity? A court could conclude there was fraud, as shown in *Matter of Ruby Slater,* conflict of interest, as exemplified by *Application of Lichtenstein,* or a finding of undue influence, as in *In re Daniel TT.*[25]

Fraud was found in *Matter of Ruby Slater*, where the representation of a lawyer for the A.I.P. was terminated by the court in a case where the New York City Social Services Commissioner was the petitioner in a guardianship proceeding.[26] An attorney hired by one of the A.I.P's home attendants persuaded the A.I.P., Ms. Slater, to revoke a prior power of attorney appointing a neighbor as her agent and execute a new power of attorney appointing two home attendants as Ms. Slater's new agents. Ms. Slater also executed a new will in favor of the home attendants, naming the attorney as executor. This same attorney appeared for Ms. Slater in the guardianship proceeding. The parties stipulated that Ms. Slater required a guardian. During the guardianship hearing, undisputed medical testimony showed that Ms. Slater suffered from dementia

and lacked judgment. The court determined that Ms. Slater's home attendants took advantage of their confidential relationship with Ms. Slater, subjecting her to "extraordinary undue influence," thereby rendering the resulting transactions fraudulent. Additionally, the court held that the circumstances under which the will was executed created a "presumption of undue influence" by the A.I.P.'s attorney over that A.I.P., especially because there was no other reasonable explanation for the change in beneficiaries of the will from the neighbor to the home attendants. Therefore, since the facts established that the relationship between Ms. Slater and "her" attorney was the product of fraud and undue influence of the home attendants over Ms. Slater, the court invalidated the attorney-client relationship. The court's finding precluded the possibility that the A.I.P. could have "freely and independently" retained counsel.

In *Lichtenstein*, a conflict of interest on the part of counsel resulted in a finding of lack of "free and independent" retention of counsel for the A.I.P. Ms. Wogelt, the A.I.P., did not consent to the guardianship.[27] However, she erroneously believed that the attorney for the petitioner, who had drawn up the A.I.P.'s will some two years earlier, still represented her in contesting the guardianship proceeding. The Appellate Division of the Supreme Court held that failure of the lower court to appoint counsel for the A.I.P., when it was apparent that the A.I.P. was "incapable of making an informed decision on this issue," was an error.[28] Nor did the lower court inform Ms. Wogelt of her right to attorney, including appointment of counsel "if she so desired."[29] The court characterized the court evaluator's role as follows:

> The evaluator's role under Article 81 is that of an independent investigator, empowered to assist the court in independently assessing the totality of circumstances affecting the person alleged to be incapacitated (A.I.P.),… and *assuring that the due process rights of the A.I.P. are not violated*[30] (*emphasis added*).

The Appellate Division stated that the attorney who had represented Ms. Wogelt in drafting her advanced directives, and who subsequently represented the petitioner, had a clear conflict of interest that prevented him from also representing Ms. Wogelt.[31] Not only did the A.I.P. not recognize this conflict of interest on the part of her former attorney, but the court evaluator failed to draw the court's attention to the conflict of interest on the part of the petitioner's attorney. Under § 81.10(c), Ms. Wogelt was still entitled to legal representation, especially because she had difficulty recognizing that the petitioner's attorney had a conflict of interest which precluded representing her in the guardianship proceeding. The lower court should have realized that Ms. Wogelt was most likely not in a position to "freely and independently" retain counsel, and should have appointed counsel on her behalf. Ms. Wogelt's due process right to representation by counsel would have therefore been protected, without reaching the specific issue of her capacity prior to adjudication.

What can undue influence on an A.I.P. in this context look like? The court evaluator in *In re Daniel TT* found that the lawyer retained by the A.I.P. for estate planning had been chosen by the caregiver child. That lawyer had prepared the A.I.P.'s advance directives, the meaning of which the A.I.P. did not understand.[32] Additionally, the A.I.P.'s longtime family attorney raised questions as to why there was an "unequal distribution" of assets upon the termination of a trust also prepared by that same retained attorney, favoring the caregiver child.[33] The Appellate Division decided that these facts raised questions of undue influence, which needed to be addressed as part of the guardianship proceeding, and refused to dismiss the proceeding based on the existence of the advanced directives. If a court determines that the hiring of an attorney by a relative, coupled with other facts, goes to the question of undue influence as a factor in retaining counsel, the court could disqualify counsel as not having been retained by an A.I.P. "freely and independently." *In re Daniel TT* is an example of a proper dismissal of "retained counsel" as not being freely and independently chosen without focusing on the capacity of the A.I.P.

D. Analogy with Approaches Used in Deciding Other Issues

1. Consent to the Appointment of a Guardian

An analogy to retention of counsel can be made with respect to the appointment of a guardian "on consent" pursuant to §81.02(a). Readers who have experience with guardianship proceedings will have participated in cases where a "settlement" is reached in cases where the A.I.P.'s capacity was suspect but agreement to the appointment of a guardian was accepted by the court notwithstanding. If a consent is acceptable in such circumstances, why is the choice of counsel by a person with questionable capacity—arguably a choice with somewhat less long-term significance than the appointment of a guardian—not acceptable, unless other disqualifying factors exist? This issue was indirectly touched upon in *In re Loccisano,* where a 95-year-old woman self-petitioned to have her home health care aide act as her guardian.[34] The court did not find the petitioner to be incapacitated under §81.02(b), and noted the lack of cases treating the appointment of a guardian upon the consent of the A.I.P. The decision, written by Justice Gail Prudenti, also discussed the least restrictive alternative basis of Article 81, specifically referring to the requirement set forth in §81.01[35]

that a guardianship should be tailored to the individual, taking into account the wishes, preferences and decisions of the person subject to the guardianship proceeding, so as to afford him or her the greatest amount of independence and self-determination. Similar to an on-consent appointment of a guardian, the choice of an A.I.P. to retain counsel can certainly fall within the least restrictive alternatives parameters set forth by §81.01.

2. Nomination of a Guardian

Under §81.17, a person alleged to be incapacitated may nominate a guardian, either in a petition, or by executing an acknowledged document.[36] Section 81.19 (b) provides as follows:

> The court shall appoint a person nominated as the guardian in accordance with the provisions of section 81.17 of this article unless the court determines the nominee is unfit or the alleged incapacitated person indicates that he or she no longer wishes the nominee to be appointed.

Section 81.19(b) *requires* a court to respect the wishes of an incapacitated person in the selection of the guardian, unless the court "determines for good cause that such appointment is not appropriate"(*emphasis added*).[37] Note that, as in the wording of §81.10(a), §81.19(b) does not refer to "capacity."

In *Matter of John Imhof*, the A.I.P. was found by the court to be incapacitated, but had nominated his neighbor to serve as his guardian. The court noted that §81.17 "does not expressly state whether a person's subject to an Article 81 proceeding must have the mental capacity to nominate a guardian."[38] The court also noted that the I.P.'s dementia "has not deprived him of the ability to express his desire on this very critical and personal issue in his life."[39] The court stated that "there is a statutory preference" for the I.P.'s choice of a guardian, and found that the I.P.'s nomination of his longtime neighbor as guardian, despite the court's finding of incapacity, was "based upon his own free will, without any evidence of him being coerced or pressured into making this choice."[40] The *Imhof* court's characterization of the right to nominate a guardian "based on the [A.I.P.'s] free will, without any evidence of being coerced or pressured into making this choice," and without reference to capacity, clearly demonstrates a proper working application of "freely and independently" in the application of §81.10(a). In *Imhof*, the court gave weight to the A.I.P.'s choice in the nomination of a guardian.[41] Accordingly, an A.I.P.'s choice with respect to retaining counsel consistent with "free will"—and the terms of the statute—should be respected by the court, absent any evidence of fraud, a conflict of interest, or undue influence.

E. How Often Does the Retention of Counsel Issue Arise?

There are few published cases and no measurable data has been collected on this issue. One of the authors has participated in several guardianship proceedings where the retention of counsel issue has arisen; in fact, the hypothetical at the beginning of this article was not a hypothetical at all but was a case where the author—the retained counsel—was directed to withdraw because the judge decided that the A.I.P. lacked capacity to retain counsel.

The co-author served as court evaluator in a recent case where the A.I.P. repeatedly expressed interest in retaining his own counsel. The first attorney consulted by the A.I.P. declined to accept the A.I.P. as a client. The A.I.P. then turned to a longtime attorney with whom he was acquainted who had drafted a family trust, of which the A.I.P. and his children were beneficiaries, and who currently served as the counsel of a child of the A.I.P. After the court evaluator advised the court of these facts, the court appointed counsel for the A.I.P., and discharged the lawyer retained by the A.I.P. This change in counsel was not based upon a determination of the capacity of the A.I.P. to retain counsel, but upon a conflict of interest of retained counsel. The court thereby properly applied the §81.10(a) standard.

F. Proposal for a Process

At present, when the issue of whether counsel was retained freely and independently arises, it is generally the Supreme Court Justice assigned to the proceeding who determines whether the statutory standard has been met. This inquiry may occur at a preliminary hearing, at a conference prior to the hearing, or at the hearing. The hearing is an inappropriate time to explore whether counsel has been retained freely and independently; if retained counsel is not to be permitted to continue there may be a need to adjourn the hearing or, even worse, the hearing might continue without counsel.

One possible solution would be for the court to instruct the court evaluator to investigate the issue and submit his or her findings in a preliminary report to the court in sufficient time for a decision to be made before the hearing. This would be consistent with the Article 81 direction to the court evaluator to determine whether "the person wishes legal counsel of his or her own choice to be appointed or is the appointment of counsel in accordance with § 81.10 of this article otherwise appropriate."[42] The court would then have an independent basis for deciding to discharge retained counsel or, alternatively, allow retained counsel to continue, either alone, discharging court-appointed counsel, or allowing both to serve (the wording of the statute appears to permit this, but in the authors' experience, it is rarely allowed).

We also submit that the issue of whether retained counsel shall continue to serve should not be determined by the judge who is assigned to the guardianship proceeding. A hearing by the same judge who will ultimately determine the issues raised by the petition could be influenced by the evidence presented on the retention of counsel issue. This should be avoided by having the assigned judge refer this "preliminary" issue to a different judge, just as Article 81 judges usually do in a case where, prior to the guardianship hearing, an application for medical treatment is made by a hospital petitioner or a temporary guardian.

Conclusion

For the reasons set forth in this article, the authors contend that an A.I.P.'s right to counsel should not be diluted by improper application of §81.10(a). Although capacity could be a factor as to whether there is fraud, conflict of interest or undue influence in an A.I.P.'s choice of counsel, great deference should be given to that choice. Only where there is clear and convincing evidence of the existence of disqualifying factors, aided by the observations of the court evaluator, should the A.I.P.'s right to choose his or her own counsel be disallowed. The choice of counsel by an A.I.P. should be given the same deference as an A.I.P.'s nomination of a guardian, consent to the appointment of a guardian, or consent to an arrangement other than a full guardianship.

Endnotes

1. Appointment of counsel is not mandated in every Article 81 proceeding. *See* § 81.09.
2. N.Y. Mental Hyg. Law § 81.10(c)(2) (McKinney 2012).
3. 3 N.Y. Mental Hyg. Law § 81.10(a) (McKinney 2012).
4. Section 81.29(a) states: "An incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted." N.Y. Mental Hyg. Law § 81.29 (a) (emphasis added).
5. N.Y. Mental Hyg. Law § 81.01 (McKinney 2012).
6. *See* N.Y. Mental Hyg. Law § 81.10(c)(1-7) (McKinney 2012).
7. N.Y. Mental Hyg. Law § 81.10(c) (McKinney 2012).
8. N.Y. Mental Hyg. Law § 81.07(d) (McKinney 2012).
9. In re Aida C., 44 A.D.3d 110, 113, 840 N.Y.S. 2d 516, 519 (App. Div. 4th Dep't 2007) (an A.I.P., who had retained her own counsel, appealed, in part, an order appointing a court evaluator.)
10. Schneidman v. Steckler, 12 Misc.2d 946, 948–49, 173 N.Y.S.2d 89, 91 (1958) (citing Parmelee v. Cameron, 41 N.Y. 392, 395 (1869)); In re Ruszkiewicz' Estate, 41 N.Y.S.2d 437 (1942), *aff'd*, 266 App. Div. 709, 41 N.Y.S.2d 568 (1943) (holding that "[e]very man is presumed to be capable of managing his own affairs…"). *See also* with reference to Article 81, In re Lula XX, 224 A.D.2d 742, 743, 637 N.Y.S.2d 234, 236 (3d Dep't 1996) ("Although a presumption exists that every person has the capacity to manage his or her own affairs…the presumption may be overcome by evidence that an individual is incapable of managing his own affairs.").
11. Rose Mary Bailly, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., N.Y. Mental Hyg. Law § 81.10.
12. *See* Joan L. O'Sullivan, 31 Stetson L. Rev. 687, 700 (2002) (citing Lassiter v. Dep't of Social Servs. of Durham Cnty., 452 U.S. 18, 24–25 (1981) (involving the termination parental rights of a mother sentenced to prison for 25 to 40 years after a conviction for second-degree murder)).
13. *See* O'Sullivan, *supra* note 12, at 700.
14. Aida C., 44 A.D.3d at 115 (citing In re St. Luke's-Roosevelt Hosp. Ctr. [Marie H.—City of New York], 89 N.Y.2d 889 at 891).
15. O'Sullivan, *supra* note 12, at 699.
16. *Id.* at 698–99.
17. As cited by O'Sullivan, *supra* note 12, at 700.
18. *Id.*
19. *Id.*
20. Allan D. Bogutz, Robert N. Brown, Joan M. Krauskopf & Karen L. Tokarz, Elder Law Advocacy & Aging § 9.14 (2d ed. 1993). *See also* In re M.R., 135 N.J. 155, 176 (1994) ("an adversarial role for the attorney recognizes that even if the client's incompetency is uncontested, the client may want to contest other issues…").
21. "Decisions concerning guardianship cannot be made on the basis of appearance alone; a thorough investigation of all the facts surrounding the situation and a dispassionate presentation of those facts to a disinterested third party (the court) are necessary prerequisites to such decisions." Bogutz et al., *supra* note 20 (citing Robert P. Roca, Determining Decisional Capacity: A Medical Perspective, 62 Fordham L. Rev. 1177 (1994)).
22. *See* In re M.R., 135 N.J. 155 (1994). The New Jersey Supreme Court said advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system. *Id.* at 176. The court stated that the role of an attorney for a disabled person is like that of an attorney for any other client—the lawyer should advocate any decision the client makes, unless the decision is patently absurd or poses an undue risk of harm to the client.
23. Unif. Guardianship & Protective Proceedings Act § 305 (1997), 2003 Comments (citing National Probate Court Standards, § 3.3.5(b) (1993) ("Appointment of Counsel").
24. *See* N.Y. Mental Hyg. Law § 81.09(c)(5)(ii) (McKinney 2012), and § 81.09(c)(5)(i) (McKinney 2012), respectively, and N.Y. Mental Hyg. Law § 81.09(c)(5) (McKinney 2012) (describing overall duties of an appointed court evaluator).
25. In re Ruby Slater, 227 N.Y.L.J. 29, Feb. 11, 2002; In re Lichtenstein, 223 A.D.2d 309, 646 N.Y.S.2d 94 (1st Dep't 1996); In re Daniel TT, 39 A.D.3d 94, 96, 830 N.Y.S. 827, 828 (3d Dep't 2007). Guardianship courts have also acknowledged that the lack of statutory authority to enforce the payment of a fee could have a "chilling effect" on the ability of an A.I.P. to privately retain counsel. *See* In re Rocco, 161 Misc.2d 760, 763 615 N.Y.S.2d 260, 262 (1994). *But see also* In re Elmer Q., 250 A.D.2d 256, 258, 681 N.Y.S.2d 637, 638 (3d Dep't 1988) (holding that the court had discretion to review fees charged by A.I.P.'s privately retained counsel, although guardianship had been dismissed, and the A.I.P. had not been adjudicated as incapacitated).
26. *See* Ruby Slater, 227 N.Y.L.J at 29.
27. *See* Lichtenstein, 223 A.D.2d at 309.
28. *Id.* at 314.
29. *Id.* at 316.
30. The court continues: "The evaluator's duties include, inter alia, meeting with the A.I.P. (Mental Hygiene Law 81.09(c)(1)), explaining the nature and possible consequences of the proceeding and the A.I.P.'s right to counsel (Mental Hyg. Law 81.09(c)(2)), determining whether legal counsel should be appointed for the A.I.P. (Mental Hyg. Law 81.09(c)(3)), interviewing the petitioner (Mental Hyg. Law 81.09(c)(4)), and issuing a written report and recommendations to address

a lengthy list of specific questions and issues set out in the statute." *Id.* at 313–14.

31. *Id.* at 315.
32. *See* In re Daniel TT, 39 A.D.3d 94, 96, 830 N.Y.S. 827, 828 (3d Dep't 2007).
33. *Id.*
34. 216 N.Y.L.J. 42, 1996 N.Y Misc. Lexis 597.
35. *Id.* at 5.
36. N.Y. Mental Hyg. Law § 81.17 (McKinney 2012).
37. N.Y. Mental Hyg. Law § 81.19(3)(c) (McKinney 2012) .
38. In re John Imhof, 24 Misc.3d 1209(A), 899 N.Y.S.2d 60, 2009 WL 1871697, at 4 (2d Dep't 2009).
39. *Id.* at 6.
40. *Id.*
41. *See* also In re Willie L.C., 65 A.D.3d 683, 685, 884 N.Y.S.2d 468, 470 (2d Dep't 2009) (finding that the lower "court providently exercised its discretion in appointing [the IP's sister] as guardian of [the A.I.P.].… Where the incapacitated person orally nominates a guardian during the hearing, the nominee must be appointed 'unless the court determines for good cause that such appointment is not appropriate'" (citing N.Y. Mental Hyg. Law § 81.19(c) (McKinney 2012), and In re Audrey D., 48 A.D.3d 806, 807, 853 N.Y.S.2d 143, 144 (2d Dep't 2008)).
42. N.Y. Mental Hyg. Law § 81(c)(3) and (5)(ii) (McKinney 2012).

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Beyond the Routine Advance Directives: An Important End-of-Life Issue That Can Easily Be Missed

By Jim D. Sarlis and Lori R. Somekh

We who are involved in Elder Law often have to discuss end-of-life issues with clients, typically in the context of executing advance directives. We try to encourage open and frank dialogue about the clients' wishes. We counsel them on the likely scenarios and the options available, and facilitate the often-difficult discussion between principal and agent that may theretofore never have been had. We present the standard dreaded scenario of the irreversible vegetative state and explain the legalities, getting the client to think about how he or she would want the situation handled. We may talk about the pros and cons of giving antibiotics, certain procedures, nutrition and hydration, and even CPR. We do this so the client's wishes are clear and the family can see to it that those wishes are honored. We also relieve the family of the heavy responsibility of having their loved one's life in their hands and having to "play God" without being sure what the loved one would have wanted. Yet, with all the care we take, we may miss some of the less obvious, sometimes logistical, details which could actually foil the client's intentions.

For example, imagine this scenario: you make your wishes known to your family that you do not want to be kept alive by extreme measures. In fact, you have signed a Living Will saying so, as well as a Do Not Resuscitate (DNR) order. Yet, in your final hours of life, your heart is automatically jolted by a series of powerful—yet futile—electric shocks from a defibrillator, violently disrupting the peaceful ending you tried so hard to preserve.

How could this happen? The implantable cardioverter-defibrillator (ICD) that was long ago surgically placed in your chest—to automatically deliver a strong electric shock to restore a regular rhythm to your heart if it starts beating out of synch—unfortunately will continue to do so to the failing heart of someone who is dying.

How bad can it get? The tragic stories include the following: One man on home hospice care suffered 33 painful shocks as he lay dying in his wife's

arms. His ICD "got so hot that it burned through his skin."[1] In another situation, a daughter could not understand why her father's body was jumping around so much that it looked like it was jumping off the bed when apparently he was no longer breathing.[2] Unfortunately, there are many reports in the medical literature and the general media detailing such family distress and patient suffering caused by ICDs in similar end-of-life situations.[3]

What is perhaps most astonishing is that the solution is remarkably easy: just turn off the device. Deactivation of the ICD once the patient is actively dying would prevent this situation from happening. Why, then, does this problem even exist? It turns out that patients and their families are unaware of this problem and its easy solution, largely because doctors and other health care providers are reluctant to discuss it.

"What is perhaps most astonishing is that the solution is remarkably easy: just turn off the [ICD]."

A recent report published in the American Journal of Nursing[4] that examined the major studies on the subject[5] revealed that deactivation discussions were uncommon. One study that surveyed the next of kin of patients who had died with an ICD in place found that deactivation had been discussed in only 27 of 100 cases.[6] Even among patients with DNR orders, deactivation had been discussed with fewer than 45%.[7] Another survey showed that just 25% of internists and family practitioners and 40% of geriatricians reported having such discussions.[8] Moreover, a survey that assessed the practices of 47 large medical centers in the management of terminally ill patients with ICDs found that deactivation is discussed in only 4% of such centers, that 85% of electrophysiologists and cardiologists discussed deactivation only "in specific cases during the follow-up," and concluded that patients are provided with surprisingly little information on the possibility of deactivation of ICDs.[9]

Other studies showed that physicians were more comfortable talking about DNRs than they were about the possible impact of an ICD at the end of life. Many indicated that they would prefer that the patient, or the patient's family, bring up the subject—indeed, one cardiologist said she feared that talking about deactivation with patients would be like "shutting off hope."[10]

Of course, while it might be hard to suggest deactivation of the ICD to a dying patient—at the very end, so to speak—it might make sense to include this discussion at the time the device was being implanted, as in, at the very beginning. However, another study showed that only 4% of doctors were routinely discussing the deactivation issue with patients before the ICD was implanted.[11]

"We who deal with individuals and their families seeking to put advance directives and other planning in place ought to add…[the ICD] issue to our checklists, and perhaps, address it expressly in our advance directives."

With Americans suffering some 250,000 to 300,000 arrhythmia deaths per year,[12] and U.S. patients receiving some 140,000 ICD implants per year,[13] it is clear that this is a widespread problem that needs to be examined. The devices are life-saving for patients who are at risk of sudden cardiac arrest because their hearts can unpredictably spin out of rhythm, beating either too fast or in an uncoordinated way. The battery-operated devices are designed to detect these abnormal rhythms and to reset the heart by delivering a strong jolt of electricity. Unfortunately, in the case of patients who are near death, the heart can get out of synch and trigger shocks from the ICD as it attempts—futilely and repeatedly—to restart a normal rhythm to a heart that is failing. Once implanted, the devices can be turned off or reprogrammed by a specialist with a computer that is designed to work with the ICD. Generally, however, neither the specialist nor the computer would be available in a hospice or similar setting.

Even if patients and their families are not ready to completely turn off an ICD, the device can be reprogrammed so that it works more like a pacemaker, delivering tiny jolts of electricity rather than the high-voltage shock that completely recalibrates the heart. Apparently, patients are often left with the impression that the shock to be delivered by the ICD is, instead, an all-or-nothing matter rather than one of degree that can be varied according to the circumstances.[14]

We who deal with individuals and their families seeking to put advance directives and other planning in place ought to add this issue to our checklists, and perhaps, address it expressly in our advance directives. Similarly, our colleagues that represent hospitals, nursing homes, assisted living facilities, hospices, and similar facilities may be well-advised to consider instituting policy manuals or policy statements addressing this issue. Physicians, nurses, palliative care providers, and others in interdisciplinary committees could, together with their attorneys, examine the issues surrounding ICD deactivation at the end of life and create guidelines and policies. After all, it has been shown that such discussions are more likely to happen where a policy is in place than where none exists.[15]

Disclaimer: Nothing in this article should be viewed as medical advice, and no action or refraining from action should be based on it. Anyone who needs to deal with the medical issues presented should consult a health care professional.

Endnotes

1. James E. Russo, *Original Research: Deactivation of ICDs at the End of Life: A Systematic Review of Clinical Practices and Provider and Patient Attitudes*, 111(10) Am. J. Nursing, Oct. 2011, at 26, 26; *see also* D. Grassman, *EOL Considerations in Defibrillator Deactivation*, 22(3) Am. J. Hospice Palliative Care 179, 179-80 (2005).
2. *See* Linda Carroll, *Shocking Ending: Implanted Defibrillators Can Bring Misery to Final Hours*, Msnbc.com (Jan. 16, 2012), http://vitals.msnbc.msn.com/_news/2011/10/10/8212715-shocking-ending-implanted-defibrillators-can-bring-misery-to-final-hours (referring to Russo study).
3. *See, e.g.*, B. Meier, *Lifesaving devices can cause havoc at life's end*, New York Times, May 13, 2010.
4. Russo, *supra* note 1.
5. *See, e.g.*, N. Goldstein et al., *"It's like crossing a bridge" complexities preventing physicians from discussing deactivation of implantable defibrillators at the end of life*. 23 J. Gen. Intern. Med., Suppl. 1, 2008, at 2 [Hereafter, Goldstein, *It's Like Crossing a Bridge]; P.J. Hauptman et al., Physician attitudes toward end-stage heart failure: a national survey*, 121(2) Am. J. Med. 127 (2008); N. Goldstein et al.. *Barriers to conversations about deactivation of implantable defibrillators in seriously ill patients: results of a nationwide survey comparing cardiology specialists to primary care physicians*, 54(4) *J.* Am. Coll. Cardiology, 371 (2009) [Hereafter, Goldstein, *Barriers to Conversations];* A.S. Kelley et al., *Management of patients with ICDs at the end of life (EOL): a qualitative study*, 25(6) Am. J. Hospice Palliative Care 440 (2008); A.S. Kelley et al., *Implantable cardioverter-defibrillator deactivation at the end of life: a physician survey*, 157(4) Am. Heart J. 702 (2009); R. Kobza and P. Erne, *End-of-life decisions in ICD patients with malignant tumors*, 30(7) Pacing & Clinical Electrophysiology, 845 (2007); W.R. Lewis et al., *Withdrawing implantable defibrillator shock therapy in terminally ill patients*, 119(10) Am. J. Med. 892 (2006); P.S. Mueller et al., *Deactivating implanted cardiac devices in terminally ill patients: practices and attitudes*, 31(5) Pacing & Clinical Electrophysiology 560 (2008); S. Sherazi et al., *Physicians' preferences and attitudes about end-of-life care in patients with an implantable cardioverter-defibrillator*, 83(10) Mayo Clin. Proc. 1139 (2008).

6. Russo, *supra* note 1, at 31, *citing* N. Goldstein et al., *Management of implantable cardioverter defibrillators in end-of-life care*, 141(11) Annals Internal Med. 835 (2004).
7. *Id.* at 31.
8. *Id.*
9. G. Marinskis and L. van Erven, *Deactivation of implanted cardioverter-defibrillators at the end of life: results of the EHRA survey*, 12(8) Europace 1176 (2010).
10. *See Goldstein, It's Like Crossing a Bridge*, *supra* note 5; S*ee also* Hauptman, *supra* note 5.
11. *See* Marinskis and van Erven, *supra* note 9.
12. G.I. Fishman et al., *Sudden cardiac death prediction and prevention: report from a National Heart, Lung, and Blood Institute and Heart Rhythm Society Workshop*, 122(22) Circulation 2335 (2010).
13. As of 2009. *See* S.C. Hammill et al., *Review of the registry's fourth year, incorporating lead data and pediatric ICD procedures, and use as a national performance measure*, 7(9) Heart Rhythm 1340 (2010).
14. *See* Goldstein, *It's Like Crossing a Bridge, supra* note 5; A.S. Kelley et al, *Management of patients with ICDs at the end of life (EOL): a qualitative study*, 25(6) Am. J. Hospice & Palliative Care 440 (2008).
15. *See, e.g.*, N. Goldstein et al., *Brief Communication: Management of Implantable Cardioverter-Defibrillators in Hospice: A Nationwide Survey*, 152(5) Annals Internal Med. 296 (2010). An example of an ICD deactivation policy is annexed to that article as a "web-only appendix" and is available online at http://1.usa.gov/ilwqs6.

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Administering Supplemental and Special Needs Trusts: What the Trustee of an SNT Needs to Know About SSI and Medicaid

By Joan Lensky Robert

A. Introduction

The fundamental purpose of a Supplemental or Special Needs Trust (SNT) is to preserve eligibility for government entitlements based upon need. The trustee of an SNT must be knowledgeable about SSI and Medicaid. The following is a discussion of issues facing the trustee in administering SNTs.

B. Statutes Relevant in the Administration of SNTs

The following federal and New York State statutes are important in analyzing the authority given trustees to administer SNTs.

1. OBRA 1993: "Payback Special Needs Trusts"

On August 10, 1993, the Omnibus Reconciliation Act of 1993 (OBRA 1993) explicitly authorized trusts to be funded with the assets of a person with a disability under the age of 65.[1] Prior to the enactment of this legislation, there was no difference in the Medicaid rules between those over the age of 65 and those under the age of 65 who sought to preserve assets. All trusts established by Medicaid applicants or recipients had to be "income only" trusts, with no discretion to the trustee to use principal for the benefit of the grantor/beneficiary. There was no payback to the State upon the death of the Medicaid recipient.[2]

Pursuant to OBRA 1993, when a person with a disability under the age of 65 transfers assets to an SNT established by a parent, grandparent, legal guardian or by court, this transfer does not result in any ineligibility period for the Medicaid program.[3] The assets in the SNT will not be counted as resources for the Medicaid program, so long as upon the death of the SNT beneficiary there is a payback to the State for an amount up to the total Medicaid benefits provided to the beneficiary.[4] New York State enacted complying legislation in 1994. At that time, the self-settled SNT was grafted onto the Third Party SNT statute.[5]

2. Medicaid: Income and Resources

a. Overview

Medicaid is a joint federal-state program established by federal law in 1965.[6] In general, in 2012, a Medicaid applicant/recipient may not have more than $14,250 in countable resources to qualify for the program.

A Medicaid recipient residing in a nursing facility will pay all income but $50/month to the facility to offset the cost of care. A Medicaid recipient residing in the community may retain income of $792/month. Although generally cash income above the Medicaid allowable income must be "spent down" on medical needs, certain SNTs may be funded monthly with the excess income and used to pay the nonmedical bills of the Medicaid recipient who receives Community Medicaid.

Income that cannot be irrevocably assigned into an SNT, even if one is under the age of 65, will be counted as available income when the Medicaid applicant/recipient is budgeted for chronic care Medicaid.[7] Income that can be irrevocably assigned into the SNT is NOT income of the Medicaid recipient and should not be considered available when computing a budget for chronic care Medicaid.[8]

b. Distribution of Trust Income May Affect Medicaid Benefits

The income provided by the trustee to the beneficiary or for the benefit of the beneficiary may result in a diminution of Medicaid benefits. The trustee must take care to assure that the use of trust assets does not reduce government entitlements unless the trustee determines that such use of income or principal is beneficial to the beneficiary. Income distributed in cash to the Medicaid recipient will reduce the benefit dollar for dollar. In-kind disbursements made by the trustee for the benefit of the beneficiary are not countable income for Medicaid purposes.[9]

c. Medicaid and Infants

For infants, eligibility for Medicaid programs is tied to the economic circumstances of the parents. Children with disabilities who receive SSI are eligible

for Medicaid. Certain Medicaid programs waive the requirement that the parents be poor in order for the child with a disability to receive Medicaid services.[10] The income of the parents and the family size determine whether or not the family may receive Medicaid benefits.

If a parent has a cause of action in a child's case and receives a lawsuit settlement, the child will lose Medicaid benefits that are based upon the parent's financial need if the recovery will place the assets and income over the Medicaid levels, even if the child's recovery is placed into a Supplemental Needs Trust. If, however, the child receives a waivered Medicaid home care program, the parent's receipt of a lawsuit recovery will not affect the child's ongoing eligibility for Medicaid.

d. SNTs and Medicaid Regulations

New York State regulations[11] require that the trustee of a "Special Needs Payback" trust notify the social services district of the creation or funding of the trust;[12] notify the social services district of the death of the beneficiary of the trust;[13] notify the social services district in advance of any transactions tending to substantially deplete the principal of the trust whose corpus exceeds $100,000, (i.e., 5% for trusts between $100,000 and $500,000; 10% for trusts between $500,000 and $1,000,000; and 15% for trusts over $1,000,000);[14] notify the social services district in advance of any transactions involving transfers from the trust principal for less than fair market value;[15] provide the social services district with proof of bonding if the assets exceed $1,000,000, unless waived by a court of competent jurisdiction; and provide proof of funding if the trust assets are less than $1,000,000 if required by a court of competent jurisdiction.[16] In-kind income provided by a third party not legally obligated to support an individual receiving Medicaid does not result in countable income for Medicaid purposes.[17]

A social services district may commence a proceeding under section 63 of the Executive Law against the trustee of the trust if the government considers any acts, omissions or failures of the trustee to be inconsistent with the terms of the trust, contrary to applicable laws or regulations or contrary to the fiduciary obligations of the trustee.[18] Payments made from a trust created under a will TO the Medicaid recipient/beneficiary results in countable income in the month received. In-kind benefits received from the trust are not counted as available income or resources for purposes of determining Medicaid eligibility.[19]

e. Advice to the Trustee Based on These Regulations

i) Based on the regulation, notification to the local Department of Social Services (the "Department") does not have to be given prior to the funding of the trust.

ii) Trusts having assets of less than $1,000,000 do not have to have a bond in place unless a court order directs the bond.

iii) Prior *notification* to the Department in advance of transactions tending to deplete trust principal does not mean *approval* by the Department.

iv) Money paid from the trust for the benefit of the beneficiary does not result in countable income for Medicaid purposes for the beneficiary.

v) If the trustee fails to follow these regulations, or the Department believes that the trustee has breached a fiduciary duty, section 63 of the Executive Law appears to be the sole remedy against the trustee. It does not appear that the Department may deny Medicaid benefits to the trust beneficiary due to the trustee's violation of the regulations.

3. Supplemental Security Income (SSI)

a. Adults

SSI[20] is a federal program that provides a cash stipend to the aged, blind and disabled whose available resources and income do not exceed the program's guidelines. An individual eligible for SSI automatically qualifies for Medicaid in New York State. The resource level for SSI is $2,000 for a single individual and $3,000 for a couple or family.

For 2012, the federal benefit level for SSI for an individual residing in his own household is $698/month. New York State provides an optional state supplement of $87/month, bringing the amount to $785/month. When computing the monthly SSI payment, the Social Security Administration considers other income received by the SSI recipient. Unearned income, such as that provided by a trust, given *in cash* to the SSI recipient, will be deducted from the SSI payment.[21] However, bills paid directly to the supplier of services other than food and shelter will not result in a reduction of the SSI benefit.[22]

When a third party such as a trustee pays for an SSI recipient's food and shelter, that results in a reduction in the SSI payment of either the dollar amount paid for the food and shelter OR, pursuant to the presumed maximum value rule, 1/3 of the SSI federal benefit amount plus $20, whichever is LESS.[23]

b. Advice to the Trustee

i) Payments made by a trustee to third parties or entities providing the beneficiary anything other than food and shelter for the beneficiary will NOT affect SSI.

ii) As with Medicaid, income from the trust paid directly TO the beneficiary, or to the beneficiary's guardian or legal representative, is countable unearned income that reduces the SSI benefit dollar for dollar.[24]

iii) Use of the trust to pay for food and shelter will result in in-kind income to the beneficiary, reducing the SSI payment by up to 1/3 of the federal benefit amount. An SNT trustee MAY provide food and shelter for the beneficiary, but must decide whether the consequent reduction in the SSI is beneficial to the beneficiary, in the trustee's discretion, depending upon the terms of the SNT.

iv) Paying for restaurants is considered food rather than recreation by the Social Security Administration.[25]

4. SSI and Children

The financial eligibility of the child for SSI depends upon the economic situation of the parents. The parents' assets and income are deemed available to the child when computing eligibility for SSI for the disabled child. The larger the household size, the greater the amount of income that may be earned without eliminating SSI. Both earned and unearned income of the parents will affect the child's SSI monthly benefit. Unearned income of a parent has an even greater impact on the child's SSI benefits than earned income.[26]

When a stipend is paid to a parent for services, the characterization of the payment as "earned" versus "unearned" income matters a great deal to the SSI benefit of a child. When the non-custodial parent pays child support to the custodial parent, 2/3 of the child support is countable income OF THE CHILD for SSI purposes.[27]

5. SSI POMS

Social Security issues internal instructions for its case workers in its Program Operation Manual System ("POMS"),[28] instructing them on SSA policy regarding many issues. It issued POMS pertaining to trusts in 2002. In January 2009 and October 2010, the Social Security Administration issued new POMS pertaining to trusts.[29] Although not regulations, the POMS may be given deference when the enabling statute has not spoken on the issue addressed. The POMS address the following:

a. Funding a (First Party) Special Needs Trust

An SNT may be funded with accumulated SSI. A Representative Payee may transfer SSI benefits to an SNT or fund an existing SNT, so long as these are not retroactive SSI benefits for a child under 18, as these must be held in dedicated accounts.[30] When the Representative Payee is funding an SNT, the Representative Payee must determine that the trust is in the best interest of the beneficiary, and that it will be used exclusively for the beneficiary and that s/he is the sole beneficiary during lifetime.[31] Income irrevocably assigned to the trust from an annuity or support payments made when the beneficiary was less than age 65 and which continue after the age of 65 remain protected by the trust.[32]

b. Use of Trust Assets

While the use of trust to pay for food and shelter results in in-kind support and maintenance, resulting in 1/3 reduction of the SSI federal benefit,[33] disbursements that are not cash and which do not result in in-kind support and maintenance are not income. Examples given by the POMS of disbursements that do not reduce SSI benefits include payments to third parties for education, therapy, medical services not covered by Medicaid, recreation, entertainment, and phone bills. Payments made to third parties for items such as household goods that are not considered a resource do not result in income for the beneficiary in the month that they are paid for.[34]

Additions to trust principal made directly to the trust are not income to the beneficiary if such payments have been irrevocably assigned to the SNT.[35] Child support payments irrevocably paid directly to a trust as a result of a court order are not income.[36] Alimony payments irrevocably paid directly to a trust as a result of a court order are not income.[37] Income that, by its own provisions, may not be irrevocably assigned to the SNT include monthly payments from Social Security, public assistance (Temporary Assistance to Needy Families or Aid to Families with Dependent Children), Veterans benefits, federal employee retirement payments, and ERISA private pensions.[38] Cash paid directly to the trust beneficiary is unearned, countable income that reduces SSI benefits dollar for dollar.[39]

Payments for credit card bills are not income if the credit card was used to pay for items other than food or shelter or countable assets.[40] Credit card bills paid by the trust for restaurants will result in in-kind support and maintenance, subject to a 1/3 reduction.[41] If the trust assets are used to pay for gift cards and gift certificates, this will be considered unearned income in the month of receipt, even if the gift certificate is to a store that does not sell food or shelter items, if the individual could sell/exchange the card for cash.[42] Income paid directly TO the beneficiary, or to his/her guardian or legal representative is countable unearned income that reduces the SSI benefit dollar for dollar.[43]

c. Countable Resources for SSI

Countable resources are resources that can be converted to cash to be used for an individual's support and maintenance.[44] If the individual does not have the

right to liquidate the asset it is not a countable resource for SSI.[45] Household goods, i.e., items of personal property found in or near the home used on a regular basis, are not countable resources.[46] These items include, but are not limited to, furniture, appliances, electronic equipment such as personal computers and televisions, dishes, cooking equipment, etc.[47]

Personal effects include items of personal property ordinarily worn or carried by the SSI recipient, such as personal jewelry, educational or recreational items such as books or musical instruments.[48] Items acquired or held for their value, such as collectibles, gems and jewelry that is not worn or owned due to family significance are countable resources.[49]

C. General Issues Concerning the Use of Trust Assets

1. Must the Trust Be Used for the Benefit of the Beneficiary or for the Sole Benefit of the Beneficiary?

a. Overview

The permissible use of trust assets vis a vis the Medicaid agency often turns on whether the trust must be used for the benefit of the beneficiary, a broad view, or a more restrictive use of assets, for the *sole* benefit of the beneficiary. The federal statute[50] and the New York State statute[51] both direct that a self-settled "payback" trust must be established for the benefit of the beneficiary, NOT for the *sole* benefit of the beneficiary. In contrast, the federal statute[52] and New York State statute[53] direct that the individual accounts in the *pooled trusts* must be maintained for the SOLE benefit of the beneficiary.

While New York State's ADM[54] is consistent with the statute, the SSI POMS,[55] as well as litigation positions taken by local Departments of Social Services objecting to several expenditures because they are not for the SOLE benefit of the beneficiary, are not consistent with the statute or our New York State ADM.

b. New York State Administrative Directive, 96 ADM-8

New York State references payback SNTs as those established by a parent, grandparent, legal guardian or a court *for the benefit of the beneficiary*, and which provide a payback to the state upon the death of the beneficiary.[56] The ADM does NOT refer to these trusts as being established for the SOLE benefit of the beneficiary. "It is the responsibility of the trustee of an exception trust to ensure that the funds are expended for the benefit of the chronically impaired or disabled person. In some cases the disbursal of funds may indirectly benefit someone other than the beneficiary. Such disbursals are valid, as long as the primary benefit accrues to the chronically impaired or disabled person." [57]

c. SSI POMS

SSI POMS states that a trust is established for the benefit of the SSI/trust beneficiary if payments are paid to another person or entity so long as the trust beneficiary derives "*some benefit* from the payment"(*emphasis added*).[58] A provision of the POMS notes that although the exception for SNTs by statute requires that the trust be established for and used for the benefit of the individual with a disability,[59] "SSA has interpreted this provision to require that the trust be for the *sole* benefit of the individual."[60] A trust is established for *the sole benefit* of an individual if it benefits no one but that individual at the time the trust is established or at any time for the remainder of the individual's life.[61] Trust income or principal paid to an individual other than the trust beneficiary is not for the sole benefit of the individual unless the trust beneficiary receives goods or services as a result of that transaction.[62]

Reasonable compensation for trustees, as well as investment or legal services with regard to the trust, are expenditures considered for the sole benefit of the beneficiary.[63] Reimbursement to the state after the beneficiary's death for Medicaid expenditures is considered for the sole benefit of the individual.[64] A pooled trust may be considered a sole benefit trust, as retention of funds in a pooled trust after the death of the individual is considered for his/her sole benefit.[65]

Thus, the Statutes and New York State ADM do not require that "payback special needs trusts" be used for the SOLE benefit of the beneficiary, while the Social Security Administration seems to have grafted this provision onto the statute. Challenges to expenditures should be addressed relying on the statute and New York's interpretation of the statute.

2. What Discretion May the Trustee Exercise?

May the trustee of an SNT utilize trust assets to provide goods and services that might otherwise be paid for by the government or which may reduce government benefits if the trustee determines that such use of trust assets is beneficial to the beneficiary? In New York, a state statute originally enacted for third party trusts to protect their assets from being considered available resources by the government for government benefits,[66] provides construction standards to be applied to a conforming Supplemental Needs Trust Fund. There is a presumption that the creator of the trust intends that neither principal nor income will be used to pay for any expense that would otherwise be paid by a government entitlement, "notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care."[67]

This limitation, however, should be read in conjunction with EPTL 7-1.6(b), which allows a court to order the use of trust principal for an income beneficiary

who is likely to become a public ward. This statute had been utilized prior to the enactment of EPTL 7-1.12 by government officials to force the use of trust assets to supplant rather than supplement government entitlements. EPTL 7-1.12 explicitly exempts SNTs compliant with the statute from EPTL 7-1.6(b).

The limitation against supplanting government entitlements, then, should be enforced against the government but should not preclude the trustee from exercising discretion to provide needs that supplant government benefits but are beneficial to the beneficiary because they may be provided expeditiously or are of superior quality.

A trustee in an individual case may, thus, choose to expend moneys in a manner that could reduce SSI benefits, such as for food and shelter, in the trustee's discretion, if the trustee determines that the benefit of purchasing food or shelter outweighs the cost to the beneficiary of a reduced SSI monthly stipend. The trustee likewise may wish to hire caregivers who are not Medicaid workers due to their reliability, thus supplanting a Medicaid benefit if a trustee determines this use of trust assets to be beneficial to the beneficiary. The SNT should explicitly give this discretion to the trustee.

D. Use of Trust Assets: Home, Car, Vacation, Stipends, Non-Medicaid Caregivers

When a trust is funded with personal injury proceeds of an infant, the family very often has a wish list of items that they wish to purchase from the trust. Very often the personal injury attorney will have promised them that these items will be forthcoming as soon as the case is resolved. The following issues may arise with commonly requested uses of trust assets, both for an infant or an adult beneficiary.

1. Home

a. Effect of SNT's Home Ownership on SSI and Medicaid Benefits

A home owned by an SNT is not a countable resource for SSI or Medicaid purposes, even if the beneficiary does not reside in the home, as it is a trust asset.[68] Shelter costs include mortgage costs, including property insurance required by the mortgage holder, real property taxes, heating fuel, gas, electricity, water, sewer and garbage removal.[69]

If the trust owns the home but does not pay for housing costs, there is no reduction in SSI monthly benefits.[70] However, the purchase of the home by the trust will be considered in-kind support and maintenance (1/3 reduction of SSI) in the month of purchase.[71] The use of trust assets to purchase a home will not reduce Medicaid benefits.

If the SNT purchases a home subject to a mortgage, and the monthly mortgage payments are made by the SNT, these monthly payments result in in-kind support and maintenance, providing shelter expenses that reduce the SSI monthly benefit by 1/3 each month in which they are made.[72] If the SNT pays for shelter or household operating expenses or household costs, this results in in-kind support and maintenance.[73]

If the SNT pays for accommodations to the home to make it handicapped accessible or for renovations that increase the value of the home, this does not result in in-kind support and maintenance that results in a 1/3 reduction of the SSI monthly benefit.[74] Extra mortgage payments to reduce the principal owed and extra insurance coverage not required by the mortgagee are not household costs resulting in in-kind support and maintenance when paid by the SNT.[75]

b. Allocation of Household Costs

New York has no statute that mandates that the family members contribute pro rata to the cost of a home. When parents and siblings are living in a home owned by an SNT for a disabled child, the trustee should seek a court order that directs what expenses, if any, are to be borne by the parents. Successful advocates often show that the services rendered to the child for which the other household members are not being paid far outweigh rent that could be paid to the trust. If the trust beneficiary is an adult for whom no guardian has been appointed, objections made by the Department of Social Services as to the lack of rent may also be countered by showing that the beneficiary could not live alone in the house without the family's support, even if Medicaid is paying for aides.

If the Department of Social Services argues that the trust must be used for the sole benefit of the beneficiary, and that having family members live rent free is not a proper use of the trust, the trustee should counter with the argument that the trust must merely be used for the benefit of the beneficiary and that having companionship around is in the best interest of the beneficiary and hence is a proper use of the trust.

c. Renovations to a Family Home Not Owned by the Trust: Who Pays?

May the trust be used to make accommodations to the family home to meet the needs of the disabled beneficiary if the trust does not own the home? If the Department of Social Services objects to the expenditures, demonstrate what percentage of the construction costs will inure to the benefit of the owners (usually not dollar for dollar) and what the benefit to the beneficiary will be to have these renovations. If the modifications will increase the taxes, an application to a court may be made to have the trust pay the increase in the taxes. If

the trust beneficiary does not pay rent to the owners, demonstrate how the renovations have benefited the beneficiary and what the cost of comparable housing would be. If a child would otherwise be in a facility, demonstrate the cost savings to the Department by having the home renovated.

2. Stipend to Parent

Stipends paid to parents as caregivers of minor children will count as income for that parent and may affect Medicaid and SSI benefits of the child. Some courts will authorize a monthly stipend to a parent caring for a minor child with a severe disability. This is based on the court's recognition that a parent cannot secure employment if s/he must oversee and provide care to a child with severe disabilities who would otherwise be institutionalized. However, the parent's income may disqualify the child for SSI and non-waivered Medicaid.

If a court order authorizes a stipend to a parent for caring for the child, and the court characterizes this stipend as earned rather than unearned income, it will have less of an effect on the SSI payment. The "break even" amount of income that can be earned by a parent of a minor child so that the SSI benefits of the child with a disability will not be eliminated by application of earned income disregards is set forth in the SSI POMS.[76]

3. Car

If the trust purchases a car, having the trust own the car will greatly increase the cost of insurance. Having the trust own the car may also make the entire trust assets vulnerable if there were an accident and insurance coverage did not meet all of the damages for which the car owned by the trust is liable.

The trustee may be able to obtain an agreement from the Department that the car will not be owned by the trust, but if the car is sold, that the proceeds will be paid to the trust and that if the beneficiary dies, then the car will be considered a trust asset for payback purposes.

With respect to insurance and gasoline, obtain court authorization for the use of trust assets and any allocation between an infant and family members if the car is used for anyone but the child/beneficiary. Demonstrate the benefit to the child to have the car (i.e., comfort, expanded horizons, easier transportation than public transportation) and the time the parent or family member expends in meeting the child's obligations. If the family owns another car, demonstrate that the family would not have purchased this car absent the special needs of the child.

4. Vacations

The cost of a vacation generally will not reach the threshold for which prior notification to the Department is required. Nonetheless, the Department may object to "family vacations," insisting that the trust should be used for the sole benefit of the beneficiary.

The trustee should demonstrate that the proposed vacation is to a place suitable for the beneficiary. If the family members will be acting as de facto caregivers, note their importance to the beneficiary. Also note the emotional benefit to the beneficiary to have family members with him/her, and the likelihood that there would be no vacation if the trust could not pay for the nuclear family.

In *Matter of Marmol*,[77] the court analyzed requests for expenditures of an infant's funds in a Guardianship proceeding which did not contain an SNT. The court required that parental income and assets be revealed in order to determine whether an infant's funds should purchase a home. The court decided that necessities remained the responsibility of the parents, but that extraordinary needs due to the child's disability would be provided through the Guardianship funds.

5. Caregivers Not Paid by Medicaid

If Medicaid has approved only a certain number of hours of care, the trustee should be able to use the assets to supplement the number of hours of care. In cases where RNs are needed, it is often very difficult to obtain the RNs for the approved number of hours. Approval should be obtained for trusts with court oversight that will allow non-Medicaid workers to be paid by the trust.

The trustee should not pay him/herself as a caregiver without court approval or approval by the Department. The trustee should obtain advice from an accountant as to withholding and/or whether or not the worker will be an independent contractor. Do not pay the worker in cash.

E. Termination of the Trust

1. Overview of the Issue

When Congress enacted the payback SNT legislation, it showed that the statute was revenue neutral, hence the payback provision of the statute. The trust must contain language that the state will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan.[78] The trust must provide payback for any states that may have provided medical assistance under the State Medicaid plans and may not be limited to any particular states.[79] There remained, however, outstand-

ing issues concerning the scope of the payback, i.e., whether reimbursement to the State upon the death of the Medicaid recipient/trust beneficiary included Medicaid paid for prior to the funding of the trust, and what final trust expenses, if any, were permissible payments prior to reimbursement to the Medicaid program. In the past few years, court decisions and SSI POMS have been issued that clarify these issues.

2. New York State Courts Clarify Payback Issue

In New York, the Court of Appeals held that the payback provision of a Supplemental Needs Trust requires reimbursement from remaining trust assets for all Medicaid provided to the beneficiary.[80] The State is not limited to reimbursement for Medicaid paid after the effective date of the trust.

Upon the death of the beneficiary, the trust assets must be used to repay the State for all Medicaid provided to the beneficiary, even when a lien has been satisfied for less than the full amount of Medicaid provided at the time of the lawsuit.[81]

3. SSI POMS

The 2009 and 2010 POMS clarified certain outstanding issues concerning the disposition of trust assets upon the death of the trust beneficiary. Taxes due *from the trust* to the state or federal government because of the death of the beneficiary and reasonable fees for administration of the trust estate such as accountings to the court, and fees for completing and filing of documents, may be paid prior to reimbursement to the State for Medicaid (*emphasis added*).[82] Reimbursement to the State must occur prior to payment of taxes due from the estate of the beneficiary.[83] However, taxes arising from inclusion of the trust assets in the estate MAY be paid prior to reimbursement to the State.[84]

Funerals, debts owed to third parties, inheritance taxes due for remainder beneficiaries and payment to remainder beneficiaries must be paid after reimbursement to the State.[85] The trust agreement may not limit reimbursement to a specific state or for Medicaid expenditures made only after the trust account was funded or established.[86]

4. Advice to the Trustee

The trustee should prepay a funeral from trust assets during the lifetime of the beneficiary, and should verify the amount Medicaid expended prior to reimbursing Medicaid or distributing the funds to remainder beneficiaries. In order to verify the amount of Medicaid expended, the trustee should request a Claim Detail Report from the New York State Department of Health. This Claim Detail Report lists services rendered, the dates of services, the diagnosis, the location where services were rendered, and the cost of the services.

Not all expenditures may be properly reimbursable. The trustee should challenge educational costs that may be listed as Medicaid expenses properly payable pursuant to an infant's right to a free and appropriate education.[87]

5. Trusts Funded with Structured Settlements

In *Sanango v. NYCHHC*,[88] the court held that an Infant Compromise Order and Settlement Agreement must reflect that guaranteed payments in case the beneficiary will not survive the guaranteed term of the structure shall be made to the SNT rather than to the estate of the beneficiary upon the death of the plaintiff. This subjects unpaid periodic payments to the claim against the trust for all Medicaid services provided to the trust beneficiary during his/her lifetime, regardless of whether or not it was causally related to the lawsuit and whether or not the beneficiary is under the age of 55 and survived by a spouse or minor child.[89]

F. Conclusion

Serving as the trustee of an SNT is a complex task. The trustee is a fiduciary who must be familiar with government entitlement rules, the needs of the beneficiary, and the interest of the remainder beneficiaries. Recognizing the SSI and Medicaid requirements will help the trustee perform his/her role. SNTs are an important planning option to maintain those with disabilities in the community, and Elder Law attorneys provide a valuable service by advising the trustee in performing a difficult task.

Endnotes

1. 42 U.S.C. § 1396p(d)(4)(A).
2. *See generally*, 42 U.S.C. § 1396p(d)(3)(B).
3. 42 U.S.C. § 1396p(c)(2)(B)(iv); N.Y. Soc. Serv. L. § 366(5)(e)(4)(ii)(C).
4. 42 U.S.C. § 1396p(d)(4)(A).
5. EPTL § 7–1.12(a)(v)(5).
6. 42 U.S.C. § 1396; N.Y. Soc. Serv. L. § 366.
7. *Wong v. Doar*, 571 F. 3d 247 (2nd Cir. 2009).
8. *See* POMS SI 01120G(1)(b), *available at* http://www.ssa.gov.
9. 18 N.Y.C.R.R. § 360-4.3(e).
10. *See, e.g.*, http://www.health.ny.gov/community/special_needs/ for a list of waiver programs. As the child must be eligible for Medicaid financially when the parents' assets are disregarded, a Special Needs Trust will be useful in sheltering a child's resources for eligibility in a waivered Medicaid program.
11. 18 N.Y.C.R.R. § 360–4.5(b).
12. *Id*. at (iii)(a).
13. *Id*. at (iii)(b).
14. *Id*. at (iii)(c).
15. *Id*. at (iii)(d).
16. *Id*. at (iii)(e).

17. 18 N.Y.C.R.R. § 360–4.3(e).
18. 18 N.Y.C.R.R. § 360–4.5(b)(iv).
19. 18 N.Y.C.R.R. § 360–4.5(c).
20. 42 U.S.C. § 1381.
21. 20 C.F.R. § 416.1123.
22. 20 C.F.R. § 416.1103(g).
23. *See* POMS SI 00835.001, *available at* http://www.ssa.gov. (discussing the difference between the one third reduction rule, which reduces the federal benefit rate by 1/3 when an individual lives in another person's household and receives food and shelter from others in that household, and the presumed maximum value rule.)
24. *See* POMS SI 01120.203B(1)(c), *available at* http://www.ssa.gov.
25. POMS SI 01120.201I(1)(d), *available at* http://www.ssa.gov.
26. 20 C.F.R. § 416.1160.
27. POMS SI 00830.420(B)(1), *available at* http://www.ssa.gov.
28. The SSI POMS are found on the Social Security website, http://www.ssa.gov.
29. POMS SI 01120.199, SI01120.200.200, SI01120.201 and SI01120.203 contain the Executive Branch's interpretation of the federal statutes authorizing "exception trusts," 42 U.S.C. § 1396p(d)(4)(A), (C), *available at* http://www.ssa.gov.
30. POMS GN 00602.075(A) and GN 00603.025(B), *available at* http://www.ssa.gov.
31. POMS GN 00602.075c(1), *available at* http://www.ssa.gov.
32. POMS SI 01120.200G(1)(b), *available at* http://www.ssa.gov.
33. POMS SI 01120.200E(1)(b), *available at* http://www.ssa.gov.
34. POMS SI 01120.200E(1)(c). *See also* POMS SI 01120.201I(c), *available at* http://www.ssa.gov.
35. POMS SI 01120.200G(1)(b), *available at* http://www.ssa.gov.
36. POMS SI 01120.200G(1)(d), *available at* http://www.ssa.gov.
37. *Id*.
38. POMS SI 01120.200G(1)(c), *available at* http://www.ssa.gov.
39. POMS SSI 01120.2011(1)(a), *available at* http://www.ssa.gov.
40. POMS SI 01120.201I(1)(d), *available at* http://www.ssa.gov.
41. *Id.*
42. POMS SI 01120.201I(1)(e), *available at* http://www.ssa.gov.
43. *See* POMS SI 01120.201D(3)(a), *available at* http://www.ssa.gov.
44. 20 C.F.R. § 416.1201(a), *available at* http://www.ssa.gov.
45. *Id*. at (a)(1).
46. 20 C.F.R. § 416.1216(a)(1).
47. *Id*. at (1)(2).
48. *Id*. at (b)(2).
49. *Id*.
50. 42 U.S.C. § 1396p(d)(4)(A).
51. N.Y. Soc. Serv. L. § 366(2)(b)(2)(iii)(A).
52. 42 U.S.C. § 1396p(d)(4)(C)(iii).
53. N.Y. Soc. Serv. L. § 366(2)(b)(2)(iii)(B).
54. 96 ADM-8 at Section IV, *available at* http://www.health.state.ny.us.
55. *See* http://www.ssa.gov.
56. 96 ADM-8 (IV)(A)(7)(B)(i), *available at* www.health.state.ny.us.
57. 96 ADM-8 at 8, Section IV(A)(7)(b), *available at* www.health.state.ny.us.
58. POMS SI 01120.201F(1), *available at* http://www.ssa.gov.
59. *See* 42 U.S.C. § 1396p(d)(4)(A).
60. POMS SI 01120.203B(1)(e), *available at* http://www.ssa.gov.
61. POMS SI 01120.201F(2), *available at* http://www.ssa.gov.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. EPTL § 7–1.12(b).
67. *Id*. at (b)(1).
68. SI 01120.200F(1), *available at* http://www.ssa.gov.
69. POMS SI 00835.465D(1), *available at* http://www.ssa.gov. *See* 20 C.F.R. § 416.1133(c).
70. POMS SI 01120.200F(2), *available at* http://www.ssa.gov.
71. POMS SI 01120.200F(3), *available at* http://www.ssa.gov.
72. POMS SI 01120.200F(3)(b), *available at* http://www.ssa.gov.
73. POMS SI 01120.200F(3)(c), *available at* http://www.ssa.gov.
74. *Id*.
75. POMS SI 00835.465D(2), (3), *available at* http://www.ssa.gov.
76. POMS SI 00810.350, *available at* http://www.ssa.gov (Income Break-Even Points).
77. 640 N.Y.S.2d 969 (Sup. Ct. N.Y. Co. 1996).
78. POMS SI 01120.203B(1)(h), *available at* http://www.ssa.gov.
79. *Id*.
80. *In the Matter of Abraham XX, Deceased,* 11 N.Y.3d 429 (2008).
81. *See, e.g.*, Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752 (2006), which does not require reimbursement dollar for dollar of a Medicaid lien filed against a lawsuit.
82. POMS SI 01120.203B(e)(a), *available at* http://www.ssa.gov.
83. POMS SI 01120.203B(3)(b), *available at* http://www.ssa.gov.
84. *Id*.
85. *Id*.
86. POMS SI 01120.203B(2)(g), *available at* http://www.ssa.gov.
87. *See* 20 U.S.C. § 1400.
88. 6 A.D.3d 519, 775 N.Y.S.2d 343 (2nd Dep't 2004).
89. These are exceptions to Medicaid recovery when one does not have assets in a Special Needs Trust. *See* N.Y. Soc. Serv. L. § 369.

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Medicaid Fair Hearings and the "Continuum of Care" from a Government Perspective

By Daniel S. McLane

Elder law attorneys are confronted at times with the awesome and daunting task of navigating families through a complex maze of issues which include taxation, personal and legal incapacity, insurance, public entitlements, and continuum of care options. It can be difficult to gauge what is or is not in the clients' best interest, or sometimes who the client is: a community spouse or adult caretaker child, a creditor institution who may be the real party in interest in the litigation, or the individual whose benefits or liberty interest is at stake. These issues become more pronounced as a client may develop needs which result in a greater loss of liberty interest, and greater care needs along the so called continuum of care, which commences from being self-directed and living at home through residing in a nursing home with twenty-four hour supervision and care.

The attorney or advocate needs to carefully and objectively gauge the client's need for care before expending considerable client resources in litigating a Fair Hearing, as opposed to using those resources in some other way that may enhance the client's position or estate. The advocate has to take note of the programs available to the client, as well as the Fair Hearing process itself. This article will consider two widely adjudicated programs, Client Directed Personal Care Assistance Program (CDPAP) and Personal Care Aides (PCAs), and will explore how these programs along the "continuum of care" may be adjudicated through the Fair Hearing process.

CDPAP and PCA Service Programs

The CDPAP and PCA programs afford Medicaid eligible individuals the opportunity to "age in place" at home instead of in an institutional environment. CDPAP is intended to permit chronically ill or physically disabled individuals receiving home care services under Medicaid greater flexibility and freedom of choice in obtaining services.[1]

CDPAP gives an elderly individual or her guardian the opportunity to "recruit, interview, hire, train, supervise, schedule or terminate an aide in accordance with an authorized Plan of Care (POC). The local Department of Social Services (DSS or "the Department") is responsible for determining that the client is eligible for long-term care provided by a certified Home Health Agency, the Long Term Home Health Care Program, the AIDS Home Care Program, the Care at Home Program, or Personal Care Services. Like all Medicaid based programs, CDPAP and PCA are ultimately supervised by the New York State Department of Health (DoH).

Pursuant to its responsibility as the agency for Administration of the Medicaid Program, the local DSS makes determinations of a recipient's appropriateness for a particular program, including Home Care Services or Private Duty Nursing. In evaluating whether a recipient is appropriate for CDPAP, the Department assesses if the consumer is able and willing to make informed choices, or has a legal guardian or a designated relative or other adult who can assist in making informed care choices with respect to services which include, but are not necessarily limited to, nursing care, personal care, and respite services.

Disagreement between the Department and a caregiver may arise in situations where the client requires a higher level of care and is no longer self-directing or if the caretaker is mismanaging the individual's care. DSS has the ability to transfer a consumer to other programs (such as PCA) with more traditional agency control should a client be deemed inappropriate to continue participation in CDPAP. Severe special needs or advanced dementia can present enormous challenges which can compromise self-direction, or even the caregiver's ability to manage the individual's needs. It is important before engaging the resources required to make a strong evidentiary presentation at a Fair Hearing to determine if CDPAP continues to be appropriate.

Personal Care Services are defined in Section 505.14(a)(1) of 18 NYCRR as "some or total assistance with personal hygiene, dressing, and feeding and nutritional and environmental functions. These services are those which are deemed essential to the maintenance of a patient's health and safety in her or her own home."[2] Personal care services include two levels of care. Level I is limited to the performance of nutritional and environmental support functions.[3] Level II includes personal care functions, as well as nutritional and environmental support functions.[4] Personal care functions can be tailored to the individual patient, and contain many of the activities of daily living, such as bathing, dressing, grooming, toileting, transferring from bed to chair

or wheelchair, meal preparation, feeding, administering medication, routine skin care, using medical supplies or equipment such as walkers and wheelchairs, or changing simple dressings.[5]

The local DSS evaluates a request for personal care services by reviewing the physician's order as determined by a medical examination conducted within thirty days prior to the physician's order.[6] The client must also present with a social assessment which must include a discussion of the patient's circumstances and preferences, and an evaluation of the potential contribution of informal care givers, such as family and friends.[7] Finally, a nursing assessment is to be completed by a nurse from a certified home health agency or by a nurse employed by the local DSS or a contract agency. The nurse's report ultimately makes recommendations for the authorization of services.[8]

Both CDPAP and PCA services are best utilized by clients with the ability to live at home. These benefits are intended for patients who can live at home, and are viewed by the Department as cost effective. Individuals in assisted living or enriched housing programs have their needs met by a facility, or by a "private pay" aide or companion. Outside of the home, adults may be housed at Adult Homes,[9] Enriched Housing,[10] Assisted Living Facilities,[11] Skilled Nursing Facility,[12] or Nursing Homes.[13] Some advocates will attempt to arrange for a private home care aide to attend to a client at a facility. These private care aides may enhance the services provided by the facility, but Medicaid will not finance services which duplicate those provided by the facility. However, Medicaid will provide CDPAP or PCA services to a resident in a facility if Medicaid does not pay the facility or if the recipient requires services not included in the Medicaid reimbursement to the facility.

Some advocates will attempt sometimes to try to secure PCA services at a facility where a much higher continuum of care is ultimately needed, such as in the case where the family may prefer to maintain an elderly relative with advanced dementia or who presents as a wandering or a high fall risk in enriched housing or an assisted living which could otherwise no longer meet the client's needs and placement at a nursing home is required.

Fair Hearings: The Intersection of Law and Policy

Section 358-3.1 0f 18 NYCRR provides a client who has been denied benefits by DSS in certain contexts the right to challenge the decision through the Fair Hearing process.[14] The Fair Hearing process affords the client (called the appellant) the opportunity to challenge the Department's determination before an Administrative Law Judge (ALJ).[15] The Fair Hearing process is fully described in both section 22 of N.Y. Social Services Law and section 358-5 of 18 NYCRR. The following is a brief summary of how the Fair Hearing process works.

Success at a Fair Hearing from the government's position requires that the Department meet a burden of proving its determination valid by a fair preponderance of the evidence.[16] The Department is in a procedurally odd position. Although the client is considered the "appellant," it is the Department which ultimately has to satisfy a burden of proof and must demonstrate its prima facie case, almost always through the introduction of documentary evidence and testimony.[17] The Department is not always represented by counsel at these hearings, but may opt to do so if a matter presents with a challenging issue, or if the appellant is represented by counsel.[18] Hearings are recorded over the telephone and as with a deposition, it is important for one person to speak at a time, because the tape-recorded record can be difficult to decipher if people speak simultaneously. The Department presents its witnesses first, subject to cross examination by the appellant. After the Department rests, the appellant presents her evidence and testimony, subject to cross examination by the Department's representative. In addition to the appellant herself, if she is able to offer meaningful testimony, the appellant may produce family members or "factual witnesses," which could include some form of "expert."[19] The Administrative Law Judge has broad discretion with respect to the admissibility of documents and testimony into evidence.[20] Parties typically agree to lax evidentiary rules, if only to prevent prohibitive costs, and therefore hearsay is admissible at these hearings. Assessment of credibility is within the sole province of the ALJ, giving the ALJ enormous latitude.

Important to the Fair Hearing process are the so-called *Varshavsky* rights, or the right of the appellant to have the Fair Hearing conducted in her home or at her residence, in the case of home-bound individuals.[21] There is a due process right of "confrontation" which is particularly vindicated on behalf of the appellant. Often, as with cases involving CDPAP or PCA services, the appellants have severe disabilities or memory loss issues and cannot meaningfully participate in the proceedings. Nevertheless, sometimes a client's advocate will invoke the *Varshavsky* rights as a tactical move to gain an adjournment or some other perceived leverage in the proceeding, as a government lawyer and witness may be inconvenienced by having to report off-site for a Fair Hearing. In this situation, the Department may argue that no additional evidence is presented by a home hearing and that the only result of the assertion of *Varshavsky* rights is additional distress and confusion experienced by the appellant. It is of course important to keep in mind that the ALJ is the trier of fact and has considerable discretion because of this position.[22]

In Fair Hearings concerning the change or denial of CDPAP or PCA services, the appellant may produce a gerontology manager. It is strongly suggested, however, in denials based upon a nursing review by the department that the appellant's representative engages a nurse case manager to evaluate the Department's determination. The best practice in the context of PCA and CDPAP determinations would be to utilize a witness who presents with credentials that mirror the RN who performed the evaluation which may have resulted in the denial, treating the hearing essentially as a peer review in the insurance context.

Conclusion

Representing a client at a Fair Hearing requires the advocate to consider a number of complex legal, ethical, and even moral issues. An advocate may have to deal with paying clients who wish to retain the dignity and autonomy of a loved one who is confronted with dementia or similar disabling condition. An advocate may be using the Fair Hearing process to obtain payment for needed care services. The advocate could also be vindicating the interests of the disabled adult's estate, providing that person with an orderly way to pass on an inheritance to her children. It is a duty which must be pursued, to paraphrase Justice Cardozo, with "not honesty alone, but the punctilio of an honor the most sensitive," as the interests ultimately at stake involve the lives of some of our most vulnerable citizens.

Endnotes

1. 18 NYCRR 505.28.
2. 18 NYCRR 505.14 (a)(1).
3. 18 NYCRR 505.14 (a)(6)(i).
4. 18 NYCRR 505.14 (a)(6)(ii).
5. 18 NYCRR 505.14 (a)(6)(ii)(a).
6. 18 NYCRR 505.14 (b)(3)(i)(a)(1).
7. 18 NYCRR 505.14 (b)(3)(ii).
8. 18 NYCRR 505.14 (b)(3)(iii).
9. 18 NYCRR 485.2 (b). An adult home is a facility that is established to provide long-term residential care and related services to five or more adults not related to the operator.
10. 18 NYCRR 485.2 (c). Enriched housing is an adult care facility that provides long-term residential care and related services to five or more adults, primarily 65 years and older, in community integrated settings similar to independent housing units.
11. 18 NYCRR 485.2 (s). Assisted living facilities provide long-term residential care, related services and provide or arrange for home health services to five or more eligible adults not related to the operator.
12. A skilled nursing facility is similar to a nursing home but provides 24 or more consecutive hours of care under the supervision of a supervising nurse, rather than a physician.
13. 10 NYCRR 700.2 (a)(11). A nursing home is a facility that provides nursing care, health related and social services for 24 or more consecutive hours to three or more patients not related to the operator, under the supervision of a physician.
14. 18 NYCRR 358-3.1.
15. 18 NYCRR 358-5.6. (This section refers to an impartial Hearing Officer, which is always an Administrative Law Judge. For purposes of this article, the term Administrative Law Judge will be used).
16. See generally 18 NYCRR 358-5.9 (c).
17. See 18 NYCRR 358-3 and 358-4 for a full discussion of the Rights and Responsibilities of the Appellant and the Social Services District.
18. See 18 NYCRR 358-4.3 (e) (citing to 18 NYCRR 358-3.4 (e)).
19. See 18 NYCRR 358-5; 18 NYCRR 358-3; and 18 NYCRR 358-4.
20. 18 NYCRR 358-5.9 (e).
21. *Varshavsky v. Perales*, 202 A.D.2d 155 (N.Y.A.D. 1st Dept 1994); 18 NYCRR 358-3.4 (j).
22. 18 NYCRR 358-5.6 (b)(7).

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But—Officer—My Transfer Was Not for Medicaid Purposes!

By Regina Kiperman

It's Tuesday morning. You walk into your office, knowing you have to deal with two matters. The first is about John, a healthy and active 68-year-old man who gave $25,000 to his granddaughter, Julie, for her wedding and got hit by a speeding car the next clear and sunny day. John was rushed to the hospital a week ago. He has not recovered from his significant injuries and requires institutionalization. The second is about Anna, a 78-year-old woman who suffers from Parkinson's disease. Anna's husband transferred their personal residence to the children a year ago and has since died. Emotionally devastated from the loss of her spouse, Anna has rapidly declined in health and now also requires institutionalization.

It would appear that both cases will incur a penalty period, unless you can demonstrate that John and Anna should be exempt from the general rule. New York State does not penalize applicants who make a "satisfactory showing that the assets were transferred exclusively for a purpose other than to qualify for medical assistance ('Medicaid')."[1] Yet, there is a presumption that the applicant made the transfer to qualify for Medicaid, and as a result, the applicant has the burden of rebutting this presumption.[2]

As practitioners, we often struggle with successfully demonstrating that a transfer was made exclusively for purposes other than to qualify for Medicaid. New York has promulgated some guidelines through Regulations and Fair Hearings to assist us in effectively establishing that the transfer was for another purpose. These standards are discussed in this article.

A. The Medicaid Reference Guide

The Medicaid Reference Guide ("MRG") provides a non-exhaustive list of factors suggesting that a transfer was made exclusively for a non-Medicaid qualifying purpose.[3] These include:

1. Traumatic onset of a disability after the transfer;
2. Traumatic onset of blindness;
3. Unexpected loss of income or other resources which would have preclude Medicaid eligibility;
4. Diagnosis of previously undetected disabling condition (e.g., applicant/recipient has a heart attack shortly after the transfer and there was no previous record of heart disease).

The MRG further states that the applicant should provide convincing evidence showing the purpose of the transfer, the reason for accepting less than fair market value for transfer, and means or plans for self-support after the transfer. Although the MRG states that the applicant "should" provide a signed statement explaining the transfer, this is by no means "required."

I have yet to find one Fair Hearing Decision in which the Fair Hearing Officer ("FHO") relied on one of the MRG factors in deciding in the applicant's favor. There would likely have been no denial if the proven facts of a case match one of the examples set forth in the MRG.

The MRG helps our client John. He was fine until suddenly and unexpectedly he was not. At 68 years of age, John had just retired, was thinking about playing golf and dancing at Julie's wedding. Now John is institutionalized, and his resources have been spent on his care. Presumably, the caseworker will recognize that this case is an instance envisioned by the MRG, and the issue will be resolved at the caseworker level.

But what happens when a person (or his or her spouse) who has been diagnosed with an illness that could result in the need for long term care makes a gift and requires institutionalization within the next five years, like our client, Anna? Was the person aware of impending institutionalization all along or was there another purpose behind the gift? Fair Hearing decisions involving these gray areas offer guidance regarding the evidence required to rebut the presumption that a transfer was done for purposes of obtaining Medicaid eligibility.

At the outset, it must be noted that each case is fact specific. Therefore, prior to making the argument that the gift was for another purpose, it is necessary to investigate the circumstances surrounding each transfer and glean, to the extent possible, the applicant's intent. Notwithstanding uniqueness of each case, common themes pervade all decisions and should be considered in a presentation to the FHO.

B. Fair Hearings

The clearest guidelines setting forth the requirements to defeat the presumption that a transfer was for the purpose of qualifying for Medicaid were set forth in *Matter of A.S.*[4] In order for a transfer to be considered made for a purpose exclusively other than to qualify for Medicaid, the applicant should demonstrate:

1. That the transfer was not made with the intention of making oneself financially eligible for Medic-

aid or to impoverish oneself with the purpose/intent of qualifying for Medicaid.

2. That there was no contemporaneous incurrence of debt or inability to maintain financial solvency at the time the gifts were made.
3. That if such transfers were considered bona-fide gifts to recipients, they were made as part of an overall established pattern of gift-giving and were not made with an exclusive purpose to make oneself eligible for Medicaid. (While discussions of a pattern of gifting appear in some of the Fair Hearings, and would be strong evidence if there was such a history, it is not a required element of proof.)

Other Fair Hearing decisions amplify these general guidelines. A review of relevant decisions indicates that the primary focus is on the applicant's thought process at the time of transfer. The FHO needs to believe that when Anna's spouse gave the house to their children, there was some valid motive other than Medicaid qualification for the transfer—for instance, because he wanted the house to stay in the family and not because he wanted Medicaid to pay for Anna's nursing home care. Therefore, the applicant's participation is critical as his or her testimony is afforded great deference by the FHO.[5]

Where the applicant, or spouse who made the transfer, is unavailable (often due to incapacity), relevant and abundant extrinsic evidence via affidavits, testimony, and other documentation must be presented. In short, the more people who attest to the applicant's happy and relatively healthy condition, of a person of their age, of a generous nature, not considering institutionalization (notwithstanding known illness) at the time of the gift, the stronger one's argument becomes. Equally important is the need to present a plethora of paid bills and/or bank statements showing solvency after the transfer.

C. The Guidelines

In order to prevail, the applicant must satisfy the first and second elements of the guidelines previously set forth. Evidence about the third guideline will be very helpful but is not mandatory unless counsel is making a pattern of gifting argument. If so, then the practitioner must still satisfy the first and second elements. Each guideline is addressed below.

1. *Guideline #1*: Transfer *Not* Made with *Intent* of Making Oneself Financially Eligible for Medicaid or to Impoverish Oneself with *Intent* to Qualify for Medicaid

a. Applicant Is in Good Health

In order to comply with this guideline, counsel must convince the FHO to recognize that either the applicant: 1) was not thinking about institutionalization and/or Medicaid at the time of the transfer; or 2) had no intention of going into a nursing home, nor was he or she nervous about its potential cost.[6] Strong evidence bolstering this position might be a showing that the applicant was not sick,[7] or that the applicant was able to independently perform some, if not all, of his or her activities of daily living.[8] The prior good health status of the applicant at the time of a transfer would be buttressed with proof that the applicant was doing well for a person of their advanced age;[9] perhaps the applicant was able to mow the lawn, play golf, use a computer,[10] drive a car,[11] ride a bike,[12] and could travel alone to and from the doctor's office.[13]

As the Fair Hearing decisions demonstrate, the argument that nursing home placement is not imminent is greatly reinforced if a physician can submit an affidavit or if medical records of regular visits to the physician can be submitted to show that the applicant, at the time of transfer, did not require imminent medical assistance or nursing home care,[14] or that the applicant's permanent placement in a nursing home was not anticipated.[15] Perhaps it is possible to obtain hospital records which indicate that the applicant is improving and the plan is for rehabilitation and discharge, rather than nursing home placement.[16]

b. Applicant Not in Good Health

Even where the applicant has been diagnosed with dementia or Parkinson's disease, it can be argued that his or her condition was not severe at the time of transfer, and, accordingly, that any gifts were not made for the purpose of establishing Medicaid eligibility.[17] Another possible argument is that although the applicant's health was declining, the applicant was managing his or her symptoms well,[18] believed he or she was doing fine and expected to continue to live at home with support from family.[19] Regarding our client Anna, it is important to locate Anna's friends and family and determine whether they are available to testify that, despite Anna's condition, she was able to groom herself, use the restroom, and function relatively independently at the time of the transfer. Perhaps somebody familiar with the situation could recount the family's care plan for Anna so that she could remain in the community.

Where the applicant's health is declining and he or she requires some assistance, it is not appropriate to conclude that nursing home placement is the only option. Where the applicant was considering moving out of the home, it can successfully be argued that the applicant envisioned moving to an Assisted Living Facility where he or she could receive basic assistance with meal preparation and housekeeping.[20]

Where the applicant is already receiving assistance in the form of private pay aides, perhaps an argument could be made that the applicant could have applied and obtained Community Based Medicaid long ago

rather than spending down and depleting his or her assets on private aides.[21]

It must be noted that the Department of Social Services has, on several occasions, attempted to argue that the applicant's age or medical condition alone were indicative of probable nursing home placement. This argument has been explicitly rejected by FHOs.[22]

c. So What Was the Applicant Thinking About?

Once the applicant has demonstrated that he or she was not thinking about Medicaid at the time of transfer, and/or institutionalization, the applicant should then demonstrate evidence of his or her motive for the transfer. Perhaps the applicant's children were in financial distress or saddled with student or business loans,[23] maybe the gifts were necessary or needed to prevent the applicant's children from going on public assistance.

An additional argument could be that the applicant had recently received an inheritance, had no need for the additional money, and just wanted to see his or her family enjoy that money during the applicant's lifetime.[24]

Perhaps the applicant:

- does not understand or fears probate and does not want his or her heirs to deal with probate at a later time; or
- the applicant intentionally wants to avoid probate because he or she plans to disinherit one of the children;[25] or
- like Anna's husband, the applicant just wanted the home to stay in the family.[26]

There must have been a reason why the applicant made that transfer, and counsel's job is to find out what that reason was and help the FHO understand it.

2. *Guideline #2*: No Contemporaneous Incurrence of Debt

The applicant must demonstrate that he or she had money after the transfer to be self-supporting. Every applicant-favorable determination that I have encountered included a statement and supporting documentation that the applicant continued to maintain solvency after the transfer, was able to timely and promptly pay his/her bills, and did not need to accrue debt by making the transfer.[27] The applicant should provide bank or other financial statements subsequent to the transfer showing that assets remained available. The amount in the bank can be as little as $6,000.[28]

If the applicant's income is sufficient to meet his or her monthly living expenses, this information should be presented to the FHO as it demonstrates that the applicant did not need the transferred resources.[29] Additionally, evidence of paid bills after the transfer should be presented. In Anna's case, although the home was transferred to the children, Anna and her spouse continued to reside there and continued to pay all of the expenses.[30] Anna continued to be responsible for the mortgage, taxes, landscaping, telephone, cable, and electric bills.

The more time that elapses between the gift and the application for institutional Medicaid, the more opportunity an FHO is afforded to review the monthly statements and understand that, in fact, the applicant did remain solvent.

3. *Guideline #3*: Pattern or "History" of Gift Argument

The evidence must indicate that there has been a pattern or "history" of gift giving to family members while the donor is in good health and has no expectation of nursing home care at the time of the gift.[31] The applicant should explain (1) the pattern or history, (2) why the gifts were not intended to establish Medicaid eligibility, and that the (3) applicant remained solvent after gift. The discussion below will focus on effectively demonstrating part (1)—the pattern or history.

Each gift recipient should submit an affidavit explaining how many gifts were received from the applicant over a continuous time frame prior to the look-back period. If there are large gaps during which there are no gifts, it may be best to omit the earlier years in their entirety.[32] Where relevant, and perhaps to eliminate any gaps, the gift recipient should also notify the FHO of the applicant's annual holiday, birthday, or good grades gift giving history or pattern.[33] Gifts can be monetary or non-monetary.[34] They can be large or small. The pattern of gifting argument is bolstered if the applicant can demonstrate that the nature and size of the gifts during the look-back period were equal to or less than gifts made prior to the look-back period.[35]

The FHOs appear more receptive when the gift recipient needs money to avoid public assistance or for college tuition.[36] The FHOs also tend to look favorably upon a pattern of gifting that is over a period of several years and, certainly, before the serious injury leading to nursing home placement. Typically the FHOs reject the argument that a transfer made after an injury, which inevitably led to institutionalization, was for another purpose.[37]

It is not sufficient to submit general statements indicating that the distributions were not intended as gifts. The gift recipient should submit a detailed explanation indicating what the money gifted was used for and when it was used for its gifted purpose.[38] If a transfer is to be called a "loan," then documentation sufficient to prove such must be provided.[39]

It is also important to cite relevant and comparable Fair Hearing decisions. If counsel intends to make a pattern of gifting argument where the applicant transferred $20,000 over a three-month period, it would be a good idea to provide the FHO with other Fair Hearings

decisions where the applicant successfully transferred a similar sum over a similarly short period of time.

Conclusion

Hopefully, after conducting the investigation called for above and obtaining all of the requisite evidence, counsel will successfully be able to demonstrate that Anna, like John, should not be penalized for the transfer.

Endnotes

1. *See* New York Social Services Law §366.5(e)(4)(iii)(B); 18 N.Y.C.R.R. 360-4.4(c)(ii)(d)(1)(ii).
2. *Gabrynowicz v. New York State Dept. of Health*, 37 A.D.3d 464 (2d Dept. 2007); Medicaid Reference Guide, pages 445-46, updated June 2010, *available at* http://www.health.ny.gov/ health_care/ medicaid/ reference/mrg/.
3. Medicaid Reference Guide, pages 445-46, updated June 2010.
4. Hearing No. 5515265P (Herkimer County, 2010).
5. *See* Hearing No. 5711377Z (Rockland County 2011), *available at* www.otda.ny.gov/fair%20hearing%20images/2011-6/ Redacted_5711377Z.pdf *[citing Varshavsky v. Perales*, 202 A.D. 2d 155 (1st Dept. 1994)].
6. *See Albert v. Perales*, 156 A.D.2d 619 (2d Dept. 1989); *see* Hearing No. 5738944J (Broome County, 2011), *available at* www.otda. ny.gov/fair%20hearing%20images/2011-7/Redacted_5738944J. pdf; *see also* Hearing No. 4898029L (Albany County 2007), *available at* http:/onlineresources.wnylc.ne/search .asp.
7. *See* supra, note 5.
8. *See* supra, note 6.
9. *See Saviola v. Toia*, 63 A.D.2d 849 (4th Dept. 1978).
10. *See* Hearing No. 4898029L, *available at* http://onlineresources. wnylc.net/search.asp.
11. *See* Hearing No. 5930719K (Chemung County, 2011), *available at www.otda.ny.gov/fair%* 20hearing%20images/2011-12/ Redacted_5930719K.pdf.
12. *See* Hearing No. 5787798M (Albany County, 2011), *available at* www.otda.ny.gov/fair%20hearing%%20images/2011-7/ Redacted_5787798M.pdf.
13. *See* Hearing No. 5571655Z (Erie County 2010), *available at* www.otda.ny.gov/fair%20hearing% 20images/2010-11/ Redacted_5571655Z.pdf.
14. *See Yiotis v. D'Elia*, 76 A.D.2d 885 (2d Dept. 1980).
15. *See* Hearing No. 5738944J (Attending physician submitted a written statement indicating that "although I was not her attending at the time of her admission here in September, 2008, I have reviewed the records and report that [A/R] was admitted from an acute hospitalization after a fall…the plan at that time was for rehabilitation and discharge. The hospital and nursing home admission was not expected.").
16. *See* Hearing No. 5571655Z.
17. *See* supra, note 6; see also supra, note 11.
18. *See* Hearing No. 5738944J, Hearing No. 5571655Z.
19. *See* supra, note 6.
20. See Hearing No. 5831428Q (Suffolk County 2011), *available at* www.otda.ny.gov/fair%20hearing%20images/2011-8/ Redacted_5831428Q.pdf.
21. *Id.*
22. *See* Hearing No. 5738944J, (reminding the FHO of several Fair Hearings holding that mere existence of a chronic condition, even Alzheimer's, does not automatically mean that nursing home placement is on the horizon); *See also* supra, note 21 (FHO rejects argument that age indicative of need for institutionalization).
23. *See id.*; *see also* Hearing No. 5363146P.
24. *See* Hearing No. 5571655Z; *see also* Hearing No. 5307252M (Suffolk 2009).
25. *See* Hearing No. 5571655Z.
26. *See* supra, note 21.
27. *See* Hearing No. 5738944J; *see also* supra, note 5.
28. *See* Hearing No. 5930719K.
29. *Id.*
30. *See* Hearing No. 5571655Z.
31. *Id.*
32. *See* Hearing No. 5570972H (Montgomery County 2010), *available at* www.otda.ny.gov/fair%20hearing%20images/ 2010-11/ Redacted_5570972H.pdf (FHO denies partly because initial gifting was in 1994, subsequent gifting was in 2006 and no evidence of gifts was submitted in between).
33. *See* Hearing No. 578944J, where the gift recipients submit affidavits indicating that A/R gave them X dollars for Christmas "for as long as I can remember"; *see also* Hearing No. 4898029L, *available at* http://onlineresources.wnylc.net/search.asp (FHO ruled in favor of A/R where A/R's spouse and A/R's son testified thatA/R made nonmonetary and monetary gifts to granddaughter for good grades and holidays since the granddaughter's birth.)
34. *See* Hearing No. 4898029L granddaughter consistently given gifts of clothing, jewelry, a computer, and necklace.
35. *Id.*
36. *See* Hearing No. 5363146P.
37. *See* Hearing No. 5738944J (FHO considered gifts made within two weeks after fall were for purposes of establishing Medicaid eligibility as nursing home placement foreseeable after such an injury).
38. *See* Hearing No. 578944J—generalized statements that funds were also intended as gifts to the children are found to be unsupported by credible evidence.
39. *See* supra, note 5 (FHO rejects that distribution was a loan where no evidence was presented to show that all conditions required for a transaction to be considered a bona fide loan were met).

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Revision of EPTL 10-6.6 and Its Implications for Special Needs Estate Planning

By Elana Krupka

In 1992, New York became the first state to allow the trustee of an irrevocable trust to decant assets from one trust into another through the enactment of Estates Powers and Trusts Law ("EPTL") 10-6.6. The law, however, limited a trustee's right to decant to trustees with absolute discretionary distribution authority. A revision of EPTL 10-6.6, effective August 17, 2011, allows trustees with only limited authority to invade principal to move assets from one trust to another. The new legislation specifically permits decanting to a Special Needs Trust ("SNT"), under EPTL 7-1.12. For special needs and estate planning practitioners, this is especially good news.

Medicaid and other government benefits are available to chronically ill and disabled individuals if certain medical and financial criteria are met. Determinations of eligibility and of the total amount of the entitlement for government benefits take into account the income, assets and other resources available to the person with disabilities. Benefits may be diminished, denied or cut altogether when an individual is over the available resource allowance.

Situations may arise where an inheritance is received by a person with disabilities which could jeopardize receipt of government entitlements. This may be because the person setting up the trust was not aware of the necessity of an SNT, or because an individual becomes disabled later in life. The matter may be further complicated when a trustee's power to invade or distribute assets causes the trust funds to be deemed available to the person with disabilities. Consider the following example:

> *In 2005, X set up an irrevocable trust, naming her living grandson as beneficiary. At that time, X named a trustee who received discretion to distribute trust assets for health, education, maintenance, and support. In 2011, X's grandson is severely injured. Without the trust assets, X's grandson is now eligible for government benefits such as Medicaid and SSI. However, if the assets are considered available to him, it may impact his ability to receive public benefits.*

The simplest solution in X's situation is to transfer the funds from the original trust into an SNT. The execution of an SNT allows family members to leave money for "extras" not covered by government benefits to their loved one with disabilities without jeopardizing government benefits. Prior to the recent change in EPTL 10-6.6, however, the trustee of an irrevocable trust who lacked absolute discretion to distribute funds lacked the authority to decant the funds. Planners had such options as petitioning court to reform the trust so funds could be transferred into an SNT, or allowing an individual with disabilities under age 65 who had capacity to receive the money and then put the money into a payback trust.[1] In cases where consent for reformation was required from minor children or legally incapacitated beneficiaries, the process was extremely complicated and sometimes impossible. Further, resolving the issue could be a costly and time consuming process. The revision of EPTL 10-6.6 introduces greater flexibility into the statute, and allows a trustee with limited discretion to decant into a new trust if specific guidelines are followed. It saves time by minimizing the need for court involvement, which in turn reduces the cost of the decanting process.

EPTL 10-6.6 Revision: Rationale and Requirements[2]

Conceptually, decanting is permitted because a trustee with the discretionary power to distribute property for the benefit of trust beneficiaries also has the power to move trust funds, when doing so would benefit the beneficiaries. The New York State Legislature removed the requirement that a trustee have absolute discretion in order to enhance flexibility and broaden the applicability of the statue.[3] It found that "so long as the trustee has the ability to distribute principal for some purpose, for example, if the trustee may make distributions for health, education, maintenance, and support, but may not otherwise invade principal, the trustee should have the ability to pay the trust funds to a new trust for the same purpose."[4]

EPTL 10-6.6(b) retains the requirements of the old statute, authorizing a trustee who has unlimited discretion to invade trust funds to decant all or a portion of trust principal into a new trust. Unlimited discretion is defined as "the unlimited right to distribute principal that is not modified in any manner." Power to distribute for wealth, comfort, or happiness, are not considered limitations or modifications.[5] The purpose of the new trust may be to benefit one or more of the benefi-

ciaries of the original trust, possibly to the exclusion of one or more of the current beneficiaries.[6]

Greater flexibility is introduced into EPTL 10-6.6 in provision (c), which authorizes a trustee to decant trust funds if the trustee has the power to invade trust principal for a specific purpose, even if the trustee lacks unlimited discretion. Section 10-6.6(c) delineates three criteria for the new, or appointed, trust. First, no change may be made to the beneficiaries or the remainder beneficiaries. Second, the language authorizing the trustee to invade or distribute trust income is the same in the new trust as it was in the invaded trust. If, however, a trustee extends the term of the new trust beyond the term of the invaded trust, the trustee may authorize unlimited discretion to invade principal during the extended term. Third, if the original trust provided an individual or class with a power of appointment, those designees must remain the same in the new trust.

In general, a trustee relying on §10-6.6 (b) cannot limit, modify, or reduce a beneficiary's right to receive income in the new trust. The statute does, however, make a specific exception in the case of an SNT,[7] wherein a trustee is authorized to move funds into an SNT, though doing so will likely change the manner and amount of a beneficiary's distribution.[8]

The benefit of decanting is its simplicity: there is no need to petition the court in order to invade trust funds. To exercise his or her power to appoint funds to a new trust, the trustee must write, sign, date, and acknowledge the appointment.[9] The trustee must notify all "persons interested" in the invaded trust, by providing them with a copy of the invaded trust and the new trust.[10] "Persons interested" is defined as anyone who would need to be served in "a proceeding for the judicial settlement of the account of the trustee" under §315 of the Surrogate's Court Procedure Acts.[11] The creator of the trust, if alive, and a person having the right to remove the trustee must be informed of the appointment as well.[12]

Endnotes

1. A payback trust is defined as: "A trust permitted by federal law that enables a disabled beneficiary, under age 65, to protect his or her own assets by transferring them to a supplemental needs trust and still qualify for governmental benefits, such as SSI or Medicaid. Upon the death of the beneficiary, the state has the right to be reimbursed for the amount of correctly paid Medicaid benefits on behalf of the beneficiary. Any remaining trust assets in excess of the payback amount may be distributed as designated where the trust is set up." NYSARC Trust Services at http://www.nysarc.org/trust-services/glossary/.
2. Some information in this section taken from *Decanting Trusts Under the New York Revisions,* notes from presentation by David Goldfarb at Elder Law Section Annual Meeting, January 24, 2012.
3. NYS Assembly A08297 Memo.
4. *Id.*
5. EPTL 10-6.6(s)(9).
6. EPTL 10-6.6 (b).
7. EPTL 10-6.6(n)(1).
8. *Id.*
9. EPTL 10-6.6(j).
10. EPTL 10-6.6(j)(1).
11. EPTL 10-6.6(s).
12. EPTL 10-6.6(j)(2).

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Drafting Special Needs Trusts That Are Tailored to the Needs of the Beneficiary: A Primer

By Anthony J. Enea

In recent years, it has been well documented that millions of "baby boomers" are coming of age, significantly impacting our medical and long-term care infrastructure. While this poses challenges for elder law and trusts and estates attorneys, one consequence often overlooked by this aging population is its impact upon non-elderly disabled children of baby boomers.

Unfortunately, there is little being done to educate aging baby boomers as to what steps should be taken to provide for the future care and well-being of their disabled children. Because Special Needs Trusts, also known as Supplemental Needs Trusts (SNT), play an integral role in planning for the disabled, this article provides an in-depth summary of the variations and analysis that need to be done in order to ensure that each trust is adequately tailored to the beneficiary's needs.

A. Pre-Drafting Issues and Analysis

The following is a sample of some of the issues and factors that need to be assessed prior to the preparation of an SNT:

1) Obtain and review biographical details relevant to the beneficiary of the Trust. Note that the age of the beneficiary is an important factor to consider, especially when drafting a Self-Settled SNT.

2) Obtain and review specific details as to the nature of the beneficiary's disability and their level of need. In addition, one should inquire as to the capacity of the beneficiary both physical and/or mental. Inquire as to the medications the beneficiary is taking. Is the medication psychotropic? Obtain as much information as possible about the nature of the disability, as well as its anticipated duration.

3) Ascertain the functional abilities and limitations of the proposed beneficiary. For example:

   (a) Is he or she able to cook, clean and attend to his or her own personal hygiene?

   (b) Can he or she handle his or her finances and live independently?

   (c) Is he or she able to participate in decisions? If yes, to what extent?

   (d) Is he or she employed? What is the nature of employment? What is their salary? What is their employment history?

   (e) What is his or her level of education? Has he or she received any special training?

4) Review and assess the proposed beneficiary's present housing. What type of housing is it anticipated the beneficiary will need in the future (group home, institutional, living with family/renting an apartment)? Is the housing federally subsidized?

5) What government benefits, if any, is the beneficiary receiving? (SSI/SSD/Medicaid/community/institutional); How long has the beneficiary received these benefits?

6) What are the anticipated future needs of the proposed beneficiary?

7) What are the financial resources available to the disabled person? Examine their potential for inheritance, family, siblings, etc. One should inquire as to whether the trust beneficiary is presently a named beneficiary or contingent beneficiary of a Will or Trust.

An analysis of all of the above will allow the drafter of a trust to tailor some of its provisions to the specific needs and wants of the beneficiary.

It should be explained to the client that an SNT is for non-basic needs. It is not a trust created for basic necessities, such as food and shelter, and that the purpose of the SNT is to preserve the trust funds for the disabled person without affecting his or her eligibility for government benefits such as Medicaid and SSI (Supplemental Security Income). Additionally, it is important to explain the federal standard for determination to the client, which holds that the beneficiary of an SNT is a "disabled person."

Under federal law, a disabled person is defined as a person "unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in

death, or which has lasted or can be expected to last for a continuous period of not less than 12 months."[1] Note that if one is receiving Medicaid, SSI or SSD, he or she is considered "disabled."

B. Three Basic Types of Supplemental Needs Trusts

1. "Third Party SNT"

A Third Party SNT is a Trust created and funded by someone other than the disabled beneficiary, generally created by a parent, grandparent or sibling. To have a valid SNT, the source of funds used to create an SNT must not be from the disabled person. This is commonly known as a third party trust, and thus, a third party SNT. A disabled beneficiary's funds should never be used to fund a third party SNT. Any individual can fund this type of trust for a disabled person without affecting the beneficiary's right to receive any government benefits for which he or she is eligible.

It is important to note that a third party SNT can be "inter-vivos" or "testamentary." The spouse of a disabled beneficiary or the parent of a minor disabled beneficiary cannot create and fund an "inter-vivos" SNT and receive protection under §7-1.12 of the EPTL, granting eligibility for government benefits. However, the spouse or parent can fund and create a "testamentary" trust for the disabled beneficiary. All too often we tend to think of SNTs as solely inter vivos instruments; however, their use in testamentary documents can be of great importance.

In the seminal case of *Matter of Escher*, the Bronx County Surrogate's Court held that a testamentary trust established by parents of a disabled daughter which provided that principal was to be used only for the "necessary support and maintenance of daughter" was protected from the claim of the State for reimbursement of the amount it had paid on behalf of the daughter.[2] The Court found that the Testator had intended principal be used for daughter during her lifetime. EPTL 7-1.12 codifies *Matter of Escher.*

It should also be noted that the funding of a Third Party SNT has Medicaid planning benefits for the Grantor of the Trust, because the transfer is considered an exempt transfer. Thus, no period of ineligibility is created.[3]

2. "Self Settled" SNT or "First Party" SNT

Self Settled Trusts are authorized by the Omnibus Budget Reconciliation Act of 1993. These are SNTs funded with a disabled beneficiary's own funds, or funds to which he or she is entitled such as a personal injury award or an inheritance. In order for the disabled beneficiary to establish and fund a Self Settled SNT, he or she must establish the following:

(a) Must be disabled (proof of SSI or SSD generally sufficient);

(b) Must be under the age of 65 (as of the date the assets are transferred to the Trust);

(c) Must be established for the benefit of the disabled beneficiary, by a parent, grandparent, guardian or court;

(d) Must have a "Payback Provision."

Once established, the Self Settled Trust may be funded by the disabled beneficiary. Yet, if the disabled beneficiary has no parent or grandparent, it will be necessary to obtain the court's permission via an order, pursuant to Article 81 of Mental Hygiene Law or SCPA 2101 and 202.

The transfer of a disabled beneficiary's funds to the Self Settled SNT creates no look-back period or ineligibility period for Medicaid nursing home benefits, so long as the disabled beneficiary is under the age of 65 at the time the gift to the Trust is made.

Upon the death of the disabled beneficiary all remaining trust principal and accumulated income must be paid back to Medicaid to reimburse Medicaid for all benefits paid to the disabled beneficiary during his or her lifetime. Any funds left over may be paid to the named beneficiary of the Trust.

3. Is a Court Order Required in Order to Create and Fund a Self Settled SNT?

If the disabled beneficiary is competent, and has a parent or grandparent willing to be the creator or grantor of the trust, a court order is not required. Nevertheless, if the beneficiary is mentally incapacitated, then regardless of the existence of a parent or grandparent, a court order is required for the creation of the trust, in order for the assets or income of the beneficiary to be transferred to the SNT. If the disabled person is competent, and has no parent or grandparent, a court order is required.

Court orders are normally obtained within an Article 81 Guardianship, and thus, it can be a single transaction guardianship. However, if the matter involves an inheritance, or funds being received by a developmentally disabled or mentally retarded person, then a less stringent 17-A Guardianship must be obtained via Surrogate's Court.

4. "Pooled Self Settled SNT"

A Pooled Self Settled SNT is one that must be managed by a non-profit association. For example, such organizations as the United Jewish Appeal and the New York State Association of Retarded Citizens sponsor such Pooled Trusts for disabled persons.

The funds transferred to the trust are pooled in the Trust, but a separate account is still established for each individual beneficiary. The beneficiary can be under or over the age of 65. However, if the beneficiary is over the age of 65 there is a penalty period for assets transferred to the Pooled Trust for Medicaid nursing home benefits. These Trusts are usually utilized when no family member is available to act as a trustee, or when the beneficiary is over age 65.

Depending on the terms of the Pooled Trust, the disabled person may be able to dictate as to how the remaining balance of his or her account is to be distributed upon his or her death. But this would be subject to a payback to Medicaid. If the balance on death is retained by the Pooled Trust, then Medicaid is not entitled to a payback of the benefits paid.

Pooled Trusts play an important role when the disabled beneficiary has income that exceeds the monthly amount permitted by the community/home care Medicaid program. For example, if a Medicaid home care applicant has income in excess of the permitted $792.00 per month for the year 2012, he or she is allowed to contribute said excess income to a Pooled Trust. The Trust will then pay for the disabled beneficiary's household expenses such as mortgage, rent and taxes from the monthly income deposited into said Trust. A Pooled Trust often provides the beneficiary the financial ability to remain at home, and still be eligible for Medicaid home care.

C. General Drafting Considerations for SNTs

The following are some provisions to consider including in an SNT: First, a specific note referencing to the *Matter of Escher* within the body of the Trust, stating that the trust is intended to comply with *Escher*. Second, make a specific reference to EPTL 7-1.12 within the body of the Trust, stating that the Trust is intended to comply with its provisions. Third, use the requisite provision that the trust corpus is to be used on behalf of the disabled individual to "supplement" and "not supplant" government benefits such as Medicaid and SSI, and that the funds are not to be used for basic needs such as food, clothing and shelter. Despite the aforementioned provision, it is still important to give the Trustee the power to make distributions to meet the beneficiary's basic needs (food, clothing and shelter), although it may diminish the beneficiary's receipt of government benefits. This is commonly referred to as the "Notwithstanding Consequent Effect" provision of an SNT.

Third Party Trusts should also provide that the Trustee has the absolute discretion to pay out principal and income. However, the use of an ascertainable standard such as "for the health, education, maintenance or support" should be avoided.

D. Drafting Considerations for a Self Settled SNT to Be Approved by Court

When requesting that the court approve the Self Settled SNT, the petition to the court seeking said approval should articulate the following:

(a) The disabled beneficiary's life expectancy and life care plans;

(b) Projected growth of funds; and

(c) Projection of how long the funds will last.

With respect to court-ordered SNTs, the courts have required various requirements with regards to drafting.[4] In *Morales*, the court offered a model SNT to be used in New York City. Further, the Department of Social Services must be notified when a court-ordered Self Settled SNT is being requested.

In drafting an SNT it is important to be familiar with the specific disability of the beneficiary. For example, the needs of a competent physically disabled non-elderly beneficiary will be different than those of someone who is mentally incapacitated and physically disabled. The competent physically disabled beneficiary can be actively involved in decisions pertaining to the drafting and implementation of a Self Settled SNT, as well as his or her future care plan. For example, he or she can be made a member of an Advisory Committee to the Trustees.

It is also important to know what government benefits program or programs will support the beneficiary. Will it be institutional or non-institutional? This will provide the draftsman an idea as to how trust assets can be used, and the specific terms to be contained in the Trust as well as for the preparation of an additional memo to Trustees about their use.

For example, a severely developmentally disabled individual residing in a group home may have more predictable needs than an individual suffering from a psychiatric illness who resides in federally subsidized housing, and who receives outpatient mental health services.

The individual suffering from a psychiatric illness who resides in the federally subsidized housing will most likely be receiving SSI, and any distributions for shelter by the Trustee of the SNT will impact the SSI coverage.

Conversely, the individual in the group home may be receiving basic community Medicaid without SSI, so the Trustee may be free to use trust funds to support a reasonable housing arrangement and provide other necessities that will enhance the beneficiary's ability to reside in the community.

It is important to consider the functional level of the beneficiary, and his or her ability in an advisory capacity to participate in decisions regarding trust expenditures and management.

E. Effect of Medicaid Lien on Funding of an SNT

The U.S. Supreme Court's decision in *Arkansas HHS v. Ahlborn* (*Albhorn*) dramatically impacted the law on Medicaid liens and the funding of Supplemental Needs Trusts.[5]

Under *Ahlborn*, when a Medicaid recipient receives a personal injury settlement following the payment by Medicaid of medical costs, the Medicaid lien amount is limited to the amount of proceeds meant to compensate the recipient for medical costs, and not for damages for pain and suffering, lost wages and loss of future earnings. This rule also applies to the personal injury settlement or award of a minor.

In *Ahlborn*, there was an agreement apportioning the settlement between medical costs and other damages, but the Court held the result would be the same for a judge-allocated settlement or a jury award which establishes liability for both medical care and other kinds of damage.

Prior to *Ahlborn*, the rule in New York was that a valid Medicaid lien may be enforced against the entire amount of a personal injury settlement, award or verdict before the proceeds are transferred into a Supplemental Needs Trust.[6]

The use of a properly drafted Special Needs Trust will help give the parents of a non-elderly disabled child a level of comfort in knowing that they have taken a significant step in assuring the future care and well-being of their child. It is truly the cornerstone of any planning for a disabled person.

Endnotes

1. 42 U.S.C. 1382C(a)(3).
2. *Matter of Escher*, 94 Misc. 2d 952, aff'd, 75 A.D. 2d 531, 426 NYS 2d 1008.
3. See 42 U.S.C. 1382 c(a)(3).
4. See *Matter of DiGennaro*, 202 AD 2d 259 (2d Dept 1994); *Matter of Goldblatt*, 162 AD 2d 888; *Matter of Morales*, NYLJ 7/28/95 (Supreme Court Kings County).
5. *Arkansas HHS v. Ahlborn*, 547 US 268, 126 SC 1752 (2006).
6. See *Cricchio v. Pennisi*, 90 NY2d 296 (1997); *Link v. Town of Smithtown*, 683 NE2d 301 (1997).

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Bullying and a Discussion of *T.K. and S.K., Individually and on Behalf of L.K. v. New York City Department of Education*

By Tracey Spencer Walsh

Bullying is universal. You, and everyone you know, has been involved in bullying—either as the victim, the aggressor, as a bystander, or as all three. No one thinks bullying is "good," but when is bullying an actual denial of a free appropriate public education (FAPE)? When clients report to you that their child with special needs is being bullied in their public school, you will serve them well to ensure that they report the bullying to the principal, document their reports, and demand that the school district investigate the bullying and address it at the child's individualized education program (IEP) meeting. Bullying can be a FAPE violation depending on what the public school knows and whether it takes adequate steps to remedy the problem.

Students with disabilities are entitled to a FAPE under the federal Individuals with Disabilities Education Improvement Act (DEIA, more commonly known as IDEA). Until recently, no court of law had developed and applied a legal test to determine whether bullying by other students inhibits a disabled child from being educated appropriately, and what a school must do about it. In our office's case, *T.K. and S.K., Individually and on Behalf of L.K. v. New York City Department of Education*,[1] (*L.K.*), Judge Jack B. Weinstein wrote what is essentially *the* treatise on bullying and how courts should analyze whether or a school district has denied a student a FAPE. The court found that "an effective and appropriate education may be negated by child bullying. When a school fails to take reasonable steps to prevent such objectionable harassment of a student, it has denied her an educational benefit protected by statute."[2]

Each of us can recall bullying situations from our childhood. I grew up in an Irish immigrant enclave in the Bronx and attended the local parochial school. I can distinctly remember a boy in my elementary school who was repeatedly bullied. He was a quiet boy with red hair and glasses. He was a gentle boy. I can remember his mother and could clearly see how much she loved him. Perhaps he was perceived as a "mamma's boy"—I do not know. His name was Desmond and his tormentor was another boy, named Joe. Joe routinely and repeatedly teased Desmond and physically abused him whenever a teacher walked out of the room, or when we were in the schoolyard. (Joe, by the way, had a father who physically abused him, his siblings and his mother). The other boys would laugh and join in. I was what we call a "bystander." One day, I decided to intervene and demanded that Joe stop abusing Desmond. Unfortunately, that only made it worse for Desmond, because a "girl" had stood up for him. I did not realize that I was doing more harm than good and I felt so badly that I had made it worse for him.

I had wonderful teachers in that parochial school, but as is the case everywhere, there were a few rotten ones, too—especially the teachers who bullied students. My fifth grade math teacher, "Mrs. C," would make my classmate, Catherine, stand at the blackboard to try to solve a math problem that she clearly was unable to do and continue to make her stand there while she cried. This happened on more than one occasion. Mrs. C even threw an eraser at Catherine's head and called her "dummy." Looking back, I realize that Catherine most likely had a learning disability and my math teacher thought in her infinite wisdom that if she humiliated her enough she would "get it."

My sixth grade English teacher, "Sister H," would post on the bulletin board in the hallway, for everyone to see, the tests of students who failed her tests. Public humiliation was *de rigueur* for Sister H. I remember the stress and discomfort I felt watching other kids being humiliated and bullied.

In those days, we grew up amidst a school atmosphere where bullying was not only tolerated, but modeled. Today, we know that bullying has no place in our schools. Forty-five states have passed laws dealing with bullying and harassment.

"Whether a child is the victim, aggressor, or merely a bystander, research shows that those in a close vicinity to bullying are adversely marked."[3] Bullying is hot topic in our country today. We are shocked and saddened by stories of death and suicides resulting from bullying. Megan Meier, a 13-year-old, committed suicide in response to "cyberbullying" (bullying via Internet).[4] Tyler Clementi also committed suicide after his roommate posted on the Internet a video recorded by a secret webcam of Clementi having a homosexual relationship.[5]

In the world of disabilities, the parents of a 17-year-old boy with autism who committed suicide have filed suit against their school district claiming that it failed to prevent the bullying that led to their son's suicide. Tina Long, the boy's mother, reported that he hated school because the bullies "would spit in his food, call him 'gay,' smack him and say, 'I can't wait until you are six feet under!' A lot of [the] time he would go to the counselor's office and call me. We complained, but nothing much was done."[6]

L.K., a student classified with a disability, had an IEP and is accordingly afforded the rights under the IDEA and is entitled to a FAPE. L.K. attended P.S. 6, a New York City Public School, in a classroom with typically developing peers.

L.K. complained almost daily about being bullied at school. L.K.'s parents complained to the school principal at P.S. 6 and other school staff that L.K. was being bullied and was suffering from school avoidance. At one of L.K.'s IEP meetings, L.K.'s parents asked the IEP team to discuss the bullying problem. The principal at P.S. 6 refused to allow the team to consider the issue of bullying and took the position that bullying was not an appropriate topic of discussion. At no time did the principal have any type of meeting to discuss L.K.'s bullying allegations. The school did nothing, absolutely nothing, about L.K.'s bullying reports.

Since P.S. 6 failed to remedy, or even address, the bullying problem, L.K.'s parents removed L.K. from P.S. 6 and unilaterally placed her in a private school. L.K.'s parents sued New York City Department of Education (NYCDOE) seeking tuition reimbursement, alleging that NYCDOE deprived L.K. of a FAPE, because, among other claims, the bullying L.K. suffered made L.K.'s educational environment hostile. The Impartial Hearing Officer (IHO) found that bullying does not deny a student of a FAPE, largely because there was no legal precedent to make such a finding. L.K. appealed the decision to the State Review Office (SRO), who also found no denial of FAPE. "Ultimately, the SRO determined that bullying did not deprive L.K. of a FAPE, though no specific test appears to have been used in arriving at this conclusion."[7] L.K. then appealed to the district court in the Eastern District of New York. Judge Weinstein held that "under IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities."[8] The court further explained:

> The rule to be applied is as follows: When responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment is reported to have occurred. If harassment is found to have occurred, the school must take appropriate steps to prevent it in the future. These duties of a school exist even if the misconduct is covered by its anti-bullying policy, and regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.
>
> It is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education. The bullying need not be a reaction to or related to a particular disability.[9]

Judge Weinstein remanded *L.K.* back to the IHO for further evidentiary inquiry into the bullying allegations. The matter is still ongoing.

Endnotes

1. L.K. v. New York City Dep't. of Educ., 779 F. Supp. 2d 289 (E.D.N.Y. 2011).
2. *Id.* at 293.
3. *Id.* at 298 (internal citations omitted).
4. Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y Times, Nov. 28, 2007, *available at* http://www.nytimes.com/2007/11/28/us/28hoax.html.
5. John Schwartz, *Bullying, Suicide, Punishment*, N.Y. Times, Oct. 2, 2010, *available at* http://www.nytimes.com/2010/10/03/weekinreview/03schwartz.html.
6. Debra Cassens Weiss, *Suit Claims School Didn't Prevent Bullying that Drove Autistic Youth to Suicide*, A.B.A. J., Mar. 22, 2010, *available at* http://www.abajournal.com/news/article/suit_claims_school_didnt_prevent_bullying_that_drove_autistic_youth_to_suic/.
7. *L.K.*, 779 F. Supp. 2d at 311.
8. *Id.* at 316.
9. *Id.* at 317 (internal citations omitted).

Tracey Spencer Walsh, a partner at Mayerson & Associates, focuses her practice on legal issues related to students with autism and other developmental disabilities, and is a featured speaker at national autism conferences, as well as at schools educating children with autism. She litigates education issues regularly at the administrative and federal levels. Prior to working at Mayerson & Associates, Ms. Spencer Walsh served as a Dean of Students for a private school in Rye, New York, where she had the opportunity to advocate for students with learning differences.

Impartial Hearings— Practical Tips for Preparing and Conducting Them

By Susan Mills Richmond

As an Impartial Hearing Officer for special education matters, I am often asked about preparation for and how to maximize a litigant's chances for success at a Special Education Impartial Hearing. I am delighted to answer these questions because I truly enjoy being a hearing officer on these cases. In addition to my Impartial Hearing Officer work, I also appear and represent both districts and parents in many settings, including impartial hearings.

The process of impartial hearings is governed by 8 N.Y.C.R.R. Section 200.5(j), which provides in pertinent part:

> Impartial Due Process Hearings: (1) A parent or a school district must submit a complete due process complaint notice pursuant to subdivision (i) of this section prior to initiation of an impartial due process hearing on matters relating to the identification, evaluation or educational placement of a student with a disability, or the provision of a free appropriate public education to the child.[1]

The Commissioner's Regulations following subsection (j) go on to state in detail the timeline for requesting an impartial hearing, the permissible subject matter for such hearing, and the availability of mediation to resolve such hearing requests.[2] There are also detailed provisions in the Commissioner's Regulations requiring a Resolution Meeting to be scheduled by the school district within 15 days of receiving the due process notice "with the parents and the relevant member or members of the committee on special education."[3]

The following are practical pointers for attorneys for both parents and school districts in preparing for and conducting these impartial hearings:

A. Prepare Your Case Thoroughly and Present a Factually Detailed Case

Of course, this is good advice in every kind of case, but it especially holds true in these types of cases. The way this process works, a hearing officer usually does not have a substantial background in the facts and law concerned in the case and comes into the hearing only having read the due process hearing notice and the Answer, if that much. As a hearing officer, I generally ask that all of the pleadings be sent to me before the hearing starts, but that does not give me any background as to the documents to be proffered as evidence or the testimony to be taken at the hearing. The pre-hearing exchange of documents required by the Regulations, which is often called the "5-Day Rule," does not provide that copies of the documents exchanged by the parties are to be delivered to the hearing officer.[4] Thus, it is important to learn all of the important facts and educate the hearing officer at the hearing with all of the key facts concerning your claim and not to assume any kind of prior knowledge of the case by the hearing officer.

Along these lines, as a litigant's attorney, I have found that thorough preparation of witnesses in going over the questions to be asked on direct, and those anticipated to be asked on cross examination by the other side, is absolutely essential before calling them to testify at the hearing. And, when you prepare witnesses and the hearing gets postponed, it is essential to prepare the witnesses again so that the issues and the relevant fact are fresh in their minds right before they are called to testify.

B. Adhere to All Deadlines, Including the 5-Day Rule

The 5-Day Rule provides in pertinent part that "[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing."[5] If you fail to disclose a document at least five business days before the hearing begins—and that is business days, not calendar days—you may be precluded from using it at your hearing. However, most hearing officers, myself included, have interpreted the 5-Day Rule to be a "rolling" rule. That is, if less than 5 business days have elapsed between disclosure to the other side of a document and the first hearing date, we will allow that document to be admitted into evidence at the next scheduled hearing date if that next date is five business days from the date of disclosure, which it usually is. This is because most hearings take more than one day and are not scheduled continuously until finished, like a trial in court. Nonetheless, even though there may be a fix for not making your five day disclosures timely, I do not recommend relying on it. It is preferable to get all documents which you may pos-

sibly use at hearing to the other side on a more than timely basis.

C. Address the Impartial Hearing Officer at Hearing, Not the Other Counsel or Anyone Else

This may seem too basic to include in this text, but you would be surprised at how many times as a hearing officer I have had to stop attorneys from going too fast through their questioning of witnesses. It is wise for the attorney to confirm that the document being referred to by the witness is also being read and followed by the hearing officer. If you lose the hearing officer along the way, you are less likely to win your case.

Also, other hearing officers and I have indicated that we do not like it when counsel are taking opposite positions concerning, for instance, an objection, or the admissibility of documents, so that they start angrily speaking to each other instead of addressing their arguments to the hearing officer. Accordingly, it is recommended that all colloquies be addressed to the hearing officer.

D. Be Ready to Submit a Brief at the End of a Hearing

More often than not, impartial hearing officers will ask for post-hearing briefs on any and all issues of law which arose during the hearing. This is taking place at least in part because hearings these days usually take many days spread out over the course of at least several weeks and sometimes several months. The post-hearing briefs are important documents which may have a substantial effect on whether the hearing officer finds for one side or the other. During the hearing, I recommend that each attorney read the transcripts provided and make notes on the important factual points made by their side and the other side so as to be ready to write the post-hearing brief. Preparing digests of testimony taken is also quite helpful for the writing of the post-hearing brief. In addition, preparing concise legal memoranda during the course of the hearing on legal points which have arisen is also invaluable preparation for the post-hearing briefs likely to be needed at the end of the hearing.

Conclusion

There are many other areas which I could address in this summary of practical tips in preparing for and conducting an impartial hearing, but space constraints dictate that they be discussed at a later date. They include, but are not limited to, preparing for and defending against pre-hearing motions, that is, motions to dismiss for insufficiency, and how to maximize the benefit of a pre-hearing conference.

Endnotes

1. 8 N.Y.C.R.R. § 200.5(j).
2. § 200.5(j)(1)(i-iii).
3. § 200.5(j)(2).
4. § 200.5(j)(3)(xii).
5. § 200.5(j)(3)(xii).

Susan Mills Richmond has had significant experience in education law on both the school district and parent sides, including special and general education law. She also currently serves as an Impartial Hearing Officer for the New York State Department of Education. Additionally, Ms. Richmond practices law relating to bankruptcy, creditors' rights, credit repair, workout plans, and general commercial litigation. She is also a Co-Chair of the Westchester Women's Bar Association's Education and Bankruptcy Committees, is a Director of that Association, has published several articles in scholarly journals, and lectures frequently.

Representing Parents in Special Education Hearings Under the IDEA: New Opportunities for the Special Needs/Elder Law Attorney

By Andrew K. Cuddy and Michael J. Cuddy, Jr.

Andrew K. Cuddy

Difficult economic times may require small and mid-sized law firms to consider adding additional areas of practice to generate business. Clients who can easily afford the cost of legal services are increasingly rare; even longstanding clients may find themselves exploring ways to reduce their reliance on costly legal services. Representing parents in formal hearings to dispute their child's educational program, in a process established by the federal Individuals with Disabilities Education Act (IDEA), is one means to utilize a firm's existing expertise and human resources to generate new business opportunities. The fee-shifting provision of the IDEA makes this possible. When the parent is the prevailing party in special education litigation, the reasonable attorney fees and costs for such parents are borne by the school district

A. The Process

The IDEA, most recently revised and reauthorized in 2004, requires that every child with a disability receives a "free appropriate public education" (often called FAPE) in the least-restrictive environment. The child's educational program must be designed to prepare him or her for further education, employment, and independent living.[1] The educational services provided to the special needs child must be outlined in an Individualized Education Program (IEP) tailored to the child's unique learning needs. The IEP must include statements of annual goals and short-term objectives that reflect those needs.

By enacting the IDEA, Congress made clear its intent to provide a substantial and meaningful role for parents in the development and implementation of their child's educational program. The IDEA establishes numerous and significant parental rights with regard to the educational decision-making process, including parental consent, parental notification, access to educational records, the composition of the Committee on Special Education (CSE) that develops the child's IEP, and numerous other due process safeguards. School districts must inform parents of their rights, which are outlined in *Procedural Safeguards Notice: Rights of Parents with Children with Disabilities, Ages 3-21*.[2] This notice provides a relatively simple explanation of the parental role in the process.

Michael J. Cuddy, Jr.

Most notably, perhaps, under the IDEA, parents have the right to challenge a recommendation of the CSE, including the evaluation, disability classification, placement, instructional services and related services (*e.g.*, occupational therapy, speech therapy, adaptive physical education, and counseling). The due process hearing at which such a challenge is considered is called an impartial hearing.

Individual states may provide additional protections for parents and their special-needs children. In New York State, for example, statutes and the regulations of the Commissioner of Education largely mirror the IDEA, but in certain respects the state provides for enhanced levels of services and procedural protections. As an illustration, state regulations specifically address the needs of children with autism and their parents, requiring full-day educational programs for such students and for training and counseling for their parents. Furthermore, children with autism must receive services from teachers with a background in educating children with this disability.[3] Lastly, a demand for an impartial hearing under the IDEA may challenge a school district's interpretation of state and/or federal requirements regarding the provision of a free appropriate public education.

Under federal and state laws, the CSE is responsible for recommending the educational program and related services for children with disabilities. The CSE is comprised of certain mandated members, including the child's parent, a parent member who is also the parent of a special needs child, a general education teacher (in the case of students who, to one extent or another, are able to access the general education curriculum), a district representative, and a special education teacher familiar with the learning needs of the child. In some cases, the participation of a school psychologist or physician may be required. Of course, the participation of others (*e.g.*, related services providers such as occupational therapists, counselors, or those familiar with

the student's particular needs) may be necessary and appropriate. The parent may bring another person to a CSE meeting to provide moral or practical support.[4]

Although the CSE is charged with reaching consensus about the child's needs and services, disagreements are not infrequent. When a dispute about a child's evaluations, classification, school placement, or program of services arises, the district representative is responsible for making the recommendation. Parents often leave such meetings unsatisfied and distraught. The decision of the CSE or the district representative will be implemented unless the parent initiates legal action to challenge the proposed IEP (*i.e.*, to initiate an impartial hearing).

Parents initiate the hearing process by filing with the board of education a demand for a due process hearing. The demand should include: 1) the student's name, address, and current school placement; 2) a statement of the disagreement (*e.g.*, evaluations, classification, placement, program, annual goals, services); and 3) a proposal for resolving the disagreement. When a school district receives a demand for an impartial hearing, it must designate an impartial hearing officer from a rotational list. The hearing proceeds according to a tight timeline, although hearings may require numerous non-consecutive days over a period of weeks or months. In New York, both school districts and parents may appeal a hearing officer's decision to the State Review Officer.[5] However, most states do not find that this costly and inefficient additional layer of government is necessary. Appeals seldom require personal appearances. Once the administrative appeal process has been completed, further appeal may be made to state or federal court.

B. An Unfortunate Truth

It is increasingly apparent that school districts have limited resources, yet they face seemingly unlimited demands for access to those resources. Special education programs often lack effective advocates and widespread community support, because they are often labor intensive and serve a small portion of the typical school district's constituency. School administrators face difficult staffing and budgetary decisions, and in some cases, have resorted to *sotto voce* campaigns with CSE members to reduce costly services to special needs students—for reasons other than the learning needs of those students.

Too often, it is the parents of special needs children who are unable to advocate effectively for their children and who lack the resources to hire attorneys for this purpose. Although the *Procedural Safeguards Notice* requires school district to provide information about free or low-cost legal services (upon request), many communities lack legal services agencies with the resources or expertise to undertake an impartial hearing. Furthermore, many working families may not meet the income threshold for access to free or low-cost legal services, yet cannot afford to pay an attorney for the hours required to pursue an impartial hearing.

C. Fee-Shifting Provision of the IDEA

Like many other civil rights statutes, the IDEA includes a fee-shifting provision allowing for the recovery of reasonable attorney fees and costs from the school district in impartial hearing cases in which the parent is the prevailing party. As these hearings can be lengthy, fee recoveries can be in the tens of thousands of dollars, and in some cases, six figures.

Fee litigation occurs in state or federal court after the administrative process is completed. Many school districts will acknowledge their liability for the parent's attorney fees and costs, and negotiate an agreeable settlement of this issue without further litigation. When litigation is necessary, courts apply the "forum rule" in determining the reasonable rate to be applied to an attorney. Under this rule, work in a particular federal court district is generally compensated at the rate of comparably experienced attorneys in that federal court district. In the Southern and Eastern Districts of New York, for example, hourly rates as high as $415 have been awarded for experienced counsel in IDEA litigation; in the Northern and Western Districts of New York, federal courts have awarded hourly rates of $250 for such work.

Of course, the pursuit of reasonable attorney fees and costs is itself an endeavor that requires substantial attorney time and expense. School districts that pursue costly litigation regarding fees may find themselves liable for the further attorney fees and costs associated with the fee claim of the parent's attorney.

D. New Business Opportunities

A very typical impartial hearing may require between forty and eighty hours of attorney time. Each level of appeal requires greater expenditure of time. Eventually, a revenue stream may be developed from cases that have been hard-fought in litigation at various levels. The revenue stream may result from: 1) parents who have the resources to pay their legal representatives directly and who are in a position to wait for the completion of the litigation in the hope of recovering fees under the federal law's fee-shifting provision; 2) cases involving parents who have limited or no ability to pay their attorney but who are able to secure legal services from an attorney willing to rely on the fee-shifting provision in order to be paid; and 3) cases concluded by the negotiation with the school district of a settlement agreement that includes a provision for the payment by the district of the parent's attorney fees and costs.

Relatively few parents are able to afford the attorney fees and costs involved in litigating a special education dispute. Parents with such resources may create new business opportunities for an attorney willing to deploy his or her litigation skills on behalf of special needs children.

Many other parents of special needs children, however, are simply unable to afford to pay for legal services. Unfortunately, many such parents are facing the daily challenges of raising children, providing for one or more children with special needs, struggling to provide for their family in low-paying jobs, enduring temporary or long-term unemployment or underemployment. Often, parents are limited in advocacy skills, do not communicate effectively in English, do not understand their rights or assume that they are unable to access the services of an attorney due to their limited resources. Too often, such families reside in school districts that have historically underserved the most disadvantaged and the neediest students.[6] Medical professionals, social service agencies, and even members of the school staff may play important and consistent roles in educating such parents about their children's right to a free appropriate public education—and about the possibility of accessing free or low-cost services from attorneys knowledgeable about the fee-shifting provisions of the IDEA. Thus, the effective use of the fee-shifting provision may constitute a second revenue stream.

Many school districts recognize that costly litigation over one child's educational program may serve only to detract from the district's ability to fund educational programs and to poison the relationship for years to come. Through the process established by the IDEA, parents may come to better understand the school district's recommendation regarding their child's education. For a variety of reasons, many hearing demands are resolved and withdrawn as a result of settlement agreements, which may be negotiated by the attorneys for the parent and the school district. Since the IDEA's fee-shifting provisions are inapplicable to matters resolved outside of the formal hearing or judicial decision-making process, parent attorneys pursuing negotiated settlements of hearing demands should consider including in such settlement agreements a clear provision regarding the payment of the parent's attorney fees and costs. Such settlements may constitute a third possibility to secure payment of legal fees.

E. The Rewards of Practice

Each of us is able to recall one or more of the ideals that led us to pursue the study and practice of the law. The embers of those youthful fires continue to glow in many practitioners. The practice of special education law provides ample and diverse opportunities to deploy our legal skills on behalf of those most in need of effective advocacy, to improve the quality of education in our local communities, and to make a lasting difference in the lives of children whose capabilities are too often discounted by the educational establishment.

The demand for special education attorneys is great. The website of the Council of Parent Advocates and Attorneys lists only forty special education attorneys in New York State.[7] In the New York City public schools alone, there are nearly 5,000 impartial hearings annually, and most of those hearings involve parents who are not represented by attorneys. The field is wide open for attorneys wishing to devote some or all of their professional practice to the service of special needs children.

Small and mid-sized law firms with a need and desire to expand their practices and realize new opportunities would do well to consider expanding their practice into the field of special education law.

Endnotes

1. 20 U.S.C. § 1400 *et. seq.*
2. *Available at* http://www.p12.nysed.gov/specialed/publications/policy/psgn109.htm.
3. 8 NYCRR § 200.13.
4. A Committee on Preschool Special Education (CPSE) addresses the needs of a preschool child with a disability. The CPSE includes a representative of the municipality (in practice, the county) of the child's residence.
5. 8 NYCRR § 200.5.
6. *See generally, Minorities in Special Education*, U.S. Commission on Civil Rights (stating, "Minority parents are less likely to have the economic resources to retain lawyers and the experts necessary to make a credible challenge to the school system in a due process hearing.") (April 2009).
7. http://www.copaa.org/.

Andrew K. Cuddy is a graduate of The College of the Holy Cross (B.A., 1987) and the State University of New York at Buffalo (J.D., 1996). He has practiced special education law since 2001. His firm has represented the parents of special needs children throughout New York State, with an emphasis on underserved populations in New York City. Andrew is the author of *The Special Education Battlefield: A Guide to the Due Process Hearing and Other Tools of Effective Advocacy* (2007).

Michael J. Cuddy, Jr. was a teacher and school district administrator for twenty-one years before joining his brother Andrew in the practice of special education law in 2009. He is a graduate of Le Moyne College (B.A., 1982), Carnegie-Mellon University (M.A., 1983), State University of New York at Buffalo (J.D., 1988) and Canisius College (M.S., 1993).

Recent New York Cases

By Judith B. Raskin

17A: Creation of SNT *Nunc Pro Tunc*

17A Guardian sought creation of an SNT *nunc pro tunc*. Granted.[1]

Daniel J.V. lost his Supplemental Security Income (SSI) and Medicaid benefits upon inheriting approximately $88,000 from his grandmother. Petitioner's brother filed to establish a Supplemental Needs Trust (SNT) for Daniel returnable on October 26, 2010. His petition was denied because a guardian of the property had not been appointed. In January 2011, petitioner filed for 17A guardianship of the person. He amended the petition to seek guardianship of the property in June 2011 and was appointed October 13, 2011.

Between October 2010 and October 2011 Daniel incurred significant medical expenses which were not covered. Petitioner requested the SNT be established *nunc pro tunc* on October 26, 2010.

The court-approved the establishment of the SNT *nunc pro tunc* to October 26, 2010. Daniel did not have the authority to act to establish the trust himself at that time nor did anyone else. EPTL 7-1.12 provides for the creation of the SNT for persons with needs such as Daniel. The court denied attorney fees to petitioner's counsel for time spent on the first petition in October, 2010 requesting establishment of the SNT when there was no guardian appointed.

SNT Budget

Co-guardians submitted their proposed SNT budget for approval. Denied.[2]

An Infant Compromise Order in this action authorized the funding of an SNT for an 11-year-old. The court-appointed co-trustees submitted their proposed annual budget for the period Dec. 17, 2010 to Dec. 30, 2011. The trust was funded with $185,145.95. The court denied the application without prejudice for several reasons. The Department of Social Services was not given notice of this budget which would deplete five percent of the principal; the covered dates exceeded one year so the budget was not an annual one; gifts and travel expenses of $250.00 and $500.00 respectively were excessive for an 11-year-old; $2,500.00 for educational expenses without support were not reasonable.

An additional issue in this matter was that one of the trustees had previously replaced a bank trustee. He did so only after signing a compensation agreement with terms regarding his fees. The court rejected this agreement, stating that compensation would be pursuant to SCPA Sec. 2309 and court approval.

Fraudulent Conveyance

Facility sought default judgment against a resident's daughter for failure to pay NAMI. Denied.[3]

Facility brought an action for fraudulent conveyance against a prior resident's daughter for failure to pay $17,320.59 of the NAMI due the facility. To support its claim, the facility cited its substituted service upon the defendant, bills sent to defendant in care of an institution, letter from Human Resources Association (HRA) stating a new pension proceeds figure and an Internet-produced report showing gift to daughter of her mother's home for no consideration prior to the look-back period.

The court denied the default judgment. Assuming the service was proper, the plaintiff failed to produce evidence that the defendant committed any wrongdoing or that she received any of her mother's funds or that she had any legal responsibility to make the NAMI payments.

Article 81: Guardian Fees

Guardian requested fees for preparing accountings. Denied.[4]

The appellant, Gina-Marie Reitano, was a co-guardian pursuant to Article 81. In 2010 she received fees of several thousand dollars for the years 2003 through 2006 for her services as co-guardian. She then moved inter alia for attorney fees for the preparation of the accountings for the same years.

The court denied her request for attorney fees finding that she failed to show that the services she provided in preparing the accountings were legal in nature and not administrative.

Article 81: Guardian Accounts

Executor sought discovery of guardian's records for accounts that had been filed and court approved. Granted.[5]

The Article 81 guardian filed annual accounts for years 2003 through 2007. All but the 2007 account were

court approved after review by the examiner. On the death of the ward, the guardian filed his final report, served the executor of the ward's estate and sought final approval from the court. The executor objected and asked for the guardian's records to review all past accounts. The Supreme Court ruled that the executor was estopped from questioning the 2003 through 2006 accounts as they had been court approved but granted the discovery for the 2007 and final reports. The executor appealed.

The appellate court reversed and stated:

> To invoke the doctrine of collateral estoppel, the guardian had to establish that the executor, the incapacitated person, or a representative on her behalf received notice and had an opportunity to be heard, or that the guardian ever sought permission to render intermediate report upon notice pursuant to Mental Hygiene Law § 81.33.[6]

Article 81: Sale of Life Estate

Guardian entered into a contract to sell house in which she held remainder interest. She then petitioned to sell her grandmother's life estate in the property. Denied.[7]

M.R. resided in a house in which she owned a remainder interest. M.H., her grandmother, and the owner of a life estate in the property, was in a nursing home and not expected to return home. M.R. entered into a contract of sale as sole grantor on January 11, 2011. She then petitioned the court for approval to transfer her grandmother's life estate to herself so that she could complete the sale. She stated this would benefit M.H. by providing the proceeds of the life estate interest for her care and maintenance.

The court was not told of the contract of sale at the commencement of the guardianship proceeding where M.R.'s attorney for her as guardian also represented her in the contract of sale. The guardian was appointed June 28, 2011 in an order that prohibited the guardian from disposing of M.H.'s property without court approval.

The court denied the request to transfer the property as this would not provide any benefit to M.H. There was no guarantee that M.R. would turn over the life estate proceeds to her grandmother.

Endnotes

1. *Matter of Daniel J.V.*, 2011 NY Slip Op 52050U; 2011 N.Y. Misc. LEXIS 5396 (Surr. Ct., Bronx County, Nov. 15, 2011).
2. *S.D. v. 2150 LLC*, 2011 NY Slip Op 51740U; 2011 N.Y. Misc. LEXIS 4553 (Sup. Ct., Bronx County, Sept. 21, 2011).
3. *Queens Blvd. Extended Care Facility, Inc. v. Campanaro,* 2011 Slip Op 52151(U) (Civil Ct., Kings County, Nov. 15, 2011).
4. *Reitano v. DSS*, 2011 NY Slip Op 9333; 2011 N.Y. App. Div. LEXIS 9153 (App. Div., 2d Dept., Dec. 20, 2011).
5. *Salvati v. McCormack*, 2011 NY Slip Op 8666; 2011 N.Y. App. Div. LEXIS 8500 (App. Div., 1st Dept., Dec. 1, 2011).
6. *Id.*
7. *Matter of M.H.*, 2011 NY Slip Op 51785(U) (Sup. Ct., Bronx County, Sept. 27, 2011).

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Advance Directive News: Bits and Pieces

By Ellen G. Makofsky

The world marches on and we all need to keep up. With that in mind, I want to bring readers up to date with what has happened in 2011 in regard to two very interesting cases discussed in recent columns.

Follow-up to the *Stein* Case

Stein v. County of Nassau[1] illustrated the limits of the health care agent's power to act on behalf of the principal. The case concerned Milton Stein who was unresponsive when his wife called 911. The emergency ambulance technicians refused to follow Mrs. Stein's directions even though she was her husband's health care agent pursuant to a validly executed health care proxy. Although Mrs. Stein requested that her husband be taken to a particular hospital where his doctors practiced and his medical records were located, the emergency ambulance technicians insisted on taking Mr. Stein to another hospital which was located just one minute closer to the Stein residence. The emergency ambulance technicians explained that their instructions were to disregard health care proxies in a pre-hospital setting. Mrs. Stein brought suit and the Court held that contrary to the assertion of the emergency ambulance technicians, the health care agent's medical decision-making ability was not limited to a hospital setting, but also found that the right of a health care agent to act was not unlimited either. Among other restrictions, the health care agent was required to consult with a professional in regard to the principal's capacity prior to acting as health care agent.[2]

In response to *Stein* the Elder Law Section of the New York State Bar Association proposed an amendment to the Health Care Proxy Law which would allow a health care agent the limited authority to make health care decisions for a principal who was unconscious or unresponsive. The New York State Bar Association has made numerous attempts to lobby the State Legislature to approve the proposed amendment. To date the NYSBA proposal has not been adopted but the issue remains a serious one which needs attention as evidenced by the *Verponi* case below.

Verponi v. The City of New York, et al.,[3] has a similar fact pattern to *Stein*. A nurse from Visiting Nurse Service of New York entered plaintiff's home to treat plaintiff's 102-year-old mother and decided to call 911 because the nurse believed the 102-year-old was in respiratory arrest. The plaintiff was her mother's health care agent pursuant to a health care proxy and, as such, objected to the call and allegedly tried to physically prevent the EMTs from providing her mother oxygen and transporting her to the hospital. Plaintiff continued to object to the treatment her 102-year-old mother was receiving and was eventually handcuffed and suffered a series of physical and psychological injuries. She brought suit.[4] Defendant New York City argued that plaintiff was not empowered as her mother's agent because there was no written determination of incapacity by a physician.[5] In the proceeding it was revealed, as in *Stein*, the EMS's policy was not to honor a health care proxy outside of a hospital.[6] In reviewing the situation the court noted:

> To interpret Section 2983 to deny empowerment of an agent in a situation where the patient is non-responsive would nullify a patient's right to choose who will make health care decisions for them in such situations. It would transfer the decision making authority from the patient's chosen agent, to a health care provider, who in most cases, would have no prior knowledge of the patient or their history and would have no knowledge of what the patient's treatment preferences might be.[7]

Although the court stated that even if there was no written determination of incapacity made by a physician "that would not bar Plaintiff from being empowered as her mother's agent, if the mother was non-responsive and could not at that point make any decision whether to refuse or accept treatment by EMS."[8] The court did not further examine the facts as there was a determination that the individual police officers were entitled to qualified immunity.[9]

These two cases illustrate that legislative action is required to remedy a sorrowful situation. Hopefully the NYSBA will have more success in 2012 in advocating for an amendment to the Health Care Proxy Law. Change is sorely needed.

Update on *Matter of Zornow*

At the 2012 Annual Elder Law Section Meeting I spoke with Miles P. Zatkowsky, who represented Highland Hospital in *Matter of Zornow*.[10] He updated me on the appeal he was hoping to make in this case. I reported on the *Zornow* case in my last two Advance Directive columns because I found the case so disturb-

ing. Joan Zornow was 93-years-old and Catholic. She suffered from advanced Alzheimer's disease. Mrs. Zornow resided in a nursing home and a dispute arose among her seven children concerning a directive to withhold food and water. Eventually a guardianship proceeding was brought and the Court turned to the Family Health Care Decisions Act ("FHCDA") as the controlling statute in regard to surrogate health care decision-making for Mrs. Zornow.[11] The FHCDA requires an examination of an individual's wishes in regard to end of life decision-making. The presiding judge, Judge Polito, in making a determination regarding Mrs. Zornow's wishes, examined his view of Catholic doctrine and determined that Mrs. Zornow's wishes had to be "those of her Roman Catholic religious belief."[12] And therefore she was "obligated by her religious beliefs to continue to receive artificially administered food and water.…"[13] Following this decision, a feeding tube was inserted. Mrs. Zornow's daughter supplemented the tube feeding and provided Mrs. Zornow with oral nutrition from time to time. In December of 2011 Mrs. Zornow aspirated and died. It will be interesting to see if additional similar cases flow out of this same courtroom.

Endnotes

1. *Stein v. County of Nassau*, 642 F. Supp. 2d 135 (E.D.N.Y. 2009).
2. *Id.* at 11-12.
3. *Verponi v. City of N.Y.*, No. 16258/2004, slip op. (N.Y. Sup. Ct. May 19, 2011).
4. *Id.* at 2-3.
5. *Id.* at 7.
6. *Id.* at 2.
7. *Id.* at 9.
8. *Id.*
9. *Id.* at 10-11.
10. *In the Matter of Carole Zornow*, 919 N.Y.S.2d 273 (N.Y. Sup. Ct. 2010) (decision further clarified by *In the Matter of Carole Zornow*, No. 10/7263, Slip Op. (N.Y. Sup. Ct. Dec. 13, 2011)).
11. Family Health Care Decisions Act, N.Y. Pub. Health Law § 2994 (2010).
12. *In the Matter of Carole Zornow*, 919 N.Y.S.2d at 276.
13. *Id.*

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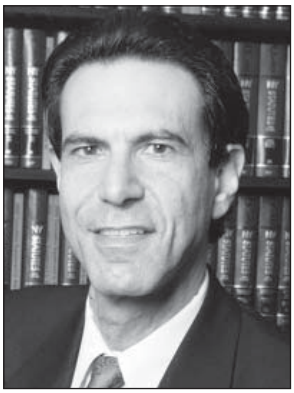
Results of Practice Management and Technology Committee's Survey

By Ronald A. Fatoullah and Robert J. Kurre



Ronald A. Fatoullah

Recently, members of the Elder Law Section participated in a survey regarding various practice management and technology issues. The survey was developed by the Practice Management and Technology Committee in order to share information about our members' current practices, and to better understand those areas where practitioners have indicated they face the most difficult challenges. Some of the highlights of the survey responses are as follows:

Questions 1, 2 and 3 focused on "delegating." Question 1 asked if respondents have discovered an efficient method of delegating tasks and related matters to staff members. Surprisingly, only 31% stated that they have instituted an efficient system of delegating, meaning that almost 70% of us could learn how to better delegate matters to our staffs. The Practice Management and Technology Committee will consider a conference call on effective delegation techniques.

Question 2 asked attorneys to describe efficient methods they have used to delegate tasks to staff. A common theme for efficient delegating involves using a trusted mechanism for creating lists of open tasks or matters, a written sublist of action items required to complete the task or matter, and calendaring follow-up meetings to make sure that staff members are, in fact, staying on task. Successful delegation involves creating a method for tracking delegated tasks until they have been completed. A majority of the attorneys who responded to the survey have set aside certain days and times to review open matters and tasks with staff members. Attorneys create open matter and task lists on several programs including Time Matters, Excel, Outlook, One Note, AIM/Perfect Law, Rocket Matter, Chaos, Word, and, last but not least, paper.

Question 3 asked respondents who do not have an efficient method of delegating tasks to describe what is troublesome about the method(s) they currently employ. A common frustration noted by respondents was the inability to stay on top of delegated matters and tasks. If a method of delegating has been established, respondents stated their office staffs have not consistently had the wherewithal to follow through until the tasks are completed. There is also an issue with "buy in" from staff members, some of whom may not embrace the firm's system on delegation. Frustrated attorneys noted that they tend to complete tasks on their own rather than delegate, which would free up their time to concentrate on other matters.

Robert J. Kurre

Question 4 concerned the use of part-time and per diem help, virtual assistants, and client maintenance programs. More than half (54.6%) of the respondents use part-time employees, while only 20.5% use per diem help. Only 10.3% use virtual assistants or other systems that work exclusively outside the office, while only 4.2% have developed a client membership/maintenance program in which clients pay an annual fee for providing ongoing legal services.

Question 5 addressed the amount of time spent on non-billable tasks such as administrative duties and marketing. Most respondents (59.5%) stated that they spend anywhere from 2% to 25% of their time on these non-billable matters, while 32.8% spend from 26%-50% of their time on these operations, 3.4% spend no time, and only 0.9% spend 76%-100% of their time on non-billable tasks.

Question 6 asked respondents to provide tips on how to integrate new attorneys into the practice of Elder Law. Many respondents suggested that an attorney will sit in on meetings and hearings and review all work given to them very closely. There was a suggestion to initially have the new attorney learn from the bottom up, having the attorney perform the tasks of an administrative assistant for a period of time, than operate as a paralegal, and only when he/she thoroughly understands the workings of the office, then to move him/her up to an associate attorney's position. A new attorney can learn by joining the Elder Law Section of the NYSBA, attending seminars, and participating in the listserv. Providing written procedures and checklists for the new attorney to follow will give him/her a concrete idea of the steps required to complete a task, and serves as a good first step in creating uniformity in the firm. A suggestion we have heard before is to hire slow and fire fast if the attorney is not cut out for this

type of work, is not efficient, or cannot assimilate into the firm's culture. However, it can be important not to expect miracles right away. One respondent accurately stated that it takes three (3) years to earn the proficiency as an Elder Law attorney well enough to practice at an acceptable level; so be patient! If you have hired the right person you will ultimately be rewarded.

Question 7 concerned practice management topics the respondents would like to see addressed by the Committee. The most prevalent responses (not in any particular order) included techniques for motivating staff, recommendations regarding practice management software, and advice concerning retirement planning.

Questions 8 and 9 pertained to client billing programs. Many different billing methods are being used, with Timeslips being the most popular program. Of the 33 respondents who indicated they use Timeslips, 26 (78.79%) indicated that they recommend Timeslips to other attorneys. As the importance of capturing, invoicing and collecting on one's billable time cannot be overstated, the implementation of a proper billing system is essential.

Question 10 addressed the topic of scanning. A full 87% of the respondents indicated that they are at least doing some scanning in their office, with almost a third (32.2%) of all respondents indicating they are scanning all or most of the documents in their office.

Question 11 asked which technology has had the most impact on the respondent's practice. The number one answer (35.5%) was the use of HotDocs or other document assembly programs in the respondent's practice, followed closely by scanning (31.8%).

Questions 12, 13 and 14 all pertained to managing e-mails. Question 12 inquired into the frequency at which respondents check their e-mail. The number one response to Question 12 (48.7%) was that respondents checked their e-mail more than four times a day. It should come as no surprise considering the volume of e-mails that the average elder law practitioner receives; most respondents indicated that they do not consider themselves as having an acceptable system of managing their e-mails (Question 13). Question 14 asked for those respondents who have a system in place to manage their e-mails to describe their system. Some of the most helpful responses indicated that e-mails should be reviewed regularly but only once or twice a day and that e-mails should be sorted to different folders or marked upon initial review.

It is important to understand the demographics of the attorneys who participated in the survey. Question 16 asked the respondents to indicate the number of attorneys in their office or organization. We were surprised to learn that more than 50% of the respondents (62 out of 118) indicated that they were sole practitioners. Also, as indicated by the survey results, the practice management needs of sole practitioners are very different than those needs of attorneys in larger firms.

Question 17 asked the respondents to indicate the age at which they plan to retire. The majority of respondents indicated that they did not know. Only 7.6% of the respondents indicated they would retire before age 66. Another 14.4% of the respondents indicated they do not anticipate ever retiring.

The complete survey results can be found at www.nysba.org/ElderSurveyResults.

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Elder Law Section Ethics Committee Poll #3

By Judith B. Raskin, Chair, Natalie J. Kaplan, Vice Chair

Judith B. Raskin

The Ethics Committee e-mailed its Poll #3 on January 9, 2012 to all Section members. On January 12, 2012 the committee e-mailed Poll #3 Results and Commentary.

Poll #3 offered this scenario:

> You have just had a Medicaid planning conference with a parent-client and her adult child. Parent then tells you that—even though they know that she is the client—child has agreed to pay for your services. Under these circumstances, do the NY *Rules of Professional Conduct* ("RPC") permit you to accept payment from the child?

The poll offered three choices.

a) Yes
b) No
c) Don't know

The numbers below show the distribution of the 292 answers received:

Yes	73.6%	(N = 215)
No	14.4%	(N = 42)
Don't know	12.0%	(N = 35)

Poll Answer: No

The attorney cannot accept child's payment under RPC 1.8(f) without meeting three conditions:

1) Informed consent from the client, as described in RPC 1.0(j);

2) Non-interference with either the lawyer's independent judgment or with the attorney-client relationship; and,

3) Protected confidentiality, as required by RPC 1.6.

New York's informed consent requirement, RPC 1.0(j), places the responsibility with the attorney to recognize and articulate the risks of, and alternatives to, the potential conflict which is inherent in third party payments. The risks can be as diverse as pressure on the parent from an only heir for outright transfers rather than transfers in trust to upheaval in an extended family over the perceived influence of the paying third party.

Natalie J. Kaplan

NAELA's Aspirational Standard, B4, is similar regarding informed consent but its commentary recommends a client's written consent and explicit statements of who the client is and the client's right to confidentiality.

The second condition of RPC 1.6(f), oddly, seeks "no interference with the lawyer's independent professional judgment…." Unlike the other two requirements, for informed consent and confidentiality, no interference is outside the attorney's control. For example, a third party's threat to refuse payment for services which he or she didn't approve constitutes "interference" which the attorney can't prevent. Extra time is required to address it with the client and the attorney's decision-making processes are cluttered with conflict of possible financial loss.

Attorneys may conclude that often the simplest course is to refuse third party payment.

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- **Ethics Opinions from 1964 – present**
- **NYSBA Reports – the substantive work of the Association**
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Go to www.nysba.org/ElderJournal to access:

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- *Elder and Special Needs Law Journal* (2011-present) and the *Elder Law Attorney* (2000-2011) Searchable Index
- Searchable articles from the *Elder and Special Needs Law Journal* (2011-present) and the *Elder Law Attorney* (2000-2011) that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

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