

Elder Law Attorney

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

Message from the Outgoing Chair

It has been an honor to serve as your Chair of the Elder Law Section during our 20th Anniversary Year! As you witnessed during the past year, much has been accomplished! With the assistance of my Officers and Executive Committee members, our Section has taken a leading role to support NYSBA in recommending necessary amendments to the new power of attorney statute, offered substantial opportunities to educate



Michael J. Amoruso

(continued on page 2)

Message from the Incoming Chair

Support Our Section

I am honored to serve as the Chair of your Elder Law Section during 2010 to 2011. Those who have served before me have accomplished so much for the Section and the legal community as a whole, and have established the Section as a resource for the entire New York State Bar Association. I am fortunate to follow recent chairs Joan Robert, Howard Krooks, Dan Fish, Ellen Makofsky, Ami Longstreet, Timothy



Sharon Kovacs Gruer

(continued on page 2)

Inside this Issue

Message from the Co-Editors in Chief.....	3
(Andrea Lowenthal and David R. Okrent)	
Medicaid Trusts: What's Your Basis?.....	4
(Bernard A. Krooks and Jonathan G. Blattmachr)	
New York State Power of Attorney Law and Proposed Amendments.....	7
(David Goldfarb)	
Using Long-Term Care Insurance as Part of the Elder Care Plan.....	10
(Jeffrey A. Asher)	
Are Inherited IRAs Subject to Creditors' Rights?	15
(Seymour Goldberg)	
Helping Homeowners Keep Their Homes During the Nation's Largest Sub-Prime Mortgage Meltdown and Foreclosure Crisis in Our Country's History	17
(Anneris M. Peña)	
The Forgotten Asset: The Buy-Sell Agreements in Partnerships, Corporations and Limited Liability Companies and Elder Law	27
(Bruce A. Rothenberg)	

Social Adult Day Services: Structure, Support and Community for Frail Older Adults and Persons with Dementia.....	31
(Julie Wexler)	
The Story of Shelter: Intervention and Prevention of Elder Abuse	33
(Deirdre M.W. Lok and Joy Solomon)	
Adult Day Health Care Services: A Community Option for the Elderly	37
(Sandra Butler)	
Accessing Fair Hearing Decisions.....	39
(Melinda Bellus and Beth Polner Abrahams)	
Advance Directive News: The Family Health Care Decisions Act	41
(Ellen G. Makofsky)	
Recent New York Cases	43
(Judith B. Raskin)	
Guardianship News: Court Evaluator's Redux	45
(Robert Kruger)	
Notes and Anecdotes.....	47

A Message from the Outgoing Chair

(Continued from page 1)

our members regarding the new law and developments, furthered initiatives to improve supplemental needs trust administration, guardianship and advanced directives, offered highly interactive educational programming during each of our meetings, continued the long-standing tradition of our pro bono clinics, established a law school task force to partner with our State's law schools for the development of elder law and special needs specific clinics and mentorship opportunities for students interested in our area of law, and, of course, we continued our steadfast commitment to lobby Albany to protect the elderly and disabled in our State. I want to commend each of the Officers and members of the Executive Committee on a challenging job well done. A leader can bring a strong vision for the future direction of our Section, however, it requires the daily commitment of the Officers, Executive Committee and our membership to make that vision a reality. I thank each and every one of you for meeting my call to action!

Your incoming Chair, Sharon Gruer, will lead this Section to new heights. I am excited to see Sharon bring her vision to the forefront and continue laying the path created by all of our Section's Past Chairs. Sharon cannot do this alone, however; she will need the assistance of each of you! Please respond to Sharon's call to action as you have mine.

Remember, my friends, though we all live very busy lives, the time to be involved is now. Renew your commitment to NYSBA. The bar association offers so much to those of us who embrace the challenge of balancing our practice with professional involvement.

Thank you again for the incredible honor of serving as your Chair.

Michael J. Amoruso

A Message from the Incoming Chair

(Continued from page 1)

Cassery and Michael Amoruso, each of whom initiated many programs, services and resources for our Section members.

Each of us should acknowledge all that Michael Amoruso, my predecessor, accomplished during his diligent leadership over the past year. He tirelessly kept abreast of all the changes in the power of attorney statute, the budget bill, health care cases and Medicaid rules, and kept the Section informed every step of the way. He initiated various task forces and groups to focus on different issues so that the Section was able to get up to speed quickly and focus on the changes around us. He also maintained an inclusive atmosphere within the Section. Mike Amoruso is to be commended for his outstanding and energetic leadership this past year, and we are thankful to him for his commitment and guidance.

I am looking forward to working with my fellow officers, T. David Stapleton, Anthony Enea, Fran Pan-teleo and Richard Weinblatt, to continue the high bar set by our predecessors. I also look forward to working with our industrious executive committee.

I am committed to increasing the diversity of our members and making it easier to serve the many different types of communities with different languages and customs in our great state.

To that end, I intend to establish a database of the various languages spoken by our Section members,

so that we may better serve our culturally diverse communities.

I also intend to support an emphasis on further integrating special needs in the elder law arena, to emphasize the issues of housing, treatment and care with regard to members of our society with mental health issues, to have an open dialog as to the issues and innovations in these essential areas of our practice and to impart that knowledge to our Section members.

The Section will continue to protect our clients' interests and closely monitor any proposed legislation and proposed budget changes.

We intend to use webcasts and e-blasts for timely updates and will continue to hold the outstanding and innovative programs for which our Section is known.

My commitment to the Section is to continue the outstanding work initiated by our past chairs, and I will make sure that the Section meetings are practice specific, relevant and thought-provoking for our members.

Our Section will continue its excellent work on the power of attorney task force, the budget task force, the pro bono initiatives started by Ellen Makofsky, the proposed Compact legislation, the proposed modifications

(continued on page 40)

Message from the Co-Editors in Chief

This Summer 2010 issue of the *Elder Law Attorney* includes articles from several senior members of our Section and stalwart contributors, and new contributing authors as well. We continue to reach out to members of the NYSBA and other professionals whose work and lives affect the practice of Elder Law and the community of clients we serve.

We have made this outreach a priority, and ask that you, our readers, keep the *Elder Law Attorney* in mind in your day-to-day interaction with other attorneys, social workers, physicians, public health professionals and others whose contribution to the community of the elderly can be reflected in these pages for the benefit of our Section.

This issue is also the first in which we have incorporated four excellent students into the editorial and production process: Elizabeth Briand (a second year student at New York Law School) and Brian Grimsley (a third year student at Albany Law School), both of whom are active members of the NAELA Student Chapter and of the NYSBA's Elder Law Student Law School task force; and they are joined by Marrisa Trachtenberg (a second year student at SUNY Buffalo Law School), who is the 2009 Elder Law Scholar, and award sponsored by the NYSBA Foundation, and Gennady Zilberman (a second year student at Brooklyn Law School) who has a demonstrated interest in elder law and trusts and estates. We welcome them to the *Elder Law Attorney* and appreciate their commitment to the Elder Law Section and this publication. Kim Trigoboff,



a recent graduate of New York Law School, and an active member of our Section, provided valuable assistance in the development of our student-editor team. We appreciate the invaluable assistance provided by Gabrielle Floen (of David Okrent's office) who did a superb job facilitating the production process, including communications with authors and editors for this issue.



Finally, we have introduced a new column, Notes and Anecdotes, because we often have requests to include letters, observations and information other than articles. In this first column, we have published a letter from a wonderful woman, Elaine McGrath, who like many of our clients has faced the transition from home to assisted living and asked to share her experience with us. The practice of Elder Law, perhaps more than others, makes us acutely aware of the challenges so many elders and their families face, and we welcome you to share your notes and anecdotes on the practice of Elder Law with our Section.

From the Co-Editors in Chief

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ELDER LAW SECTION

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Medicaid Trusts: What's Your Basis?

By Bernard A. Krooks and Jonathan G. Blattmachr

A. Introduction

Much has changed in the world of elder law over the years; especially, in the past few years with the enactment and implementation of the DRA in New York.¹ One tool in the elder law attorney's arsenal that has survived in this changing environment is the Medicaid trust. Although there have been challenges to the continued viability of the Medicaid trust by the state and local Medicaid agencies, it remains a very valuable planning technique for our clients.



Bernard A. Krooks

Under the typical Medicaid trust, the individual who creates the trust (the "grantor") typically retains the right to income for life. For many seniors, this is important as they need the income to maintain their quality of life. If the trust is created at least 60 months before applying for Medicaid benefits, the existence of the trust will not foreclose qualifying for the benefits and the entire corpus of the trust may be protected from the cost of long-term care. If the trust is created within such a 60-month period, then a portion of the trust may still be protected, depending on the specific client circumstances.

B. Some Tax Issues to Consider

- 1. Larger Gift Issues.** Although a Medicaid Trust typically is created for asset protection, consideration must be given to several tax issues. One is whether a taxable gift will be made when the trust is created. Usually, the interest in the trust retained by the grantor is not treated as a gift for gift tax purposes. But the interest in the trust which is not retained by the grantor can be a gift. That may use all or part of the grantor's lifetime gift tax exemption or result in gift tax being due. In fact, under section 2702 of the Internal Revenue Code of 1986 as amended ("Code"), the gift made to the successor beneficiaries (that is, the persons to whom the trust assets will be paid when the grantor dies) can be deemed to be equal to the entire value of the assets transferred to the trust.² In other words, the interest (typically, the right to all of the trust's income) retained by the grantor is ignored in valuing the gift to the successor beneficiaries if those successors are members of the grantor's

family as defined for purposes of that section (including the grantor's spouse, descendants and siblings and descendants of the spouse).

For 2010, there is another onerous tax rule. Under Section 2511(c), an individual will be treated as making a gift, regardless of the control he

or she retains over the trust if the trust, is not a grantor trust in its entirety.³ Where an individual retains only the right to income but neither eligibility to receive nor the right to control the ultimate disposition of the trust principal, only the income portion and not the principal portion of the trust might be treated as a grantor trust—and that also means the interests in the trust may constitute a taxable gift.



Jonathan G. Blattmachr

- 2. Estate Tax Inclusion Issue.** The retention of the right to the income from the trust causes the entire trust to be included in the gross estate of the grantor at his or her death for Federal estate tax purposes.⁴ In other words, making a taxable gift in setting up the trust does not reduce the estate tax burden on the property at death, although it may result in an overall reduction of taxes if gift tax is paid on a gift made more than three years before death. Of course, if no gift tax was payable and no other use would have been made of the gift tax exemption used in creating the trust, there is no significant "downside" in having the taxable gift being made and causing the trust to be included in the grantor's gross estate. In fact, while the Federal estate tax was in effect, there was a potential benefit: an automatic "step up" in basis for income tax purposes to estate tax value because the trust is included in the grantor's gross estate for Federal estate tax purposes.⁵
- 3. Death While There Is No Federal Estate Tax.** But this year there is no Federal estate tax (although some in Congress have proposed for a retroactive reinstatement of the tax effective as January 1, 2010). And while the estate tax is not in effect, there is no step-up in basis. Rather, the income tax basis of most inherited assets

for someone who dies this year is the lesser of the property's fair market value at death or the decedent's basis. In other words, for this year, there is a modified carryover basis regime.

- 4. Carryover Basis Adjustments or Not.** However, two adjustments to the "inherited" basis of carryover basis property are permitted. Under section 1022(b) of the Code, the basis of the carryover assets may be increased by \$1.3 million (plus certain capital, operating and other losses of the decedent) but not above fair market value at death, although, if the decedent was a non-resident alien of the United States, the basis adjustment is limited to \$60,000.⁶ In addition, under section 1022(c), an additional \$3 million increase in basis is allowed, but again not above fair market value at death, and whether or not the decedent and/or his or her spouse is a U.S. citizen or resident, with respect to "qualified spousal property."⁷ Qualified spousal property consists of assets "inherited" directly by the surviving spouse or by a so-called "qualified terminable interest property" or "QTIP" trust.

Not all assets that would have been in the decedent's gross estate if he or she had died while the Federal estate tax was in effect are property to which the basis increases may be applied. As a general rule, only assets both "owned by" and "acquired from" the decedent are eligible for adjustment. Section 1022 clarifies that assets in a revocable trust (with respect to which the election under section 645 may be made so it is treated as part of the decedent's probate estate for Federal income tax purpose), assets in a trust over which the decedent retained the power to control the beneficial enjoyment and assets that pass by reason of the decedent's death without consideration are eligible for the basis adjustment because they are treated as owned by the decedent at the time of death. In addition, certain joint property is so eligible as is property received by the decedent within three years of death from his or her spouse (but not to the extent that spouse has received the property by gifts from others within that three-year period) but not from anyone else. Property subject to the decedent's general power of appointment, even though such property would be included in the decedent's gross estate for Federal estate tax purposes under section 2041, is not eligible for the basis adjustment.

- 5. Carryover Basis and Medicaid Trusts.** Somewhat surprising, perhaps, property in which the decedent had retained the right to income for life does not appear to be eligible for the basis adjustment because it does not appear to be ac-

quired from the decedent. Thus, there may be no basis adjustment when the recipient dies with respect to the assets in the trust (even though there would have been a step-up in basis when the decedent died if the Federal estate tax were in effect).

- 6. The Cure to Avoiding the Large Gift Tax on Creating the Medicaid Trust and to Obtain the Carryover Basis Adjustments.** There's a relatively simple way for an individual to avoid being deemed as making any gift (much less a larger gift under section 2702) in creating a Medicaid Trust from which an individual retains the income for life. And that way is to retain the power to control where the property passes at death by "appointing" it to someone other than the grantor, his or her estate or creditors or creditors of his or her estate. That power to appoint, even if it is exercisable only with the consent of another person who is not a beneficiary, will render the gift of all interests in the Medicaid trust incomplete under Treas. Reg. § 25.2511-2. An incomplete gift, of course, means there is no use made of the lifetime gift tax exemption and no gift tax due. Because the retention of the income interest causes the entire trust to be included in the grantor's gross estate if there is a Federal estate tax in effect at death, there is no detriment at all in making the gift to the trust entirely incomplete—and the estate tax inclusion means, when the estate tax is in effect, that the trust assets will receive an income tax step-up in basis.

If the grantor dies this year, there is another benefit to avoiding making the gift complete—that is, it may permit the trust assets to be eligible for the basis adjustment under the carryover basis rules if the grantor dies this year. That is because the basis adjustments apply where the grantor has retained the power to control the beneficial enjoyment of the trust assets which the grantor will have done through the retained power of appointment. And that will be the case even if the grantor may exercise the retained power of appointment only with the consent of someone else who is not a trust beneficiary.

There is an additional hurdle, however, for the carryover basis adjustments: not only must the property have been acquired from the decedent, it also must have been owned by the decedent at death. Property in a trust (such as a QTIP trust that the decedent's spouse had created for him or her) would not apparently be treated as owned by the decedent for carryover basis purposes even though it would have been included in the decedent's gross estate under section 2044

if the Federal estate tax were in effect. However, it is the official position of the Internal Revenue Service that all assets in a grantor trust are treated for all income tax purposes as owned by the grantor.⁸ A grantor trust, of course, is one the income, deductions and credits of which are attributed to the grantor under section 671.⁹

A Medicaid Trust from which the grantor has retained the right (or merely eligibility) to receive the income and over which the grantor has retained the power to specify how the corpus will pass at death is a grantor trust in its entirety under sections 677 and 674.¹⁰ Hence, it seems that such a Medicaid trust is a grantor trust in its entirety and, therefore, should be treated as owned by the grantor at death because the carryover basis provisions of section 1022 are income tax provisions and Rev. Rul. 85-13 applies for all income tax purposes.¹¹ It also means new section 2511(c) does not apply. If the grantor had retained only an income interest (and no control over corpus), the trust likely would be a grantor trust only with respect to income which, in turn, probably means it would not be treated under that revenue ruling as entirely owned by the grantor for income tax purposes and, therefore, would not be eligible for the basis adjustments under the carryover basis rules. It should be mentioned, however, there are other ways in which a trust can be made a grantor trust in its entirety (such as having the grantor retain the power to substitute other assets of equivalent value for those in the trust).¹² For those of you who like to wear belts *and* suspenders, this approach might appeal to you. In other words, the grantor retains a limited power of appointment and also the power to substitute property of equivalent value.

C. Conclusions

Whenever creating a Medicaid Trust, consideration should be given to having the grantor retain a power to control the ultimate destiny of the trust property when he or she dies. That will prevent any taxable gift being made when the trust is created. It also will ensure that the trust property will be eligible for the carryover basis adjustments if he or she dies this year. Although one might argue that the basis adjustments are allowed on the ground that the retention of the income interest is a type of retention of the power to control the beneficial enjoyment of the trust property or will be a transfer taking effect at death, that argument might fail. Retaining the power of control makes the result more likely.

Endnotes

1. Deficit Reduction Act of 2005.
2. I.R.C. (Internal Revenue Code- 26 U.S.C.) § 2702 .
3. I.R.C. § 2511 (c).
4. I.R.C. § 2036 (a) (1).
5. I.R.C. § 1014 (a).
6. I.R.C. § 1022 (b).
7. I.R.C. § 1022 (c).
8. Rev. Rul. 85-13, 1985-1 CB 184.
9. I.R.C. § 671.
10. I.R.C. § 674; I.R.C. § 677.
11. Rev. Rul. 85-13.
12. I.R.C. § 675 (4) (c).

Bernard A. Krooks is the founding partner of Littman Krooks LLP, with offices in Manhattan, White Plains and Fishkill. Mr. Krooks is past Chair of the Elder Law Section of NYSBA, past President of NAELA, and past President of the Special Needs Alliance. In addition, he is a fellow of ACTEC and co-editor of Wealth Transfer Planning's Elder Law and Special Needs Document drafting software.

Jonathan Blattmachr is a member of the Alaska, California and New York Bars, and retired partner from the law firm of Milbank, Tweed, Hadley & McCloy LLP. He has served as a lecturer-in-law of the Columbia University School of Law and an Adjunct Professor of Law at New York University Law School. He is a former Chairperson of the Trusts & Estates Law Section of the New York State Bar Association and of other committees of the New York State Bar Association and the American Bar Association. Mr. Blattmachr is a Fellow and a former Regent of the American College of Trust and Estate Counsel and past Chair of its Estate and Gift Tax Committee. He is author or co-author of over 300 articles and five books on estate and tax planning topics including a new book published by the Practising Law Institute on Circular 230. He has been designated as a Distinguished Accredited Estate Planner by the National Association of Estate Planners & Councils. Mr. Blattmachr also is a co-developer of Wealth Transfer Planning, a software system published for lawyers which provides specific client advice and automated document assembly for Wills, trusts, powers of attorneys and other estate planning documents.

A similar version of this article appeared in the May 2010 issue of Trusts & Estates Magazine.

New York State Power of Attorney Law and Proposed Amendments

By David Goldfarb

Assemblywoman Helene Weinstein has revised her “clean-up” bill for the power of attorney law to incorporate many of the recommendations of the New York State Bar Association, its Task Force on the Power of Attorney, and the Elder Law Section’s Ad Hoc Committee on the Power of Attorney. The bill is A8392-C (S7288-A in the State Senate) and at the time of this writing it has passed the Assembly and the Senate, but has not been signed by the Governor. This may well have changed by the time you are reading this. The bill would amend various sections of Article 5, Title 15 of the New York General Obligations Law. References in this article are to sections of the N.Y. General Obligations Law as it is proposed to be amended.



First, the bill would exclude from the law a number of powers of attorney in a new section, 5-1501C. The exclusions pertain primarily to commercial and governmental transactions that were probably never intended to come under the new law. The powers of attorney excluded are:

- (1) those given primarily for a business or commercial purpose including (a) a power to the extent it is coupled with an interest in the subject of the power; (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; or (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets;
- (2) a proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- (3) a power created on a form prescribed by a government or governmental agency for a governmental purpose;
- (4) a power authorizing a third party to prepare, execute, deliver, submit and /or file a document or instrument with a government or government agency or other third party;
- (5) a power authorizing a financial institution or its employee to take action relating to an

account holding cash, securities, commodities or other financial assets on behalf of the person giving the power;

- (6) a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity;
- (7) a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, or certain condominium documents or other agreement governing the internal affairs of an entity which authorize someone to take lawful action relating to such entity;
- (8) a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit;
- (9) a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement;
- (10) a power authorizing acceptance of service of process on behalf of the principal; and
- (11) a power created pursuant to authorization provided by a federal or state statute, other than G.O.L. Article 5, Title 15, that specifically contemplates creation of the power, including a power to make health care decisions or decisions involving the disposition of remains.

To be valid a statutory short form or a non-statutory form a power of attorney must meet the execution requirements and contain the warnings in the statute. 5-1501B. The amendments continue to only make it unlawful for a third party to unreasonably refuse to honor a *statutory short form* power of attorney and continue to make a proceeding under 5-1510 the *exclusive* remedy for enforcement. 5-1504.2. However, powers of attorney executed in another state or jurisdictions in compliance with the law of that state or jurisdiction or the law of New York or that comply with section 5-1501B are valid and a power of attorney executed in New York by a domiciliary of another state or jurisdiction in compli-

ance with the law of that state or jurisdiction or the law of New York is valid in this state. 5-1512.

The prior law had made it unclear whether an individual acting on his or her own behalf could validly execute a non-statutory form which met the other requirements of 5-1501B, specifically the type size, cautions and warnings, and signing and acknowledgment requirements. The amendment offers some help here. The amendment would redefine a “principal” as an individual who executes a power of attorney “acting for him or herself and not as a fiduciary or as an official of any legal, governmental or commercial entity.” 5-1501.2(k). Then, 5-1501B would state that nothing in the law would bar the use or validity of any other or different form of power of attorney desired by a person “other than a principal.” 5-1501B.4. This means, in a roundabout way, that a “principal” acting on his or her own behalf cannot execute a valid power of attorney unless it at least conforms to the requirements of 5-1501B. But, see the discussion above about which powers of attorney are enforceable.

Since a 5-1510 proceeding is the exclusive remedy to enforce honoring the *statutory short form*, the question remains whether a *non-statutory* form that is valid because it conforms to the requirements of 5-1501B or 5-1512 is enforceable by some other action or proceeding.

Although the NYSBA had recommended eliminating the statutory major gifts rider (SMGR), the bill leaves it and redefines it as a statutory gifts rider (SGR). Although the bill would clarify that the SGR is necessary for “gifts,” and not “other transactions,” [5-1514] the statutory form still recites in the modification section, “However, you cannot use this Modifications section to grant your agent authority to make gifts or *changes to interests in your property*.” 5-1513.1(h) [emphasis added]. This still leaves some ambiguity.

The proposed amendment clarifies that SGR gifting authority must be exercised according to any instructions either in the SGR “or in any other writing provided by the principal regarding the exercise of any authority.” 5-1514.5. It continues to allow gifting “for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including financial, estate, or tax planning, including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes.” It also continues to leave out of the best interest definition planning for public benefits eligibility.

The bill does have a provision that would require the New York State Law Revision Commission to study and report to the Governor and Legislature on the SGR.

A statutory form (either the POA or SGR) continues to require the “exact” wording in the statute, it will not,

however, be prevented from being a “statutory form” by reason of a mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type. 5-1501.2(n) and (o).

The ability to create, modify or revoke a trust is restored to most of the sections of the statute which describe and explain the specifically enumerated powers in the statutory short form, unless such creation, modification or revocation of a trust is a gift transaction. 5-1502A, 5-1502B, 5-1502C, and 5-1502L.

Under the amendments, revocation of prior powers of attorney is no longer the default and the modification section can include a provision revoking prior powers of attorney. 5-1503.3 and 5-1513.1(d)

Third parties which must honor the statutory short form include those doing business in New York. 5-1504. The reasons for refusing to honor a power of attorney still include the refusal by a title insurance company to underwrite title; however, it is now limited to a refusal for a gift of real property made pursuant to a SGR or non-statutory power of attorney that does not contain express instructions or purposes of the principal. 5-1504.1(a)(9).

A power of attorney (statutory or not) that meets the requirements of 5-1501B shall be accepted for recording if it has been signed (and acknowledged) by one agent or if two or more agents must act together, then signed (and acknowledged) by all of them. When a successor or co-agent authorized to act separately from any other agents presents a certified copy of a recorded power of attorney with the agent’s signature acknowledged, the instrument shall be accepted for recording. 5-1504.7.

The special proceeding under 5-1510 is no longer the “exclusive remedy” for the production of records. 5-1505.2(a). Thus a record production could be compelled in a guardianship proceeding or by subpoena in a criminal or civil proceeding.

Under the amendment, it would no longer be required that every agent be unable to act before a successor can act. The power of attorney could provide for specific agent succession rules. Those rules would go in the form in the section on successor agents. 5-1508.2 and 5-1513.1(c). Signing and acknowledgement by the successor agent is now in a separate section on the form. 5-1513.1(p). Any person, other than an estate or a trust, may act as an agent, co-agent or successor agent. 5-1508.4.

Under the amendments it would no longer cause a conundrum if a principal wanted to revoke a power of attorney but could not locate the agent to give him or her notice. The power of attorney can be revoked by delivering the revocation to the agent in person or by sending a signed and dated revocation by mail, courier,

electronic transmission or facsimile to the agent's last known address. 5-1511.3(b). An agent is deemed to have received a revocation when it has been delivered to him or within a reasonable time after it has been sent to his last known address. 5-1511.5(b). Where a power of attorney has been recorded the principal shall also record the revocation in the office in which the power of attorney is recorded. 5-1511.4.

Under the amendment it would be clear that without additional gifting powers, the \$500 gift limit is not per person per year. The authority for "personal and family maintenance" granted in 5-1513.1(f)(I) would allow the agent to make gifts totaling \$500 in a calendar year. 5-1502.14 and 5-1513.1(h).

The amendment makes it clear that the notary who takes the acknowledgement on the SGR can be one of the witnesses. 5-1514.9(b).

The current provision in the bill for effective dates states, "This act shall take effect on the thirtieth day after it shall have become a law and shall be deemed to have been in full force and effect on and after September 1, 2009. Provided, that any statutory short form power of attorney and any statutory gifts rider executed after August 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act." The NYSBA has urged that the bill also apply to powers of attorney that were executed prior to August 31, 2009, in anticipation of the new law.

David Goldfarb is a partner in Goldfarb Abrandt Salzman & Kutzin LLP, a firm concentrating in elder law, trusts and estates and the rights of the elderly and disabled.

He is co-author of a *New York Elder Law*, formerly *New York Guide to Tax Estate and Financial Planning for the Elderly* (Lexis-Matthew Bender 1999–2009). He has written numerous articles including articles for the *New York Times*, *New York State Bar Journal*, the *National Academy of Elder Law Attorneys' NAELA News* and the *New York Law Journal*.

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The Elder Law Attorney is also available online

The screenshot shows the website for the New York State Bar Association's Elder Law Attorney. The header includes the NYSBA logo and the title "NEW YORK STATE BAR ASSOCIATION". Below this, there's a navigation menu with links like Home, My NYSBA, Blogs, CLE, Events, For Attorneys, For the Community, Forums / Listserves, Membership, Practice Management, Publications / Forms, and Sections / Committees. The main content area is titled "Elder Law Attorney About this publication" and contains a description of the publication, a "Report Permission" link, and a "Citation Enhanced Version from Loislaw" link. There are also sections for "Inside the Current Issue (Spring 2010)" and "Past Issues (Section Members Only)".

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Using Long-Term Care Insurance as Part of the Elder Care Plan

By Jeffrey A. Asher

People are living longer.¹ The number of persons aged 65 and over is expected to double by the year 2030 and the fastest-growing segment of the population consists of people who are 85 and older.² Many experts are concerned that “aging issues” will reach a critical point as early as this year when the “baby boom”

generation first starts to reach the age of retirement.³ In this current political world, issues of health insurance, retirement, and long-term care are dominating discussions surrounding the upcoming mid-term elections. For some, aging will bring continued health, enjoyable retirement, and financial freedom. For others, aging will bring mental disability, terminal illness, and poverty. For all, aging will bring an increased complexity to life.

As Elder Care attorneys we focus on issues of long-term care, financial management, assisted living, public benefits, and whether our clients can afford their long-term care choices. A good Elder Care attorney will work closely with social workers, retirement coaches, geriatric care managers, financial planners, and others, to create a comprehensive plan for our elder clients. The following shows how long-term care insurance (“LTC insurance”), as part of a comprehensive elder care plan, will address many of the needs discussed above.

The Need for Long-Term Care and Long-Term Care Solutions

A person needs long-term care when he or she suffers from a chronic illness or condition, or has suffered a trauma, that will limit his or her ability to carry out basic self-care tasks, what we know as “activities of daily living” or ADLs. These are activities such as bathing, dressing, toileting, and eating. Such a person may also be unable to perform “instrumental activities of daily living” or IADLs, such as doing household chores, preparing meals, food shopping, and/or managing his or her finances. Alzheimer’s disease is a good example of a common chronic illness that, depending on how far the disease has progressed, will necessitate long-term care and long-term care solutions.



For most of our clients needing long-term care solutions, we typically evaluate their financial situations, prepare for them a Health Care Proxy and/or Power of Attorney evidencing their appointments of alternate decision-makers, help them prepare a realistic and appropriate budget to pay for their long-term care needs, or help them get benefits, when necessary and appropriate, to pay for such care. For those for whom it is appropriate, we will help them prepare more long-term planning solutions, such as qualifying for Medicaid benefits.

There are generally two types of Medicaid coverage: Medicaid home care⁴ (also referred to as community-based Medicaid), which provides home health care, some hospital coverage, doctor appointments, medications, etc. and, Medicaid nursing home care (also referred to as institutional Medicaid), which is care in a skilled nursing facility or similar institution.

The Costs of Long-Term Care

According to the Genworth 2009 Cost of Care survey,⁵ a person aged 75 years needing long-term care should anticipate paying, at a minimum, around \$45,000 per year in home health care costs,⁶ around \$48,000 per year in assisted living facility costs, and around \$133,000 per year in nursing home costs. A person aged 55 now anticipating care sometime around 75 years old, will pay at 75 years old, approximately \$124,450 per year in home health care costs, \$127,258 per year in assisted living facility costs, and \$354,165 per year in nursing home costs.⁷ Depending on the number of years care is needed for, this can become very expensive very quickly.

A good Elder Care attorney knows that his or her client has only so much from which to pay these costs. We sometimes need to advise the client how best to anticipate and plan for these expenses. Sometimes, that advice entails transferring assets, appropriately and ethically, to set up qualification for government benefits in the future.

Medicaid Eligibility and the Transfer of Assets Planning Dilemma

To qualify for Medicaid, an applicant must prove financial need; that is, having assets not in excess of the eligibility thresholds. All Medicaid recipients (whether community-based care or nursing home care) are permitted to retain only a small amount of assets and income. As of the time of writing this article, a Med-

icaid recipient living alone may retain no more than \$13,800 in non-exempt assets (this amount increases depending on the number of family members who live with the Medicaid recipient). There are certain exempt resources, including a portion of the equity in the applicant's home, the contents of his or her home, and money set aside for a funeral/burial (provided it is done correctly), among other things.

An individual not in a nursing home can have no more than \$767 per month in income (this amount also increases depending on the number of family members who live with the Medicaid recipient) plus an unearned income credit of \$20 if the applicant is over 65, blind or disabled. An individual in an institution, such as a nursing home, is restricted to a personal needs allowance of \$50 per month.

Transferring assets, for less than full and adequate consideration, to qualify for Medicaid benefits is not permitted. As such, a Medicaid applicant who does so is "penalized"—ineligible to receive Medicaid benefits—for a period of time following the transfer. The "penalty" period is equal to the value of the transferred asset(s) (other than exempt assets) divided by the average cost of nursing home care to a private patient in the community. In New York City, for example, the average cost of nursing home care for 2010 is presumed to be \$10,285 per month; on Long Island it is \$11,227 per month; in Westchester, Orange, Putnam and Rockland Counties it is \$10,163 per month; in Rochester it is \$9,058 per month; in the Central territory it is \$7,264 per month; and in Western territory it is \$7,694 per month.

The transfer of asset rules for each type of Medicaid (i.e., Medicaid home care or Medicaid nursing home care) are different. For example, a transfer of assets to a non-exempt donee will cause a penalty period for Medicaid nursing home care, but not for Medicaid home care.

In determining the penalty period, Medicaid will "look back" at the applicant's assets over a period of 5 years. The "look back" period examines account statements, deeds, tax returns, etc., intended to discover any transfer of assets which would disqualify an applicant from Medicaid.

The Deficit Reduction Act of 2005 ("DRA"),⁸ enacted on February 8, 2006, changed, among other things, the date on which the applicant's penalty begins, following a transfer of assets. Under the "old rules" of Medicaid eligibility, relating to transfers prior to February 8, 2006, the penalty period, once it is calculated on the transfer, began on the first day of the month following the transfer of assets, regardless whether a Medicaid application was made or whether the applicant was otherwise eligible for Medicaid.

Under the "new rules," however, the transfer of assets penalty period begins, not on the first day of the month following the original transfer like under the "old rules," but on the date the applicant makes his or her Medicaid application, is in an institution receiving care, and would otherwise be eligible for Medicaid but for the transfer of assets. The DRA shifted the penalty period from something that may have occurred in the past but hopefully and typically expired before the Medicaid application is made, to one not yet happening until the applicant needs Medicaid.

So, this leaves us in a bit of a planning dilemma. The good Elder Care attorney cannot advise his or her client to transfer an asset to qualify for Medicaid unless and until the client (1) enters and is in need of institutional care, (2) makes a Medicaid application to pay for such care, and (3) has no other non-exempt assets such that the client is otherwise eligible for Medicaid.

If we wait until (1) and (2) are true, and then make the transfer of assets, then our client will be penalized from Medicaid benefits beginning on the date of the transfer because (3) would have been false. On the other hand, if the client makes the transfer of assets now when any of (1), (2), and / or (3) are false, and waits until (1) and (2) become true to make (3) true, then the client had better not need Medicaid within the five years following the transfer. The best solution is that the client waits the five years from the date of the transfer to apply to Medicaid. That way, Medicaid will not pick up the transfer within the look-back period.

But, what if, as happens many times, (1) and (2) become true, but it is within five years of the transfer of assets? In that case, (3) is false since the value of the transferred property will be brought back into the client's available resources and the client will be ineligible to receive Medicaid benefits for the duration of the calculated penalty.

The Role of Long-Term Care Insurance in the Qualified Elder Care Plan

This article proposes an Elder Care plan utilizing a transfer of assets, together with a Medicaid Trust, and assumes the likelihood that Medicaid nursing home benefits may be needed within five years. For purposes of this article, and the plan discussed herein, the reader needs to assume a few things:

1. We are not dealing with a situation where the client is imminently going into a nursing home and the family is looking for emergency Medicaid planning. For those situations, there are other planning options that are the subject of other articles.

2. There are no qualified donees with which to make exempt transfers for purposes of the transfer of asset rules.
3. The client is of a certain age where the purchase of long-term care insurance is at least reasonable, if not affordable.

Example Carla Client's irrevocable income only trust ("Medicaid Trust") was funded with \$600,000 on May 1, 2006, after the effective date (February 8, 2006) of the new Medicaid rules.

Under the old rules, the transfer penalty would have been calculated as follows:

$$\begin{aligned} \$600,000 \div \$9,132 / \text{mo}^9 &= 65.70 \text{ months} \approx 66 \text{ months} \div \\ 12 \text{ months} &= 5.50 \text{ years.} \end{aligned}$$

Under the old rules, the funding of the trust on May 1, 2006 would have generated a 5-year and 6-month penalty beginning on May 1, 2006 and ending on November 1, 2011. Assuming that Carla Client would not have needed Medicaid to pay for her nursing home until at least November 2011, this would have been a great result for the client and a great plan by the attorney.

However, the new rules did away with such planning. Under the new rules, assuming the facts above and further assuming that the client goes into a nursing home and applies to Medicaid on June 1, 2010, the transfer penalty is calculated as follows:

$$\begin{aligned} \$600,000 \div \$10,285 / \text{mo}^{10} &= 58.34 \text{ months} \approx 59 \text{ months} \div \\ 12 \text{ months} &= 4.91 \text{ years.} \end{aligned}$$

The funding of the Medicaid Trust back on May 1, 2006, will generate a penalty period of 4.91 years beginning on June 1, 2010. Starting June 1, 2010, and continuing for almost 5 years, the family will have to pay privately for the nursing home services. Taking \$12,000 per month as an example for the cost of Carla Client's nursing home care, the Medicaid Trust will be exhausted (assuming no growth) in 50 months or just over 4 years. In other words, the Medicaid penalty will continue for another year even after the Medicaid Trust has been exhausted.

On the other hand, if in May of 2006, Carla Client had purchased a LTC insurance policy at the same time she created and funded her Medicaid Trust, then the planning would have been complete back in May of 2006. On June 1, 2010, when Carla Client goes into a nursing home three things will happen: (1) she will file a claim with her LTC insurance provider starting her entitlement to nursing home benefits under the policy;¹¹ (2) Carla Client's Medicare benefits will pay entirely for the first 20 days of the nursing home's services and will require a co-pay for the next 100 days; and (3) Carla Client will make an application for Medicaid thus beginning the 4.91 year penalty period.¹²

When 4 years and 11 months have elapsed, and Carla Client is no longer subject to Medicaid's penalty period, then she will be able to stop the benefits from her LTC insurance policy and qualify for services under Medicaid. Or can she? The answer is probably not, because Medicaid will not just let you stop your outside benefits if you are entitled to them. And, if Carla Client had purchased a "lifetime benefit" policy rather than a set term policy, then there might be a few more years left in the policy during which time Medicaid, which is called the "payer of last resort," will expect the LTC insurance company to continue to pay.

But, assuming that Carla Client purchased a LTC insurance policy that was structured through the coordinated planning of the Elder Care attorney and the LTC insurance broker to provide no more than 5 or 6 years¹³ in benefits, then the transition from the LTC insurance company to Medicaid would coincide with the expiration of the look-back period following the creation and funding of the Medicaid Trust in May of 2006.

Understanding LTC Insurance

In New York, LTC insurance is available in four general forms: Home Care Insurance Only, Nursing Home Insurance Only, Nursing Home and Home Care Insurance, and Long-Term Care Insurance. It is the Long-Term Care Insurance that we are discussing in the examples herein.

As the name states, Home Care Insurance only pays for home care. It is used by individuals who have absolutely no intention whatsoever to go into a nursing home, or have already purchased a Nursing Home Insurance Only policy and need to cover for home care services. By NYS Insurance Department standards, such a policy must provide at least 12 consecutive months of coverage of non-certified home care services of at least \$25 per day in a private residence.

Similar to Home Care Insurance Only policies, Nursing Home Insurance Only pays for nursing home care. It is used by individuals who have every intention of going into a nursing home, or anticipate that their condition will necessitate them going into a nursing home. And, individuals who purchase Nursing home Insurance Only policies typically have the financial wherewithal to provide for their home care needs, but want to guard against the costs for nursing home care. Or, these individuals have already purchased a Home Care Insurance Only policy and need to cover for nursing home services. Such a policy must provide at least 12 consecutive months of coverage of custodial care services of at least \$50 per day while in a nursing home.

A Nursing Home and Home Care Insurance policy provides coverage for nursing homes and home care

only. This policy should be less expensive than a Long-Term Care Insurance policy, but does not cover as much. These policies must provide at least 12 consecutive months of coverage of custodial care services of at least \$50 per day while in a nursing home and coverage of custodial care services of at least \$25 per day in a private home.

Long-Term Care Insurance policies must provide at least 24 consecutive months of all levels of care in a nursing home of at least \$100 per day for policies sold in the New York City Metropolitan area¹⁴ and \$70 per day for all other parts of New York State; and must cover the cost of home care services of at least 50% of the daily indemnity amount provided for care in a nursing home. The Long-Term Care Insurance is the broadest policy, and thus the most expensive. Typical Long-Term Care Insurance policies also cover adult day care facilities, assisted living facilities, and other such places.

All LTC insurance policies in New York must offer, as an option, the “inflation protection” benefit which is designed to increase the daily benefit amount over time to keep pace with inflation. Otherwise, an individual could choose to increase the benefit amounts at a future time. Under this option, the individual can increase the benefit amounts every specified number of years. However, choosing to increase the daily benefit will also increase the premiums based on the individual’s attained age at the time he or she increases the benefits.

Speaking with my long-term care insurance broker, I asked the question “for those people who don’t like LTC insurance, why don’t they?” His answer was: cost of the premiums and “because they don’t really understand it.” As Elder Care attorneys we really cannot help with the cost aspect, since that is the responsibility and a function of the LTC insurance company and industry. But, we can help with the lack of understanding.

The reason why people do not understand LTC is because it is not part of an overall comprehensive elder care plan. When LTC insurance is purchased outside of a qualified planning process, people typically do not know whether to choose a “lifetime benefit” or a term benefit; they do not know how much to choose as a daily benefit, nor whether or not to take the inflation protection rider. Incorporating LTC insurance with an elder care plan gives the client a real understanding of the way in which LTC insurance works as part of the greater long-term care solution.

Now, imagine that Carla Client’s brother, Charles Client, purchased his LTC insurance policy and created his Medicaid Trust also in May 2006. But, for whatever reason, Charles Client did not fund his Medicaid Trust at that time. Ten years later, in May 2016, Charles has to go into a nursing home for skilled nursing care. At the

same time that Charles files his claim with the LTC insurance company he also funds his Medicaid Trust. By making his Medicaid application in May 2016, and assuming none of the current rules have changed within the last ten years, including the look-back period, then Medicaid will see the transfer of assets in May 2016 and penalize him accordingly. Since we do not know how long the penalty period will be at that time (and it may be longer than the 6-year benefit Charles Client purchased under his LTC insurance policy), it would probably be wise for Charles Client to wait out the look-back period and apply to Medicaid only after the five years have elapsed since the funding of the Medicaid Trust. By waiting until June 2021 to apply for Medicaid benefits, Charles Client can ensure that his Medicaid application will be approved since (1), (2), and (3), as discussed above, would all be true—he would already be receiving qualified institutional care, he will make a Medicaid application to pay for such care, and he will have no other non-exempt assets that would otherwise render him ineligible for Medicaid.

For those people who like and understand LTC insurance, they purchase it because they want to preserve the assets they have worked hard to accumulate, or because LTC insurance gives them independence—freedom from having to rely on children or the government to provide long-term care.

For those people, however, who do not understand LTC insurance or fail to see that the annual cost for such LTC insurance is only a fraction of the lifetime costs for long-term care, the qualified comprehensive elder care plan may help them better understand the benefits of LTC insurance. The bottom line is that when used properly as part of a comprehensive elder care plan, LTC insurance enables our clients to receive qualified care in their home, the community, in an alternate living facility, or in a nursing home or other skilled nursing facility.

I am not trying to sell LTC insurance.¹⁵ I am merely pointing out that this type of planning should be fairly obvious to us. But, is it obvious to our local LTC insurance brokers and companies? I suggest that you speak with your local LTC insurance broker and make it obvious to him or her. We surely see the need for LTC insurance as part of our Medicaid planning to cover the gap, if any, between transfer of assets / trust funding and the need for Medicaid. But, do our local LTC insurance brokers see the need for Elder Care and Medicaid planning when they sell a LTC insurance policy to their clients? This is not a primer intended to show us, the good elder care practitioner, the value of LTC insurance, but to show the financial adviser the value of our services in combination with their own for the benefit of their clients.

Endnotes

1. The average American life expectancy is about 75 for men and 80 for women. Deaths: Final Data for 2006: National Vital Statistics Reports; Vol. 57, No. 14; Hyattsville, MD; National Center for Health Statistics; 2009; Table 8, pg. 27. Available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf.
2. World Population Ageing, 1950–2050, New York (NY): United Nations Publications; 2002; Pg. 23. Available at <http://www.un.org/esa/population/publications/worldageing19502050/>.
3. The United States Census Bureau considers a baby boomer to be someone born between 1946 and 1964. See, United States Census Bureau, "Oldest Boomers Turn 60" (2006). Available at http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html.
4. Within Medicaid community-based care there are several programs, such as: Certified Home Health Agency Services, Personal Care Services, Long-Term Home Health Care Program (a/k/a Lombardi), Medical Adult Day Care, and Managed Long-Term Care Services.
5. Available at http://www.genworth.com/content/products/long_term_care/long_term_care/cost_of_care.html (Genworth Study).
6. Based on 8 hours of care per day, 5 days per week.
7. Genworth Study, *supra* note 5. The Genworth Study webpage has a function to calculate future costs.
8. Pub.L. 109-171, 120 Stat. 4 (Feb. 8, 2006).
9. The 2006 Medicaid monthly regional rate for NYC. GIS 10 MA/001. Available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/06ma001.pdf.
10. The 2010 Medicaid monthly regional rate for NYC. GIS 10 MA/001. Available at http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/10ma001.pdf.
11. The commencement of Carla Client's benefits will be subject to the policy's elimination period, which is typically 90 days. The "elimination" or "waiting period" is the number of days the insured must wait before long-term care benefits will be paid under the policy. During the elimination or waiting period, the insured will have to pay privately for the care he or she receives. Shortening the elimination period will increase the cost of coverage.
12. Carla Client can apply to Medicaid either when she goes into the nursing home and have her penalty period calculated at that time, or after the look-back period expires thus avoiding the calculation of a penalty period. The end result would be the same.
13. Different LTC insurance companies offer different benefit terms and options.
14. Defined by the NYS Insurance Department as the counties of Bronx, Kings, Nassau, New York, Queens, Richmond, Suffolk, Rockland and Westchester.
15. The client (and the reader) should consult with qualified LTC insurance broker to learn more about available LTC insurance policies and options. LTC insurance policies have certain limitations on benefits or even exclude them altogether. The client must understand the individual limitations and benefit exclusions which are contained in his or her LTC insurance policy.

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Are Inherited IRAs Subject to Creditors' Rights?

By Seymour Goldberg

As a practitioner who may be involved in estate planning, you must stay on top of emerging issues that may be harmful to your client and /or your client's family unit. The purpose of this memorandum is to highlight a wealth preservation issue that you need to know about if your client dies with significant assets in his or her IRA. Because of the economic uncertainty facing future generations, you must anticipate potential problems and attempt to avoid them to the extent possible.



I am sure that most taxpayers are under the impression that their IRAs are protected against creditors from an asset protection point of view. That asset protection position is generally correct if the IRA owner goes bankrupt or is subject to the claims of creditors in a non-bankruptcy proceeding.

However, a major issue is developing regarding whether inherited IRAs are protected in bankruptcy proceedings. There were a number of bankruptcy cases involving inherited IRAs that took place prior to the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). BAPCPA was signed by the President on April 20, 2005 and was generally effective on October 17, 2005.

In the bankruptcy cases that were commenced prior to October 17, 2005, the bankruptcy courts held that inherited IRAs were subject to claims of creditors. The bankruptcy courts in the following states rendered adverse decisions against debtors:

Year	State
1999	Oklahoma
2003	California
2004	Alabama
2006	Wisconsin
2006	Illinois

The bankruptcy courts have primarily taken the position that an inherited IRA is not a retirement type asset. One bankruptcy court stated that an inherited

IRA is more like a liquid cash asset. Other bankruptcy courts have examined the distinction between the tax rules that apply to traditional IRAs and those that apply to inherited IRAs in reaching their adverse decisions against the debtors.

In a bankruptcy case filed in the bankruptcy court in Texas in 2006, the bankruptcy court held that the inherited IRA was not protected against the claims of creditors. Under Texas law, the debtor may elect to claim federal exemptions or state exemptions in a bankruptcy proceeding. The debtor elected to claim the state law exemptions. In that case the debtor claimed that his inherited IRA was exempt under the Texas state law exemption statute. The bankruptcy court held in 2007 that the inherited IRA did not qualify as an exempt asset under the Texas state law exemption.

“The purpose of this memorandum is to highlight a wealth preservation issue that you need to know about if your client dies with significant assets in his or her IRA.”

As a result there is a 2007 Texas bankruptcy court case that is adverse to the debtor since it held that an inherited IRA is subject to the claims of creditors. In 2010, a Texas bankruptcy court rendered another adverse decision against the debtor regarding an inherited IRA. It held that the inherited IRA was subject to the claims of creditors. However, in that case the debtor claimed that the inherited IRA was exempt under the federal exemption statute. Once again the debtor lost. The 2010 Texas decision was extremely important since the debtor claimed that the inherited IRA was exempt because it was a retirement fund as defined in the Bankruptcy Code. The Bankruptcy Code lists property that may be exempt from creditors and includes:

Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

If the inherited IRA is a retirement fund then the inherited IRA is exempt from the claims of creditors. According to the 2010 Texas bankruptcy court “[t]he funds contained in an inherited IRA are not funds intended for retirement purposes but, instead, are distrib-

uted to the beneficiary of the account without regard to age or retirement status.” Since the bankruptcy court held that an inherited IRA is not a retirement fund the debtor lost.

“[T]he issue as to whether the BAPCPA exemption covers inherited IRAs is debatable and unlikely to be resolved until the Supreme Court of the United States makes a determination.”

In an earlier 2010 bankruptcy court case in Minnesota, the court held that an inherited IRA is a retirement fund and allowed the inherited IRA to be exempt from the claims of creditors under the federal exemption statute. The Minnesota bankruptcy court stated in part that “the transferred amounts [from a traditional IRA] did not lose their character as retirement funds.” The debtor was successful in protecting the inherited IRA from creditors. The Minnesota case has been appealed by the bankruptcy trustee to the United States Bankruptcy Appellate Panel for the Eighth Circuit.

In 2008, a bankruptcy court in Idaho issued a decision involving an inherited IRA. The debtors claimed that the inherited IRA was exempt under the Idaho state law exemption statute. Idaho only uses state exemptions in bankruptcy proceedings. The bankruptcy court held that the state law exemption was applicable and that the inherited IRA was not subject to the claims of creditors. The debtor was successful in protecting the inherited IRA from creditors.

In 2009, in a non-bankruptcy state court proceeding in Florida, an appellate court held that an inherited IRA was not protected against a creditor under the state law exemption statute. This was a case of first impression

in the state of Florida. It is probable that this case will be considered in other states in non-bankruptcy state court proceedings involving creditor rights and inherited IRAs as well.

In conclusion, the issue as to whether the BAPCPA exemption covers inherited IRAs is debatable and unlikely to be resolved until the Supreme Court of the United States makes a determination.

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Mr. Goldberg is the author of manuals for the American Bar Association, the American Institute of Certified Public Accountants and J.K. Lasser. His most recent manual is *J.K. Lasser’s IRA Trusts & Retirement Distribution Trusts as Beneficiary of Retirement Assets: What the Practitioner Needs to Know*, available at www.jklasser.com/go/downloads.

Helping Homeowners Keep Their Homes During the Nation's Largest Sub-Prime Mortgage Meltdown and Foreclosure Crisis in Our Country's History

By Anneris M. Peña

On December 15, 2009, New York State Governor David A. Paterson signed into law comprehensive legislation which significantly altered foreclosure practice as it existed to date for the benefit of homeowners. The new legislation, referred to as The Foreclosure Prevention, Tenant Protection and Property Maintenance Act of 2009,¹ imposes greater responsibilities on the mortgage holder seeking to foreclose said mortgage, provides increased protection to homeowners via greater notice requirements prior to commencing foreclosure and increase options for loan workouts at the outset of the foreclosure action.



A. Foreword

Between the years of 2001 and 2004, the real estate market reached historical highs. In 2004, the homeownership rate in the U.S. peaked with an all time high of 69.2 percent.² This peak was greatly influenced by the increased demand to leave New York City and its surrounding areas after 9-11, by the historically low interest rates³ and by lender's increasing ability to approve mortgages to many who, just a few years earlier, would not have been approved.⁴ In 2005, the booming housing market came to an abrupt halt as median prices from the fourth quarter of 2005 to the first quarter of 2006 dropped 3.3 percent.⁵ In the fourth quarter of 2005, prices fell 1 percent from the third quarter.⁶ In 2008, Lawrence Yun, the chief economist for the National Association of Realtors (NAR), announced that 2007 had the first price decline "in many, many years and possibly going back to the Great Depression."⁷ On December 30, 2008, the Case-Shiller home price index reported its largest price drop in its history.⁸

When it was all said and done, the new purchasers as well as the existing homeowners who had refinanced their existing mortgages and depleted the equity in their homes, were left with a myriad of problems: homeowners whose home loans contained low introductory rates (sub-prime) which would revert to a regular interest rate within a few years causing their monthly mortgage payment to double, homeowners

with interest-only mortgage payments whose monthly payment would increase substantially once payment of principal began, and homeowners who sought to refinance once that temporarily fixed interest rate became adjustable but could not do so due to the negative equity in their homes caused by the decrease in property values once the real estate market collapsed.

"The Foreclosure Prevention, Tenant Protection and Property Maintenance Act of 2009, imposes greater responsibilities on the mortgage holder seeking to foreclose said mortgage, provides increased protection to homeowners via greater notice requirements prior to commencing foreclosure and increase options for loan workouts at the outset of the foreclosure action."

The collapse in the housing market had a correlating effect on other markets: mortgage markets, home builders, real estate, home supply retail stores, Wall Street hedge funds held by large institutional investors and foreign banks, and then, of course, the demise of those businesses caused losses in employment, caused delinquency in the payment of the mortgages, leading to a vicious cycle. With unemployment rates rising, even homeowners with fixed rate mortgages could no longer afford the monthly mortgage payments. For senior citizens on a modest monthly fixed income of retirement benefits and / or social security benefits, this posed an even greater problem as their chances of employment, and ability to make the increased monthly payments, became impossible.

The foreclosure crisis began to rear its ugly head in 2006 when more than 1.2 million foreclosure filings were reported nationwide.⁹ In 2006, New York was one of the top ten cities with the highest foreclosure rates in the nation.¹⁰ It became apparent that significant changes needed to take place in order to stop the rising number of homeowners defaulting on their mortgage payments, leading to foreclosure.

B. 2006—The Home Equity Theft Prevention Act

Once the foreclosure crisis began, unscrupulous individuals sought to take advantage of homeowners who had fallen behind on their monthly mortgage payments. Faced with the prospect of losing their homes, these trusting and desperate homeowners were fraudulently induced to sign over the Deeds to their homes to individuals in exchange for promises that these scammers would stop the foreclosure. The homeowner would be allowed to stay in the home, pay a “lease” payment to the scammer and was promised that the property would be Deeded back to the homeowner. In reality, the transfer of title back to the homeowners did not occur and the properties were lost to the scammers. In order to warn the defaulting borrowers, on July 26, 2006, Governor Pataki signed into law the Home Equity Theft Prevention Act¹¹ (“hereinafter “HETPA”).

Additional Notice to be served along with Summons and Complaint: § 1303(1) of the RPAPL, effective February 1, 2007, was enacted as part of HETPA. It requires that mortgage foreclosure actions involving residential real property consisting of owner-occupied one-to-four family dwellings contain an *additional* notice entitled “HELP FOR HOMEOWNERS IN FORECLOSURE.”¹² The purpose of the notice is to warn the homeowner in foreclosure that they may be preyed upon by scammers, to refer them to the New York State Banking Department’s website for information to and non-profit agencies, which can provide assistance to the homeowner. The Notice must be in the required bold, fourteen-point type and the title of the notice shall be in bold, twenty-point type and must be on colored paper which is other than the color on which the Summons and Complaint was printed. The additional notice must be on its own page and must be delivered with the Summons and Complaint.¹³ The Court may deny the foreclosing Plaintiff’s application for an Order of Reference due to failure to plead compliance with this law.¹⁴

C. The 2007 Foreclosure Legislation

In 2007, foreclosure activity increased 75 percent nationwide to a total of 2,203,295 foreclosure filings—default notices, auction sale notices and bank repossessions—on 1,285,873 properties nationwide during the year, up 75 percent from 2006.¹⁵ In August, 2007, the stock of Countrywide Financial, the largest mortgage lender in the United States, fell 13% on the New York Stock Exchange after Countrywide reported that foreclosures and mortgage delinquencies rose to their highest levels since early 2002.¹⁶ The 13% drop was Countrywide’s sharpest decline since the Stock Market Crash of 1987.¹⁷

In response to the foreclosure crisis existing in New York, attempts were made to implement new proce-

dures in foreclosure actions in order to protect homeowners. On August 1, 2007, Governor Spitzer signed into law legislation¹⁸ which added a new § 1320 to the Real Property Actions and Proceedings Law (hereinafter “RPAPL”) and amended New York Civil Practice Law and Rules (hereinafter “CPLR”) 3215(g)(3)(iii) to provide additional notice to mortgagors that a foreclosure action has been commenced.

1. **Additional Notice contained in Summons:** RPAPL § 1320, effective August 1, 2007, requires that a new warning to the homeowner be inserted on the face of the foreclosure Summons.¹⁹
2. **CPLR 3215(g) is now applicable to Foreclosure Actions:** While historically the additional notice provisions of CPLR 3215(g) when seeking a default judgment against a natural person were not applicable to actions affecting title to real property,²⁰ the new provisions of CPLR 3215(g)(3)(iii) removed that exception with regard to foreclosure actions only and now require that additional service in residential foreclosure actions (not exceeding three units).²¹ Thus, prior to moving for a default Judgment, an *additional* copy of the Summons must be sent by first class mail to the subject defendant at his last place of residence in an envelope that (1) is marked “personal and confidential” and (2) does not indicate that the correspondence emanated from an attorney or concerns a debt.²² Further requirements are contained in the cited section and it should be carefully consulted. In the event the Defendant has any cognizable defense to the foreclosure action, this is yet another stage at which he is receiving notice so that he may assert those defenses.

D. The 2008 Subprime Lending Reform Bill

The foreclosure legislations enacted so far introduced procedural changes. However, they did little to actually assist homeowners in resolving their default in the remittance of mortgage payments. In October, 2007, the U.S. Secretary of the Treasury called the bursting housing bubble “the most significant risk to our economy.”²³ On August 5, 2008, New York State Governor David A. Paterson signed into law a subprime lending reform bill²⁴ to help existing homeowners facing foreclosure while balancing the regulatory impact on the mortgage lending industry. This new law put in place further procedures to be followed by lenders / servicers before and after commencement of residential foreclosure actions against natural persons in which the subject loan was a “high cost” home-loan,²⁵ “subprime home loan”²⁶ or a “non-traditional”²⁷ home loan²⁸ of a one-to four-family dwelling consummated between January 1, 2003 and September 1, 2008, which

fell within certain “threshold” loan limits.²⁹ If the mortgage to be foreclosed falls within the ambit of this new legislation, as provided above, then the new provisions of RPAPL § 1304 and CPLR 3408, would have to be adhered to, as follows:

1. 90-Day Pre-Foreclosure Notice of Default:

New York RPAPL § 1304, effective as of September 1, 2008, requires that the lender or mortgage loan servicer send a 90-Day Notice of Default to the borrower prior to the commencement of a Foreclosure Action.³⁰ The lender or mortgage loan servicer is also required to list in the Notice the names and telephone numbers of at least five (5) HUD approved Credit Counseling Agencies provided by the U.S. Department of Housing and Urban Development serving the region where the borrower resides.³¹ The statute is very precise as to the content of the Notice of Default,³² the size font in which it must be written (at least 14 point type), the method by which the Notice must be delivered and where the Notice must be given to the Borrower.³³ The notice only needs to be given once in a twelve month period.³⁴ The requirement ceases to apply if the borrower files for bankruptcy or the property is no longer the principal place of residence of the borrower.³⁵

Contractually, the standard Note and Mortgage require no more than a 30 day notice of Default to the borrower. However, this change in the law provides an additional 60 days’ notice to the borrower during which time the Borrower can commence settlement negotiations with the lender or mortgage servicer to modify the loan, if possible. If a Modification is accomplished prior to the commencement of the foreclosure action, the borrower is spared not only the emotional turmoil of a foreclosure proceeding but the expense of the lender’s attorney’s foreclosure fees and costs which are added on to the borrower’s outstanding balance, pursuant to customary terms of the note and mortgage.

2. Mandatory Settlement Conferences:

CPLR 3408 introduced a new and significant stage during the judicial fore-

closure proceeding. It is a critical stage for homeowners attempting to modify their loan but unable to accomplish a modification due to the overwhelming modification demands on the lenders/ servicers and failure in communication and transmittal of documentation between the homeowner and the lender/ servicer. The Court must schedule an early mandatory Settlement Conference with the parties to the foreclosure action (the lender and the homeowner) for all mortgages which fall within the ambit of the legislation. The Settlement Conference must be held within 60 days from when the Plaintiff files proof of service of the Complaint or such date as is agreed to by the parties.³⁶ The purpose of the Settlement Conference is to attempt to work out a resolution between the parties in the early stages of the foreclosure action in order to keep homeowners in their homes. The Plaintiff, or its counsel, must appear with authority to dispose of the matter.³⁷ For those borrowers who cannot afford an attorney, the Court will appoint one.³⁸ Practically speaking, if a homeowner appears at a conference and requests a workout/ modification, the Courts can and do adjourn the conferences multiple times, if necessary, until a response is provided by the lender/ assignee/ mortgage loan servicer. As such, it is a critical tool for a defaulting homeowner. The law applies to all actions commenced as of August 5, 2008 and to foreclosure actions commenced prior thereto where a Judgment of Foreclosure and Sale has not yet issued.

3. Affirmative Allegation of Ownership:

Due to prior issues regarding Plaintiff’s “standing” and problems with faulty Assignments of Mortgage, as of September 1, 2008, RPAPL § 1302 requires that in actions to foreclose high-cost or subprime home loans,³⁹ affirmative allegations regarding the ownership of the subject loan must be made by the Plaintiff.⁴⁰

All in all, the 2008 legislation brought about significant changes to aid homeowners. In addition to providing measures for additional notice to homeow-

ers prior to and after the foreclosure proceeding has commenced, homeowner defendants were now provided with additional defenses to foreclosure actions.⁴¹

In 2008, the New York State Banking Department and RealtyTrac® released New York foreclosure statistics for the full year.⁴² Foreclosure filings for the full year of 2008 increased 29 percent compared to an increase of 81 percent for the United States. In 2008, New York State ranked 35th among all states in total foreclosure filings, which was an improvement from 2007 when New York ranked 27th in total filings.⁴³ Foreclosure proceedings were still on the rise and from a defaulting homeowner's perspective, so was the need for further legislation.

E. The Foreclosure Prevention, Tenant Protection and Property Maintenance Act of 2009

Despite the initiatives taken in order to halt foreclosure proceedings at its root and keep the American dream of homeownership alive, the amount of foreclosure proceedings commenced in New York State continued to rise. Some chief economists called 2009 "the worst financial crisis since the Great Depression."⁴⁴ In the wake of the mortgage industry meltdown and the foreclosure crisis, New York State Governor Paterson passed yet another piece of legislation which, as provided below, significantly changed the practice of foreclosure proceedings in New York as it existed prior to its enactment.

1. 90-Day Notice of Default required prior to foreclosure of all home loans

The statutorily mandated 90-Day Notice of Default (previously required by NY RPAPL § 1304 only in foreclosure of subprime, high-cost or non-traditional home loans consummated between 2003-2008, within certain "threshold" loan limits) is now required in foreclosure proceedings of ALL residential home loans.⁴⁵

The required content⁴⁶ of the 90-Day Notice of Default remains the same. The list of Credit Counseling Agencies, however, is no longer provided by the U.S. Department of Housing and Urban Development but by the division of housing and community renewal and the Banking Department

serving the region where the borrower resides.⁴⁷

The statute now requires that the Notice be sent in a separate envelope from any other mailing or notice.⁴⁸ Lastly, the Notice is now also necessary in foreclosures of mortgages on "condominium units" and on "co-operatives."⁴⁹

The effective date of this statute is January 14, 2010 and applies to any and all Notices of Default served on or after January 14, 2010. The statute will be in place for a five (5) year period and shall expire and will be deemed repealed on January 14, 2015.

2. Electronic filing with the State

RPAPL § 1306 now imposes a new filing requirement on the lender/assignee/mortgage loan servicer. Within three (3) business days of the mortgage holder mailing the 90-Day Notice of Default prior to commencing a foreclosure on a home loan, it must electronically file with the Superintendent of Banks information about the delinquent loan in the form prescribed by the Superintendent.⁵⁰ This requirement is now a condition precedent to a foreclosure action and compliance therewith must be affirmatively pled by the Plaintiff in the foreclosure action.⁵¹

The Superintendent may thereafter request any information it deems necessary from the lender or loan servicer in order to facilitate a review of whether the borrower might benefit from counseling or other foreclosure prevention services.⁵²

The effective date of the statute is February 13, 2010 and applies to any and all 90-Day Notices required by this statute and mailed on or after February 13, 2010.

3. Additional Notice Requirement to Tenants

Within 10 days of service of the Summons and Complaint on any tenant of residential real property, the foreclosing party must now provide a separate notice of the foreclosure action to any and all Tenant(s) of the premises.⁵³ The Notice to the Tenant must be on a col-

ored paper other than the color of the Summons and Complaint, in bold, title must be in twenty-point type and text in fourteen-point type⁵⁴ and must be in the form set forth by the statute.⁵⁵

If the premises consist of fewer than five dwelling units and the Tenant's identity is known, the Notice shall be mailed to said Tenant at the premises by Certified Mail, Return Receipt Requested and by First Class Mail.⁵⁶ If the identity of said Tenant is not known, the Notice shall be mailed by First Class Mail addressed to "Occupant."⁵⁷

For premises with five or more dwelling units, a legible copy of the Notice shall be posted on the outside of each entrance and exit of the building.⁵⁸

The effective date of the statute is January 14, 2010 and applies to any and all Complaints requiring this Notice and served on or after January 14, 2010.

4. Mandatory Settlement Conferences now required in *all* residential foreclosure actions

CPLR 3408 was amended to require Settlement Conferences in *ALL* residential foreclosure actions.⁵⁹ Previously, the conferences were only required in residential foreclosure actions involving subprime, high cost or non-traditional home loans consummated between 2003-2008, within certain "threshold" loan limits.

At the Settlement Conference, the Plaintiff must make available, at a minimum, the following documents: payment history, reinstatement figures, payoff figures, mortgage, note, name, address and phone number of the legal owner of the Mortgage and Note.⁶⁰ The Defendant homeowner must bring proof of income such as two months of pay stubs, most recent tax return and most recent property tax statement.⁶¹ Both the Plaintiff and the Borrower(s) are required to negotiate in good faith toward a mutually agreeable resolution, including a Modification of the Loan, if possible.⁶² An important revision in the law, benefiting homeowners, is that it imposes on the lender full financial responsibility for appearance at or participation in the Settlement

Conference.⁶³ This may be an incentive for lenders / servicers to be diligent in their responses to modifications / workouts.

The effective date of the statute is February 13, 2010 and applies to any and all actions filed on or after February 13, 2010. However, as of February 13, 2015, the applicability of this section to *ALL* residential foreclosure actions expires and will be deemed repealed.

5. Mandatory Discontinuance of Action

Under the new law, in any action leading to a Loan Modification or Settlement Agreement, a Notice of Discontinuance of Action and Vacatur of the *Lis Pendens* must be filed with the Court within 105 days of the fully executed Loan Modification or Settlement Agreement.⁶⁴ In the past, many of the modification agreements provided that the foreclosure proceeding would not be discontinued but would be placed on hold by lenders / servicers in the event of the borrower's subsequent default.

The effective date of the statute is February 13, 2010 and applies to any and all actions filed on or after February 13, 2010. However, as of February 13, 2015, the applicability of this section to *ALL* residential foreclosure actions expires and will be deemed repealed.

6. Foreclosure Notice attached to Summons and Complaint in all foreclosure actions revised anew and now applicable to *ALL* home foreclosure actions

Effective September 1, 2008, the text of the "HELP FOR HOMEOWNERS IN FORECLOSURE" Notice required by § 1303(1) of the RPAPL was revised anew.⁶⁵ Further, the requirement that it be served along with the Summons and Complaint on colored paper, etc., became applicable to *all* foreclosure actions, not just those involving residential real property consisting of owner-occupied one-to-four family dwellings.⁶⁶

7. Occupancy Rights for Tenants and additional Notice requirements to Tenants

RPAPL § 1305 now provides Tenant(s)⁶⁷ of non-rent controlled or

non-rent stabilized units of “residential real property,”⁶⁸ who resided at the premises on the date the RPAPL § 1303 Notice was given, with the right to remain in occupancy of the unit for a period of time, as provided below, after a transfer of the premises.

If the leasehold Tenant utilizes the unit as his / her principal place of residence, the tenant has the right to remain in occupancy of the unit for a period of 90 days from the date of the mailing of such Notice or the remainder of the lease term, *whichever is greater*.⁶⁹ The Tenant is entitled to continue the tenancy under the terms of the lease as existed at the time of the Judgment of Foreclosure and Sale and if no such Judgment was entered, as the terms existed at the time of transfer of ownership of the premises.⁷⁰ There are exceptions to the rule if the successor in interest will be using the premises for residential purposes.⁷¹ In that case, the successor may limit for one unit only, the tenant’s rights to occupancy to ninety (90) days.⁷²

Any and all successor(s) in interest to the premises must now provide written Notice to all tenants advising them of their rights to remain in the property, as detailed above and providing the Tenants with the successor’s name and address.⁷³

The Tenants are obligated to remit the monthly lease payments to the successor(s) in interest and if not, the successor(s) in interest have all of the remedies of non-payment and eviction proceedings available in New York State.⁷⁴

Any Judgment of Foreclosure issued on or after the effective date of this statute, shall provide that the successor in interest takes the premises subject to the rights and obligations of the Tenants, as set forth above.

The effective date of the statute is January 14, 2010 and applies to any and all actions where a Judgment of Foreclosure and Sale is issued on or after January 14, 2010.

8. Maintenance of the premises by lender once Judgment of Foreclosure and Sale is obtained

NY RPAPL § 1307 now imposes on Plaintiff a duty to maintain⁷⁵ the residential real property after issuance of a Judgment of Foreclosure and Sale, if the premises are or become Vacant or are abandoned by the Mortgagor but occupied by a Tenant.⁷⁶ Plaintiff must maintain the property until title to the property has been transferred and the Deed has been recorded.⁷⁷ If a Receiver is appointed, Plaintiff is not obligated to maintain during the time that the Receiver is serving.⁷⁸ If the Defendant mortgagor files for bankruptcy relief before the foreclosure sale is held, the Plaintiff’s duty to maintain the premises is suspended until a vacatur of the automatic stay.⁷⁹

Plaintiff shall have the right to enter peaceably upon the premises for purposes of inspections, repairs and maintenance.⁸⁰ If a tenant resides at the premises, seven 7-days’ notice of entry must be given to the Tenant unless emergency repairs are necessary, in which case, “reasonable notice” shall suffice.⁸¹

The Municipality, Board of Managers in a Condo Association or a lawful Tenant may bring an action against Plaintiff for failure to maintain the premises and for costs incurred by them to maintain the property.⁸²

The effective date of the statute is April 14, 2010.

F. Options to Seniors Facing Foreclosure

And so in the midst of all this new legislation, how does this assist senior homeowners trying to make ends meet and keep their homes?

- 1. Loan modification:** For starters, the increased Notice requirements under the new legislation provide the homeowners with earlier notification of default. The 90-Day Notice also provides homeowners with a list of local counseling agencies that can assist with a loan modification agreement in the event the homeowners are unable to prepare the necessary forms and communicate with the lender on their own. If action is not taken at that time, the homeowner can take advantage of the resources provided by the

Court via the Settlement Conferences held early on in the foreclosure proceeding. A coalition of state Attorneys General and Banking supervisors, The State Foreclosure Prevention Working Group, a multi-state task force, was established in July 2007 by Iowa Attorney General Tom Miller to work with subprime mortgage servicers. Their focus is on preventing unnecessary foreclosures where homeowners have the desire and reasonable ability to make payments on a loan.⁸³

In 2008, in recognizing that providing counseling services with trained mortgage counselors to individual homeowners is a critical part of addressing the foreclosure crisis, then-Governor, Eliot Spitzer awarded more than half a million dollars in additional grants from the State of New York Mortgage Agency (SONYMA) and the Division of Housing and Community Renewal (DHCR) to nonprofit counseling services.⁸⁴ In 2009, President Obama started the Home Affordable Modification Program (HAMP),⁸⁵ as part of his larger initiative to make waves in home affordability. The government program makes available \$75 billion in funding to help 3-4 million homeowners at risk of foreclosure to stay in their homes. HAMP allows eligible mortgagees to lower their monthly payments to 31% of their pre-tax income, or lower, through a loan modification. Modifying the home loan must equal more net value than foreclosing would. The adjustments are introduced on a temporary basis but are made permanent after the homeowner makes three on-time payments. Lenders modify the loans because the Obama administration is offering up thousands of dollars in incentive payments not only to lenders but to homeowners and mortgage investors as well.

2. Sale and pay off mortgage/possible short-sale:

For an elderly person, overwhelmed by the physical demands of maintaining a house and unable to pay the mortgage, an option is always sale of the real property. The problem, however, is that due to the loss in property values, many homeowners are finding themselves in a position of negative equity: a mortgage debt higher than the value of the property. In this situation, the homeowner may attempt to have the lender approve a "short-sale" of the property where the lender(s) agrees to accept less than the full amount due to them to pay off the mortgage(s).

3. Refinance: In today's market, again, due to negative equity in the property, refinancing is not always a viable option. However, with low

interest rates at this time, if a homeowner has enough equity and credit worthiness, refinancing the existing mortgage may be an option which can help avoid foreclosure.

4. Bankruptcy: When modification attempts have failed, when there is negative equity in the home, when the lender refuses a short-sale or when efforts to sell are to no avail, the homeowner may have to consider his/her options in bankruptcy.

a. Chapter 7: If the Borrower qualifies to be a debtor in a Chapter 7 bankruptcy liquidation proceeding,⁸⁶ the debtor's non-exempt assets (if any) are liquidated and paid off to its creditors. The secured creditor's position is not altered by the Chapter 7 Discharge as the lien remains a lien on the property; however, the borrower's personal obligation on the Note is Discharged. For a senior homeowner with substantial credit card debt and/or medical bills, the absence of the monthly payment to pay those unsecured debts can provide them with the additional funds necessary to fund a modification plan and help them keep their home.

b. Chapter 13: If the Borrower qualifies to be a debtor in a Chapter 13 bankruptcy proceeding,⁸⁷ the pre-petition mortgage arrears due to the mortgage holder can be paid over a period of thirty-six (36) to sixty (60) months via a Chapter 13 Plan.⁸⁸ The Borrower must continue to make post-petition mortgage payments as well. Further, if there is absolutely no equity in the property above the first mortgage, the Debtor may file an Adversary Proceeding to strip down the second mortgage on the property to the status of an unsecured creditor.⁸⁹ In that manner, the sums due to the second mortgage holder will be paid by the disposable income left over after payment to the secured creditor. The second mortgage holder, now holding an unsecured claim, will be paid pro rata just as all other unsecured creditors are paid. This can be a tremendous savings to the homeowner and may provide the needed financial assistance to keep his/her home.

G. Conclusion

In early 2008, with regard to one of the many early intervention programs designed at assisting homeowners to modify their loans and avoid foreclosure, Senator Diane Savino (D-Statens Island) said: "The American

public has been calling on the federal government for some kind of response to the mortgage crisis. What we have gotten instead are band aid solutions that do little to help the thousands of homeowners on the verge of foreclosure. By bringing lenders and homeowners together in this unique forum, we hope we can bring real solutions to those struggling to stay in their homes.”⁹⁰

“[T]he tools have been provided to the homeowners and lenders to attempt to modify these loans in order to keep these homeowners in their homes and to date, outside of bankruptcy court, the Settlement Conferences leading to Modification Agreements may be the best tool available to homeowners (including seniors) to remain in their homes.”

As I write this article two years later, the crisis is still having devastating consequences for families and for communities across New York State. It’s hard to say whether the programs in place will actually help homeowners permanently or whether these measures will provide only temporary relief to homeowners who, in reality, could not have afforded the homes they purchased or the loans they were approved for in the first place. However, the tools have been provided to the homeowners and lenders to attempt to modify these loans in order to keep these homeowners in their homes and to date, outside of bankruptcy court, the Settlement Conferences leading to Modification Agreements may be the best tool available to homeowners (including seniors) to remain in their homes.

Endnotes

1. 2009 N.Y. Laws ch. 507.
2. Robert R. Callis and Linda B. Cavanaugh, *Census Bureau Reports on Residential Vacancies and Homeownership*, U.S. Census Bureau, October 27, 2006 available at <http://www.census.gov/hhes/www/housing/hvs/qtr307/q307press.pdf>.
3. From 2000–2001, the Federal Reserve Chair Alan Greenspan lowered the Federal funds rate 11 times, from 6.5% in May 2000 to 1.75% in December, 2001. See <http://www.federalreserve.gov/fomc/fundsrate.htm>.
4. Between 2003 and 2007, the U.S. subprime mortgages increased 229% from \$332 billion to \$1.3 trillion See Subprime Crisis Impact Timeline, http://en.wikipedia.org/wiki/Subprime_crisis_impact_timeline. Traditionally, banks financed their mortgage lending through the deposits they receive from their customers. In recent years, the secondary mortgage market has made it much easier to fund additional borrowing; however, it has also led to abuses as banks no longer have the incentive to check carefully the mortgages they issue.
5. Les Christie, *Real estate cools down, Prices in the first quarter fell 3% from the fourth quarter*, CNN Money, May 16, 2006, available at http://money.cnn.com/2006/05/15/real_estate/NAR_firstQ2005_home_prices/index.htm.
6. *Id.*
7. Michael M. Grynbaum, *Home Prices Fell in ‘07 for First Time in Decades*, The New York Times, January 24, 2008, available to members at <http://www.nytimes.com/2008/01/24/business/24cnd-home.html>.
8. Mantell, Ruth, *Home prices off record 18% in past year, Case-Shiller says*, Marketwatch, December 30, 2008, available at <http://www.marketwatch.com/News/Story/Story.aspx?guid={A0BC3037-386D-4810-86C7-066AF28F6017}>.
9. *More Than 1.2 Million Foreclosures Reported in 2006*, PR Newswire, January 25, 2007, available at <http://www.prnewswire.com/news-releases/more-than-12-million-foreclosures-reported-in-2006-according-to-realtytractm-us-foreclosure-market-report-53758717.html>.
10. *Id.*
11. 2006 N.Y. Laws ch. 308.
12. Former NY RPAPL § 1303(1).
13. The exact text of the Notice, as it existed when enacted, is not reprinted here as it was thereafter amended, as is provided below.
14. See *Countrywide Home Loans, Inc. v. Taylor*, 843 NYS2d 495 (Sup. Ct., Suffolk Co. 2007).
15. *U.S. Foreclosure Activity Increases 75 Percent in 2007 According to RealtyTrac U.S. Foreclosure Market Report (TM)*, January 29, 2008, available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/01-29-2008/0004744598&EDATE>.
16. Jonathan Stempel, *Countrywide plunges on downgrade, bankruptcy fear*, Reuters, August 15, 2007, available at <http://www.reuters.com/article/marketsNews/idUKN1525333820070815?rpc=44>.
17. *Id.*
18. 2007 N.Y. Laws ch. 458.
19. NY RPAPL § 1320 requires that in foreclosure proceedings of residential properties containing not more than three units, the Summons must contain the following language:

NOTICE

YOU ARE IN DANGER OF LOSING YOUR HOME
If you do not respond to this summons and complaint by serving a copy of the answer on the attorney for the mortgage company who filed this foreclosure proceeding against you and filing the answer with the court, a default judgment may be entered and you can lose your home.
Speak to an attorney or go to the court where your case is pending for further information on how to answer the summons and protect your property.
Sending a payment to your mortgage company will not stop this foreclosure action.
YOU MUST RESPOND BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE PLAINTIFF (MORTGAGE COMPANY) AND FILING THE ANSWER WITH THE COURT.
20. Prior to the 2007 amendment, CPLR 3215(g)(3)(iii) expressly excluded “any summary proceeding to recover possession of real property, or to actions affecting title to real property” without any exception for foreclosure actions.
21. NY CPLR 3215 (g)(3)(iii), as amended by Chap. 458 of the Laws of 2007.

22. NY CPLR 3215 (g)(3)(i).
23. Henry Paulson, *Housing woes take bigger toll on economy than expected*, AFP, October 16, 2007, available at <http://afp.google.com/article/ALeqM5hWSjWmGJ4YXTh3PM5kOC7csTT48g>.
24. 2008 N.Y. Laws ch. 472.
25. As defined in NY Bank. Law § 6-l.
26. As defined in former RPAPL § 1304(5)(c).
27. As defined in former RPAPL § 1304(5)(e).
28. As defined in RPAPL § 1304(5)(b).
29. Fannie Mae Conforming Loan Limits are available at <http://www.fanniemae.com/aboutfm/pdf/historicalloanlimits.pdf>.
30. NY RPAPL § 1304(1).
31. NY RPAPL § 1304(2).
32. NY RPAPL § 1304(1) requires the following content:

YOU COULD LOSE YOUR HOME. PLEASE READ THE FOLLOWING NOTICE CAREFULLY

As of [-----], your home loan is [-----] days in default. Under New York State Law, we are required to send you this notice to inform you that you are at risk of losing your home. You can cure this default by making the payment of [-----] dollars by [-----].

If you are experiencing financial difficulty, you should know that there are several options available to you that may help you keep your home. Attached to this notice is a list of government approved housing counseling agencies in your area which provide free or very low-cost counseling. You should consider contacting one of these agencies immediately. These agencies specialize in helping homeowners who are facing financial difficulty. Housing counselors can help you assess your financial condition and work with us to explore the possibility of modifying your loan, establishing an easier payment plan for you, or even working out a period of loan forbearance. If you wish, you may also contact us directly at [-----] [-----] and ask to discuss possible options.

While we cannot assure that a mutually agreeable resolution is possible, we encourage you to take immediate steps to try to achieve a resolution. The longer you wait, the fewer options you may have.

If this matter is not resolved within 90 days from the date this notice was mailed, we may commence legal action against you (or sooner if you cease to live in the dwelling as your primary residence).

If you need further information, please call the New York State Banking Department's toll-free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.
33. See NY RPAPL § 1304(2).
34. NY RPAPL § 1304(4).
35. NY RPAPL § 1304(3).
36. Former NY CPLR 3408(a).
37. NY CPLR 3408(c).
38. NY CPLR 3408(b).
39. Defined in NY Bank. Law § 6-1 and 6-m.
40. Pursuant to NY RPAPL § 1302(1)(a)&(b), the following allegations must be made in Plaintiff's Complaint: "Plaintiff is the owner and holder of the subject Mortgage and Note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note"; and "Plaintiff has complied with all of the provisions of section five hundred ninety-five-a of the Banking Law and any rules and regulations promulgated there under, section six-l or six-m of the Banking Law and section thirteen hundred four of RPAPL."
41. N.Y. Bank. Law § 6-m(13) provides that "[i]n any action by a lender or assignee to enforce a loan against a borrower in default more than 60 days or in foreclosure, a borrower may assert as a defense, any violation of this section." In addition, under subsection "2" of amended § 1302 of RPAPL (RPAPL) ("Foreclosure of high-cost home loans and subprime home loans"), effective August 5, 2008, "[i]t shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of § 6-l or 6-m of the Banking Law" or RPAPL § 1304.
42. See *New York Foreclosure Filings Down in Fourth Quarter 2008, Reflecting Impact of State Legislation and Initiatives*, New York Banking Department and RealtyTrac® Release Fourth Quarter and Full Year 2008 Foreclosure Data for New York State, January 23, 2009 Press Release available at <http://www.banking.state.ny.us/pr090123.htm>.
43. *Id.*
44. Nouriel Roubini, professor of economics and international business at New York University, Kenneth Rogoff, professor of economics and public policy at Harvard University, and Nariman Behraves, chief economist and executive vice president for IHS Global Insight, all agreed. See *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps Are Not Taken*, Business Wire, February 27, 2009, available at <http://www.reuters.com/article/idUS193520+27-Feb-2009+BW20090227>.
45. "home loan" is defined in NY RPAPL § 1304(5)(a).
46. See 32, *supra*.
47. NY RPAPL § 1304(2).
48. *Id.*
49. See UCC § 9-611(f).
50. NY RPAPL § 1306(1).
51. *Id.*
52. NY RPAPL § 1306(2).
53. NY RPAPL § 1303(1)(b) and (4).
54. NY RPAPL § 1303 (4).
55. NY RPAPL § 1303(5) requires the following content:

Notice to Tenants of Buildings in Foreclosure

New York State Law requires that we provide you this notice about the foreclosure process. Please read it carefully. The dwelling where your apartment is located is the subject of a foreclosure proceeding. If you have a lease, are not the owner of the residence, and the lease requires payment of rent that at the time it was entered into was not substantially less than the fair market rent for the property, you may be entitled to remain in occupancy for the remainder of your lease term. If you do not have a lease, you will be entitled to remain in your home until ninety days after any person or entity who acquires title to the property provides you with a notice as required by section 1305 of the Real Property Actions and Proceedings Law. The notice shall provide information regarding the name and address of the new owner and your rights to remain in your home. These rights are in addition to any others you may have if you are a subsidized tenant under federal, state or local law or if you are a tenant subject to rent control, rent stabilization or a federal statutory scheme.

If you need further information, please call the New York State Banking Department's toll-free helpline at 1-877-BANK-NYS (1-877-226-5697) or visit the Department's website at <http://www.banking.state.ny.us>.

56. NY RPAPL § 1303(4).
57. *Id.*
58. *Id.*
59. NY CPLR 3408, as amended by 2009 N.Y. Laws ch. 507.
60. NY CPLR 3408(e).
61. NY CPLR 3408(d).
62. NY CPLR 3408(f).
63. NY CPLR 3408(h).
64. RPAPL 3408(g).
65. NY RPAPL § 1303(3), as amended by 2009 N.Y. Laws ch. 507 § 1, now requires the following content:

Help for Homeowners in Foreclosure
New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.
Summons and Complaint

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

Sources of Information and Assistance
The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process.

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Banking Department at [fig 1] (enter number) or visit the Department's website at [fig 2] (enter web address).

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.
66. NY RPAPL § 1303(1).
67. As defined in NY RPAPL § 1305 (c), the definition of "tenant" is as follows: "Tenant" shall mean any person who at the time the notice required by subdivision four of section thirteen hundred three of this article appears as a lessee on a lease of one or more dwelling units of a residential real property that is subordinate to the mortgage on such residential real property; or who at such time is a party to an oral or implied rental agreement with the mortgagor and obligated to pay rent to the mortgagor or such mortgagor's representative, for the use or occupancy of one or more dwelling units of a residential real property.
68. As defined in RPAPL § 1305(1)(a).
69. NY RPAPL § 1305(2).
70. *Id.*
71. *Id.*
72. See NY RPAPL § 1305(2).
73. See NY RPAPL § 1305(3).
74. See NY RPAPL § 1305(4).
75. Maintenance of the premises must be in compliance with New York Property Maintenance Code Chapter 3, Sections 301, 302 (excluding 302.2, 302.6 AND 302.8), 304.1, 304.3, 304.7, 304.10, 304.12, 304.13, 304.15, 304.16, 307.1, and 308.1; provided, however, that the property must also be maintained in a safe and habitable condition if there are tenants. See NY RPAPL § 1307(5).
76. NY RPAPL § 1307(1).
77. *Id.*
78. NY RPAPL § 1307(6).
79. NY RPAPL § 1307(4).
80. NY RPAPL § 1307(2).
81. *Id.*
82. NY RPAPL § 1307(3).
83. State Foreclosure Prevention Group Procedures First Monthly Report on Mortgage Servicer's Loss Mitigation Performance, February 7, 2008 Press Release available at <http://www.banking.state.ny.us/pr080207.htm>.
84. *Banking Department Announces Request for Proposal for \$1.5 Million in Foreclosure Prevention Counseling Services Grants*, February 13, 2008 Press Release available at <http://www.banking.state.ny.us/pr080213.htm>.
85. *Information available at* http://blogs.findlaw.com/law_and_life/2009/08/what-is-the-home-affordable-modification-program-hamp.html.
86. See 11 USC § 109 (b).
87. See 11 USC § 109 (e).
88. See 11 USC § 1322, 1325 *et seq.*
89. See 11 USC § 1322(b)(2) and 11 USC § 506(a) & (d).
90. *Senate Democrats, NYS Banking Department and Financial Institutions Join Forces to Help New York Borrowers Protect Their Homes*, February 10, 2008, available at <http://www.banking.state.ny.us/pr080210.htm>.

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The Forgotten Asset: The Buy-Sell Agreements in Partnerships, Corporations and Limited Liability Companies and Elder Law

By Bruce A. Rothenberg

What is a buy-sell agreement and where is it used? An Elder Law Attorney may have to deal with a buy-sell agreement as part of the business assets of a client in need of nursing home care and/or Medicaid. The Elder Law attorney should be aware of what and where a buy-sell agreement is used for, some of the basic provisions and the effects on a client's estate plan. This article is an introduction to a buy-sell agreement for the Elder Law attorney. Although this article may touch on certain areas of tax law, there may be other tax implications which are not covered. The reader should be aware of those tax consequences.



A buy-sell agreement is primarily used for a closely held business entity, whether that business entity is a sole proprietorship, partnership, corporation or limited liability company. This includes the many variations of these entities which were developed for tax and estate planning purposes. A closely held business entity is a business with a single owner or just a few owners, usually fewer than five. Although a buy-sell agreement will often involve at least two owners, a single owner may have an agreement with a third party, a key employee, family member or even a competitor, to buy him or her out should a triggering event occur. Under New York Law,¹ a limited liability company or partnership must have a management agreement. Further, that agreement should include provisions detailing the transfer of ownership upon the occurrence of one of the defined triggering events. Although a corporation is not required to have a shareholders agreement, it is a very good idea for the shareholders to have one. Too often a client comes to me to set up a business entity without additional documentation such as a shareholders agreement. Or even worse, many will use an incorporation service to get the business entity filed and fail to include these important documents because doing so would cost too much.

A. Purpose, Use and Basic Terms of a Buy-Sell Agreement

A buy-sell agreement is a restriction on the sale or transfer of the ownership interest by the owners of the business entity. Generally, it is a contract between two or more owners agreeing that if a triggering event occurs to one of the owners, the remaining owner(s) have the

option or obligation to purchase the ownership interest from the owner causing the triggering event or from that owner's estate.

There are a variety of triggering events in a buy-sell agreement. The primary events include death, disability or retirement of one of the owners. Other important triggering events that are often provided for may include the following, as examples: the trigger event of an owner filing for personal bankruptcy; the termination of one of the owner's employment with the business entity; an owner's attempt to transfer shares outside the buy-sell agreement; the owner(s) desire to sell the business; or an unresolvable disagreement among the owners or their desire to dissolve the entity and go their separate ways.² A buy-sell agreement can also be used to define the value of a party's interest in the business entity for gift and estate tax purposes³ or to handle possible deadlock situations when there are two equal shareholders.

There are three types of buy-sell agreements. The first is a cross purchase agreement. The second is a redemption agreement. The third is a combination of the first and second types of agreements and is referred to as a hybrid agreement.

A cross purchase agreement allows shareholders to purchase each other's interests.⁴ A cross purchase is useful to keep the shareholder's basis consistent in order to avoid significant capital gains and when there are only a few shareholders. Usually, a buy-sell agreement is funded by insurance. When the shareholders use a cross purchase, buying and tracking the different insurance policies can be very cumbersome. A redemption agreement has the corporation purchase the shareholder's interest. This type of agreement has the advantage of allowing the easier handling of insurance policies for a larger number of shareholders. Finally, the hybrid agreement combines both a cross purchase and redemption. The redemption agreement would provide for a right of first refusal to the corporation and then shareholders would have the option. This type of agreement is typically the preferred agreement used since it allows the shareholders to defer to the actual triggering event of who will purchase the shareholder's interest.

Another consideration in designing a buy-sell agreement is whether or not the purchaser(s) (either the corporation or other shareholders) are obligated to purchase the shares of the triggering owner or if the shares may be purchased by a third party. This is one of the areas where a hybrid agreement is most useful because the corporation may be given first choice to purchase the

shares. If the corporation does not purchase the interest, then the remaining shareholders must purchase the interest. For instance, if the entity is a Professional Limited Liability Company of lawyers, only another lawyer may own an interest in the Company. In a buy-sell agreement for the Company, the owners can agree that the Company has the choice of purchasing the interest before the other owners are required to purchase the triggering owner's interest. Other examples of businesses where an owner must be in the profession include physicians, real estate brokers, insurance brokers, and such other professions where the state regulates the licensing.

On the other hand, if the corporation or the owners do not have an obligation to purchase the shares, then the buy-sell usually allows for a third party purchaser. A buy-sell agreement without the obligation of either the corporation or the other owners would work for a non-professional non-licensed business, where there is no government restriction on who may own the business. However, preventing such a third party purchaser, when the corporation or the other shareholders are not obligated to purchase the shares of the triggering owner, could be considered an unreasonable restraint on alienation and should be avoided.

Nonetheless, restrictions may be imposed on the third party purchaser, including a requirement that the third party purchaser sign the buy-sell agreement before being admitted as an owner. Accordingly, the owners could agree that if the Company does not exercise its obligation to purchase the interest and the other owners decide that they do not want to purchase the interest, the triggering party's interest may be sold to a third party, as long as the purchaser is another attorney and is approved of by the current owners.

Similar to the obligation of the corporation or shareholder purchasing the shares is the right of first refusal. If an owner wishes to sell or transfer his or her shares and has a third party purchaser, the corporation may have the first right of refusal to purchase the shares at the offered price to the third party purchaser. Then the current shareholders may have the second right of refusal before the third party purchaser may be allowed to purchase the shares. A buy-sell agreement may contain both types of provisions, with certain triggering events causing the obligation to purchase and other triggering events giving the corporation or current shareholders the option to purchase. The agreement should also require that the selling owner sell all of the shares, whether to the corporation, other owners or a third party purchaser. Therefore, the selling owner is not holding a very small interest.

The next consideration in a buy-sell agreement is the purchase price. The buy-sell agreement must set forth the purchase price or a method of calculating the purchase price if there is no other determination by the shareholders. Usually, the agreement states that the

shareholders shall determine and agree on a per share value at least annually and that if the shareholders do not make that determination, if a triggering event occurs the price is determined through some other method. Further, the agreement may call for different valuation methods depending on the specific triggering event; however, this may prove dangerous if each method provides for a significantly different outcome. Finally, the Internal Revenue Service can disregard the purchase price with regard to an estate valuation if the valuation is not the fair market value.⁵ This can cause difficulties for the estate if it is required to sell at a lower price pursuant to the agreement while having to pay taxes on the higher amount determined by the IRS.

There are myriad methods for calculating the value of the share to be sold. As stated above, the owners can make their own determination as to the price for which they would be willing to sell their shares, and what they would be willing to pay the other owners for their shares, strictly based upon what they believe the business is worth.⁶ On the other hand, they may also agree today that the price will be based upon a formal appraisal of the business at the time the buy-sell is triggered. An appraisal value is the most accurate method but usually comes at a high price. Other methods of valuation include using the book value or book value with adjustments for things like goodwill, earnings ratios or some combination of these methods. Finally, there should be a provision in the agreement to determine the purchase price when the owners cannot agree on any specific determination method.

The next issue to take into consideration is the payment terms. It is important for a buy-sell agreement to have payment terms and that they have some flexibility. Such flexibility allows the business or other shareholders to avoid being financially strapped in making payments and avoids a financial strain upon the selling shareholder who must wait for payment. Further, different payment terms may be used for differing triggering events. For instance, where the triggering event is the death or disability of an owner, the agreement may call for more favorable payment terms, while the sale to a third party purchaser may have more restrictive terms. The agreement should include purchase terms such as: date of closing, down payment, amount and periodicity of installment payments, interest rate on unpaid balance, default remedies and security for the obligation to pay.

The owners or the corporation may fund the buy-sell agreement's purchase price through insurance. Such insurance may include life insurance and /or disability insurance. With today's Medicaid five year look back period and the disqualification period commencing with the Medicaid application, using long-term care insurance to fund or protect buy-sell agreements makes sense. Most buy-sell agreements downpayments are

funded with a combination of insurance policies with the obligation to pay the balance due falling on the purchasing corporation and / or owners. The payment balance remaining is usually paid through the use of promissory notes.

In a cross purchase agreement each shareholder would purchase life insurance on each other shareholder. However, this can be cumbersome if you have more than three shareholders. For instance, if there were four shareholders each would have to purchase life insurance on the other three. Each policy's face value would have to be no more than one third of the purchase price in order to not over pay. Further, the premium amount of each policy may be different depending upon each owner's age, health and percent interest owned. In addition, when one of the owners dies, there may be additional tax consequences in reallocating the ownership interests with regard to the insurance policies. For example, with four owners there would be twelve different policies. Add in the disability policies that have to be included and it gets very cumbersome to track. Further, these insurance policies should be used for the specific purpose of funding the buy-sell agreement. The corporation should have its own key-man life insurance policy to defray the cost of losing one of the owners. This problem does not arise so much with a redemption agreement, where the corporation owns the policies on the owners. The corporation only needs one policy for each owner. In a hybrid agreement, since the decision as to who purchases the shares (either the corporation or the shareholders) can be delayed until the triggering event, who owns the insurance policies becomes more difficult.

Coupled with the issues discussed above, another serious issue that can occur with any buy-sell agreement that is funded with life insurance is that surviving owner(s) may decide not to pay the proceeds of the policy to the estate in order to utilize the cash in the business (that is why a key-man policy is important). This may cause serious problems for the estate as it could leave it illiquid with a large tax liability it cannot pay.⁷ In order to handle this situation, a trust may be used to own the life insurance. In a cross purchase, a separate trust would be set for each owner and set up by the other owners. The provisions of the trust would include collecting the funds to pay the premium, collect the proceeds from the death benefit, collect the shares owned by the deceased owner and exchange the shares to the owners or corporation upon the payment of the death benefit. By having the trust own the policies, there would only need to be one policy for each owner. The costs of each policy can be more easily allocated among the owners and / or corporation and the trust would be responsible for making payments to the selling owner or the owner's estate, heirs or beneficiaries.

B. Estate Planning and the Buy-Sell Agreement

Another reason for a buy-sell agreement is to keep a business within a family and to control the specific family members allowed to own the business. A buy-sell agreement should be an integral part of an estate plan with business holdings. Family-owned real estate is an asset I see often. Usually it is mom and dad who own rental property worth a few million dollars or more and they want to pass this property to their children. The first issue to be dealt with in this situation is to determine how the rental properties would be owned. In order to protect each asset from potential liabilities incurred on another asset, each asset should be owned by a separate business entity. If there are several separate rental properties, placing each property in a separate entity is usually preferable but may be costly—especially if several limited liability companies are used. Also, each limited liability company needs its own management agreement. Moreover, corporations and limited liability companies make great gifting vehicles.

Until 1993, the IRS refused to allow discounts for family-owned businesses. However, with a revenue ruling issued in that year⁸ an estate planner today can utilize minority interest discounts, lack of marketability discounts,⁹ the annual exclusion for gifts¹⁰ and the unified credit against gift taxes.¹¹ A donor can give away a larger percentage of a family-owned business than if the donor were giving cash or marketable securities, while still maintaining control over his or her business. For example, each parent can give away \$13,000 to each of their children and grandchildren this year, and another \$13,000 to each of their children next year (or the applicable amount, as adjusted for inflation).

Minority interest discounts are taken when a shareholder's interest does not include rights that would ordinarily be associated with a typical shareholder's interests. Some of those rights that may be removed from a shareholder's interest to obtain a minority interest discount include removing voting rights, no participation in management or the right to receive distributions. Lack of marketability discounts relate to the ability to sell the interest. The combined discounts have been as little as twenty percent to as much as sixty percent of the value. Combined discounts must be calculated on a per case basis. On average, the discount has ranged between thirty-five to forty-five percent. As an example, using the assumption of a forty-five percent discount rate, a parent would be able to give away \$1,841,818 worth of a family owned business without incurring a gift tax. Should one dollar more be given away a tax is due. Let's say a business is worth \$4,000,000 and both parents were to give away \$3,683,636 of the business' value (which equals a ninety-two percent interest in the business), while keeping control to obtain the discounts. Upon their deaths, assuming a reversion to the old estate tax laws, the estate would pay a tax of about \$150,000. Without this planning the estate would pay approximately

\$930,000 in estate taxes. This amounts to a savings of almost \$780,000.

In addition to all of the considerations that must be taken into account when designing a buy-sell agreement between non-related owners, a buy-sell agreement must be carefully drafted and reviewed in order to avoid bringing back the asset into the donor's estate and to make sure that the donor keeps enough control to ensure the discounts.

As discussed above, if there are insurance policies funding at least the downpayment, a trust can be utilized to ensure payment of the insurance proceeds to the seller. If the buying owners are going to pay over time, the payments can be made to that trust as well. Usually those payments are made over a short period of time (typically 60 months). However, the selling owner may not want all those funds that quickly. For example, take a business worth four million dollars per owner and there are three owners. When the business was just starting, the owners listened to their attorney and set up a hybrid buy-sell agreement and a trust to handle the purchase and sale of the shares pursuant to the terms of that buy-sell agreement. The trust also purchased whole life insurance on the life of the owners. The buy-sell agreement calls for a twenty percent down payment with the remainder to be paid over sixty months and an interest rate of six percent per annum. Payments would equal \$61,864.96 per month. Also assume that the selling owner is retiring after 40 years in the business.

The selling owner turns over the shares to the trust. Assume that the life insurance policy on the retiring owner has enough cash value to be used for the down payment. The remaining two owners determine that they will buy the shares individually. They make equal payments into the trust for the next sixty months. Upon the last payment they would receive the shares from the trust. On the other side, the retiring owner does not want to receive four million dollars over the next five years. He would rather receive it spread over his lifetime. The trust can be set up to make that happen. He would only have to pay capital gains on the amount he actually receives since he is a cash taxpayer, thus spreading his taxable event over a longer period of time. If it were his estate that was the beneficiary, capital gains would be based upon the stepped up basis.

C. Elder and Medicaid Planning and the Buy-Sell Agreement

Planning for a nursing home runs counter to the business and estate planning described above. The purpose of an estate plan is to preserve assets and, to some extent, control from the grave, but Medicaid planning means the choice between divesting assets or having to spend them on a nursing home. With the costs of a nursing home running between \$12,000 and \$15,000 per month, it is pretty easy to deplete assets quickly or to be stuck with an asset that cannot be easily liquidated (and

therefore possibly face disqualification for Medicaid). With a properly drafted buy-sell agreement in place, an individual needing nursing home care may have the means to provide for liquidity to cover such costs, while still protecting those business assets and provide for family members. As a final note, the lawyer planning for Medicaid must be aware of any business that has utilized minority interest discounts and how taking those discounts may affect a Medicaid application.

Endnotes

1. N.Y. Ltd. Liab. Co. Law § 417 (2010).
2. Steven C. Alberty, *Advising Small Business—Forms*, Chapter 21 Buy-Sell Checklist (Thomson West 2008) (additional triggering events include preserving S corporation elections, preserving professional corporation status, preventing violations of securities law limitations, preventing transfers in violation of licensing requirements).
3. I.R.C. § 2703 (2010) (regarding IRS disregarding buy-sell valuations except where the buy-sell uses fair market value).
4. In the rest of the document I use the terms shareholder and corporation. These terms can be interchanged with the terms used for a limited liability company or partnership.
5. I.R.C. § 2703.
6. I have used this method a number of times. I would begin by asking an owner for how much he would be willing to sell his business. I would look at the company's financial information and I would pick a number to start with by asking if the owner would be willing to sell me his business for X dollars. If he said no, I would increase the amount until I got a maybe. Then I would reduce the size of the increase of the offering price until the owner said he would sell. After we came to an agreeable price, I would reverse the role and ask him what he would be willing to pay for the business. I would go through the same pricing methodology until we came to an agreeable purchase price. Somewhere in the middle would be a fair value for the purchase of the business. This is one of four "down and dirty" methods I use to help figure out a ballpark value for a business. These methods are primarily useful when making a determination for face amounts of insurance purposes and when the business has been previously valued. Most owners know what their business is worth. Additionally, I feel comfortable doing this since I have a significant financial background.
7. See Treas. Reg. § 20.6151-1 (as amended in 1960) (regarding time and place to file the estate tax return).
8. Rev. Rul. 93-12, 1993-1 C.B. 202.
9. The lack of marketability discount is usually incorporated into the minority interest discount by courts but can be a separate discount used to calculate the value on top of the minority interest discount.
10. I.R.C. § 2503(b) (2010).
11. I.R.C. § 2505(a) (2010) ((1) applicable credit amount in effect under section 2010(c) for such calendar year (determined as if the applicable exclusion amount were \$1,000,000) reduced by, (2) the sum of the amounts allowable as a credit to the individual under this section for all preceding calendar periods).

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Social Adult Day Services: Structure, Support and Community for Frail Older Adults and Persons with Dementia

By Julie Wexler, MPA

Carol and Allen have been married for 45 years. Allen stopped working five years ago when he began noticing in himself cognitive deficits that made his job as a warehouse manager too difficult. Since then, he has been diagnosed with Alzheimer's disease and Carol has taken on the full time responsibilities as his caregiver. Still able to perform most activities of daily living on his own, but now requiring minimal assistance with personal care and dressing, Carol is determined to care for him at home for as long as possible. Allen attends a social model adult day services program three times a week. This provides Allen with cognitive stimulation and daily routine, and Carol with time to run errands and take care of other household responsibilities.



Accustomed to being active, 59 year old Sophie found herself isolated from her friends and unable to work as a result of a stroke 10 years ago. With support from a home health aide to assist with showering and with transportation services provided, Sophie attends a social model adult day services program five days a week. Attending a social adult day services program enables Sophie to remain active and involved in her community in a supportive environment.

For 87-year-old Eileen, who has outlived her spouse and friends and now lives with her daughter, the program provides her with opportunities for socialization with peers, purposeful activities and nutritious meals during the day. She would otherwise be home alone most days.

For frail older adults, those with cognitive deficits related to Alzheimer's or other forms of dementia, and individuals who are socially isolated, social model adult day services programs ("SADS") provide a structured, supportive and therapeutic environment. In New York State, they are distinguished from a medical model (or Adult Day Health programs) which also provide on-site health related services (including nursing services and physical and occupational therapies, etc.). Medical model programs are always connected to a licensed nursing home.

Federal funding does not support social model programs, despite being considered the next step in the continuum of care in the community when a tradi-

tional senior center can no longer meet the needs of an individual due to cognitive or physical frailty. Without a direct funding stream, the availability of SADS varies throughout the State and often throughout a region. In 2001, the New York State Office for the Aging funded just 19 programs in the state from a selection of over 90 applications. Although the State Office for the Aging maintains standards for service delivery, there is no licensure for SADS in New York State. State Office for the Aging funded SADS follow regulations set forth in Statutory Authority, Executive Law, Article 19J, Section 6654.20, Social Adult Day Care Programs. Although some cities, towns, and Area Agencies on Aging offer SADS for a low fee, the availability of these programs varies by geographic location. Some areas do not offer any programs. Others offer full service programs five days per week including support with activities of daily living and transportation.

Not-for-profit organizations and for-profit companies have worked to fill the gap in services to provide SADS, but without government support, these programs often struggle to remain competitive because of the cost of running such programs with well-trained and appropriate staffing and transportation. In summary, New York State's delivery system for social adult day services is a patchwork of programs, varying by service level, geographic availability, staffing patterns and price.

For people like Allen, Sophie, and Eileen, the benefits of social adult day services are enormous, providing not only socialization with peers in a supportive environment, but professional supervision by staff trained to engage older adults with memory impairment or physical disability in meaningful activities throughout the day. For those with Alzheimer's or other forms of dementia who are relying on routine to manage their own day, SADS offer structure and a new community of friends to make their days meaningful despite the disease's progression. For those with physical frailties, the extra support and recreational activities help to support and maintain functioning. It is typical for families to report improved mood, behavior, sleep and overall functioning of their loved one as a result of participation in SADS.

Many programs concurrently offer services for caregivers as a complement to the day program. These support programs also vary by availability, and may include support groups, educational events for caregivers, and extended hours to meet the needs of working caregivers. Social adult day services staff often view

caregiver support as vital to the success of an enrollment. By supporting the caregiver, particularly those of persons with dementia, and offering them emotional support and information on elder law, home safety, disease progression, paying for long-term care and the like, their capacity for caregiving is increased. This enables them to keep their loved one home longer and delays more restrictive and costly care options such as nursing home placement.

Despite the countless benefits for both the participant and the caregiver, there remain many barriers to accessing SADS. In addition to the geographic and other inconsistencies among programs, many caregivers are resistant to accessing care, often believing that their loved one won't enjoy the program or that they need to save money for more expensive care later. What day care centers find, however, is that most individuals adjust well after a few visits. Financially, SADS remain a cost effective and reliable means to access care which can significantly delay the need for more expensive care.

Transportation is another challenge to enrollment. While many publicly run and privately run programs provide transportation, others do not or are limited in what they can provide. The excessive cost of a taxi service and safety concerns for the dementia patient on public handicap-accessible transit options are other hindrances in accessing SADS.

Since social adult day services programs do not have medical personnel on staff, they are restricted in regards to medication management and are only able to remind individuals to take medicines during program hours. Outside New York State, it is common to see a "blended" model of service which includes nursing oversight and full medication management. NYS continues to consider this option, but as of yet there has not been a demonstration project to test the blended model's efficacy.

Although programs strive for excellence in care, lack of government support, a fragmented delivery system, and limited coordination among respite and caregiver services providers restrict accessibility. To be commended are the recent efforts on the state level to coordinate Alzheimer's and caregiver services among the NYS Office for the Aging, the NYS Department of Health, and private community-based organizations. The New York State Coordinating Council for Services Related to Alzheimer's Disease and Other Dementias reported to the Governor and NYS Legislature in 2009 that "adult social and medical day care models hold promise, especially for people in the early stages of AD. These models can provide an appropriate level of supervision and stimulation for the patient and needed respite for caregivers who need to remain in the workforce or tend to other responsibilities."

With the number of Alzheimer's disease cases expected to triple in the coming decades as a result of

demographic trends, the need for a coordinated delivery system that is geographically available, effective, and affordable will become even more necessary.

There are several options for paying for SADS—private pay, Long-Term Care Insurance ("LTC") and certain programs under Medicaid. If an individual pays for the service privately, fees can sometimes be supplemented by various sources such as local organizations or foundations that will help families offset the cost of respite care. LTC insurance policies vary in terms of their coverage for SADS. Most frustrating for many programs is often the LTC insurance vendor's requirement that care be provided by a licensed agency. Since there is no license for social model adult day services in New York, many are automatically eliminated as possible care options. Sometimes the LTC insurance plan will accept the oversight of a licensed social worker once the parameters of NYS social model programs are explained.

Payment options under Medicaid include the Long Term Home Health Care program (or Lombardi program), which will cover SADS as a waived service, Medicaid managed care plans, and the Nursing Home Transition and Diversion Waiver program. Since SADS programs are not providing any medical service, but opportunities for socialization, recreational activities, assistance with activities of daily living and meals, Community Medicaid does not cover the cost of the program. However, if an individual is a member of a pooled trust to meet income thresholds for Community Medicaid, social model day care is often an allowable expense.

Many social model programs work closely with elder law attorneys not only to ensure that families have the necessary documents and estate planning in place to plan for the eventual decline in their loved one's health status, but to ensure that care remains accessible to their clients. Despite the challenges, many social model programs maintain well trained staff and offer a level of care that surpasses expectations for such programs by offering invaluable ancillary services such as assistance with ADLs and caregiver support groups, extended hours for working caregivers, transportation services, and case management. If not already doing so, attorneys specializing in elder law in New York State can utilize such local programs as a vital cost effective care option for their clients.

Information about programs can be obtained by contacting the local Area Agency on Aging or by accessing the New York State Adult Day Services Association. An online directory at www.nysadulthood.com can assist professionals and family caregivers locate providers in their community.

Julie Wexler, MPA, is an Outreach Coordinator at Day Haven Adult Day Services in Ronkonkoma, New York.

The Story of a Shelter: Intervention and Prevention of Elder Abuse

By Deirdre M.W. Lok and Joy Solomon

The fastest growing segment of our population are persons 85 and older, increasing from 4 million in 2000 to an estimated 19 million by 2050.¹ Medical technology and advances in medicine and research have led to longer, happier lives, but growing older can also mean an increased risk of medical complications, diminished cognitive functioning and an increased risk of abuse. Each year, an estimated 2.1 million older Americans are victims of physical, psychological, or other forms of abuse and neglect.² Financial abuse, especially in our current economic climate, is growing at an alarming rate, with an annual monetary loss by victims of elder financial abuse estimated to be at least \$2.6 billion.³



Deirdre M.W. Lok

Elder abuse is often undetected and underreported. One out of every five cases is unreported.⁴ New York is one of only six states without mandatory reporting of elder abuse.⁵ Attorneys, and not just elder law attorneys,⁶ are seeing the impact and prevalence of elder mistreatment in their respective practices and are wondering where to turn and what resources exist. In addition, public cases such as Brooke Astor, the recent change in the power of attorney law, and the unusually high attendance at the elder abuse presentation at the 2010 New York State Bar Association annual conference also point to the growing and pervasive effect and problem that elder abuse and exploitation presents to legal practitioners.

Throughout the nation, aging experts, domestic violence practitioners and others are using creative strategies to combat elder abuse in the community. In 2004, Joy Solomon, Esq., then the Director of Elder Abuse Services at the Pace Women's Justice Center, identified a gap in service for victims of elder abuse in need of emergency shelter. However, at such time, no such safe-haven existed. Joy sat on the Westchester Public Private Partnership with Daniel Reingold, J.D., M.S.W., the President and CEO of the Hebrew Home at Riverdale. Together, they conceived the idea that the Home was the perfect place to create a shelter.

The Harry and Jeannette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale

("the Weinberg Center") is a comprehensive elder abuse center that provides an emergency residential shelter as well as psychosocial, health care and legal advocacy and community-based services for victims of elder abuse. The Weinberg Center also provides educational, training, research and community awareness programs on issues of elder abuse.



Joy Solomon

A. Seeds of An Elder Abuse Shelter: Intervention

The Hebrew Home at Riverdale, (hereinafter "the Home"), located on 19 acres overlooking the Hudson River, is an 870-bed facility that provides a full spectrum of residential health care, adult day and night care, rehabilitation services, and home care on a non-profit, non-sectarian basis. Extensive services, including a full medical staff able to provide 24-hour care, an extensive rehabilitation department, a memory care unit, art, pet and aquatic therapies, alternative therapies, including yoga, a high school and extensive art collection and museum, give the Hebrew Home a unique ability to fully serve the needs of older adults, and provide the ideal blueprint for The Weinberg Center. Inspired by the successful collaboration with non-profit agencies and government and the need to focus multi-disciplinary attention on elder abuse, the Weinberg Center developed relationships with community agencies who refer victims of elder abuse, and the doctors, psychiatrists, social workers, attorneys, nurses and companions at the Hebrew Home. At its core, the Weinberg team consists of two attorneys and a social worker. However, the Weinberg Center clients utilize the entire Hebrew Home staff and resources for daily living and care.

Today, elder abuse cases are referred from the New York City Department for the Aging, the New York City Police Department, District Attorneys' Offices, Adult Protective Services, hospitals, and community-based agencies. Every referral is reviewed on a case-by-case basis, due to the complex and unique medical, social, mental, financial and housing needs of each victim. Before a victim is accepted for admission, a Patient Review Instrument (PRI) must be completed to assure that he or she can obtain appropriate and adequate care at the Home. Once completed and reviewed, the

appropriateness of the admission is determined and transportation is arranged usually within 24 hours. The shelter space is virtual because the victims have varied medical and other needs; they are carefully placed in the Home among other resident peers where only the staff is aware of their “special” circumstances. Admission is not based on an ability to pay; in fact, Medicaid benefits can often be secured on their behalf.

Once admitted, the Weinberg Center client meets with a caring medical team, a social worker, and lawyers from the Weinberg Center. Medical, mental health and other assessments are completed. A legal assessment and review is done with the victim, to consider possible civil remedies, including an Order of Protection, revocation of a power of attorney, and annulment of a marriage. When appropriate, Weinberg Center attorneys petition the court for the appointment of a guardian. Often, a multi-agency and disciplinary approach continues after admission, including work with the police department, district attorneys’ offices, the referring agency and other community resources.

The goal of the Weinberg Center is to return the victim home, if possible. If not, appropriate long-term plans are arranged.

Security is vital to ensure the safety of Weinberg Center clients and to the other long-term care residents and staff. The Home has only one secured point of entry and a trained security team is kept apprised of relevant court orders, limits on visitation and other restrictions. Initially, a two-week “no visitation” policy is implemented for each new Weinberg resident to give the victim time to adjust to his or her new surroundings, and for the staff to complete an evaluation and investigation into the alleged abuser(s).

B. Elder Abuse Training, The Weinberg Screen and ElderServe’s Overnight Day Care: Prevention

The Weinberg Center offers unique education programs on elder abuse. Partnerships with law enforcement, hospital doctors, social workers and discharge planners, community centers and senior centers, community organizations and groups, faith-based leaders and organizations, attorneys and local bar associations, judges and court personnel, and even 32 BJ (the doormen and superintendent’s union in New York City), have led to trainings and programs for a full spectrum of community members and professionals who work with older adults.

In an effort to increase the identification of elder abuse victims who may otherwise go unnoticed, the Weinberg Center team, with help from Terry Fulmer, Dean of New York University’s College of Nursing, developed a screening tool for elder abuse detection. The tool was designed to be easy to administer and to

provide a way to gain insight into an older person’s circumstances that may evidence abuse. The screening has grown from use in the short-term rehabilitation part of the Home to all of the Home’s portals, including long-term residential care, and short- and long-term home health care. The screen is available for use in community centers, hospitals and other health care settings. The research division at the Home is tracking data collected from the screen. The Weinberg Center team has also adapted the screen to be used by attorneys in their initial client meetings to assess for possible signs of elder abuse, especially financial abuse.

ElderServe on the Palisades, another program at the Home, has developed the only overnight medical model day care program in the country. The night care program, ElderServe at Night, is based on the medical model day care program that provides medical services, social work services, dietary supervision, occupational and physical therapies as well as a wide variety of activities to promote cognitive functioning. This unique program is a means to care for a patient with dementia or Alzheimer’s disease who suffers from sleep disturbances commonly associated with the disease. Perhaps most importantly, the program prevents caregiver stress. Often, the erratic sleep patterns typical of an Alzheimer’s patient are overwhelming, if not impossible to manage when safety precautions and personal care of an individual are required during normal sleeping hours.

Throughout the night, these clients engage in activities, peer socialization, and exercise. This safe, medically monitored and engaging program can be a critical piece to abuse prevention, offering a reprieve for caregivers and clients alike.

C. Case in Point

Mrs. G is an 82-year-old woman with a dementia diagnosis. She spent the last twenty years of her life living in Midtown Manhattan. She was single and had only one known living relative, but had numerous friends from the fashion industry, where she worked for years. Mrs. G was also born in Austria. Mrs. G frequently went to the park, socialized with neighbors in her building, and went almost daily to a local senior center. Mrs. G was always beautiful, fashionably well-dressed, and independent, until a close friend of hers died. This traumatic event seemed to trigger the start of a decline in Mrs. G’s cognitive functioning.

Through 2008-2009, the staff at the senior center observed a decrease in Mrs. G’s ability to care for herself and a marked increase in her dependence and trust in people she did not know. It was evident that the dependency on others, in combination with decreased cognitive ability and judgment, put Mrs. G. at great risk of financial exploitation. In May 2009, Mrs. G suddenly became instantly attached to a man, “Mr.

M”, who frequented the senior center. The senior center staff was convinced that Mr. M was untrustworthy and did not have her best interests in mind. He had only become close to Mrs. G in the last few weeks and suddenly was involved in her daily care, decision making and acted with authority about her finances and health care. When attempts were made to help Mrs. G schedule doctor visits, Mr. M would cancel the appointment or argue with the senior center staff that she did not need to see the doctor. Mrs. G would allow him to advocate for her, without seeming to understand what was in her best interest. The senior center staff was particularly concerned that Mrs. G was providing access to her apartment, her finances and personal information to Mr. M.

On July 19, 2009, Mrs. G was admitted to the hospital for pain to her hip. She had an odor, her clothes were dirty and she was agitated. When she was diagnosed in the emergency room with a fractured hip, Mrs. G did not know how she was injured and did not recall what happened to cause the pain. She had been to the emergency room on nine occasions within the prior eight months. The hospital learned that she refused home assistance, did not have a doctor, did not know how to manage her pain and did not seek appropriate medical attention or take advice from medical professionals. In April 2009, New York State Adult Protective Services (hereinafter, “APS”) was contacted by the same New York City hospital because Mrs. G had a femoral neck fracture, but disturbingly she walked out before being evaluated by an orthopedic doctor. APS was in the process of evaluating her when Mrs. G was admitted to the hospital again in July. By July 22, 2009, APS determined that Mrs. G could not be safely discharged back into the community without the appointment of a guardian for her person and property. She did not have any family to look after her medical needs or personal affairs.

Perhaps the most immediate threat was from Mr. M. The hospital staff was alarmed when Mrs. G suddenly agreed to appoint him and his friend (who appeared to be suffering from dementia) as her health care agents. Mr. M was not making decisions in her best interest and did not seem to be able to provide the level of care Mrs. G needed. He was domineering and controlling, and exerted a strange level influence on Mrs. G about her health care decisions. Mr. M’s proposed plan of care for Mrs. G was to ask his friend with dementia to provide 24-hour care to Mrs. G. Further, he asked repeated questions about Mrs. G’s finances, assets, bank accounts and costs of care. He inquired about whether or not she would be appointed a guardian and was adamantly opposed to the appointment of a guardian, notwithstanding Mrs. G’s condition and needs.

The hospital did not want to release Mrs. G to Mr. M’s care, but did not know what to do. Mrs. G could not take care of herself, but had no known family to care for her. Mrs. G’s complex dementia diagnosis further complicated the situation. A domestic violence shelter could not provide the medical care that Mrs. G needed, yet somehow she had to be protected from Mr. M. The Weinberg Center was the perfect answer. The hospital social worker made the referral, and Mrs. G was admitted into the Weinberg Center.

Mrs. G arrived at the Home underweight, malnourished, unable to hear well, barely able to walk, and in a great deal of pain. Mrs. G was placed in the memory care unit of the Home, and taken into the care of a support team consisting of a nurse, nutritionist, therapist, social worker, and doctor. The staff immediately provided her with a hot meal and clean clothes. A doctor examined her and agreed that she needed hip replacement surgery, and in the meantime prescribed her medication to ease her pain. A psychiatrist met with her and determined that she suffered from considerable cognitive impairment, could not attend to her own personal care, or manage her finances, and was unable to understand the nature and consequences of her limitations. She was fit for a new hearing aid by the audiologist. Mrs. G was given a walker to help her ambulate independently.

The Weinberg Center continued to investigate the suspicions of financial abuse, and as the facts unfolded, the deception of Mr. M became more evident. He falsely identified himself as a doctor during various phone conversations with the Home staff and acquaintances of Mrs. G. He called several of her financial advisors, and pretended that he was “the doctor from the center.” Mr. M asked everyone he could about her assets. It was revealing that Mrs. G had absolutely no idea who Mr. M was at this time.

The Weinberg Center reached out to every possible member in the community who might be in a position to help or provide information about Mrs. G. The landlord from Mrs. G’s apartment agreed to hold her apartment and refrain from commencing an action or proceeding based on non-payment of rent in light of her circumstances. Her banks agreed to take extra measures to prevent any transfers of funds. The staff from the senior center was willing to provide information and even testify about Mrs. G’s deterioration and the sudden and suspicious involvement of her “friend.” The hospital provided the medical records that contained pertinent information about Mrs. G’s mental and physical health when she was first seen in the emergency room. Even the Austrian consulate was involved in helping to locate and contact a friend, as well as certain assets she owned in Austria.

Mrs. G needed a guardian. Her assets were at risk, and she had no idea where her money was saved or how much she had. Her rent was due and she had no idea how to pay it. Mrs. G could not take care of herself or follow doctor's orders. The attorney from the Weinberg Center went to court and petitioned for a guardian to be appointed. The Judge designated a guardian to protect Mrs. G's finances and manage her personal care. The suspicious health care proxy was voided, her bank accounts frozen, and temporary restraining orders put in place to prevent any further damage to Mrs. G's property. Mrs. G was safe and receiving the care she needed, her assets fully and finally protected.

It is still unclear how much money was taken from Mrs. G. Because of evidentiary limitations, including the timeline of events, Mrs. G's lack of capacity, and how much money was taken, a criminal case was not commenced. But, Mrs. G. is safe, at her optimal health, is walking, can hear, is free of pain, and has a responsible third party managing her finances. The Weinberg Center and the efforts and cooperation of the community made her case a success.

C. Conclusion

For more information on training provided by the Weinberg Center, the services at the Weinberg Center, or the Weinberg elder abuse screening tool, please contact dlok@hebrewhome.org. For any referrals to the Weinberg Center, please contact 1-800-56-SENIOR.

Endnotes

1. Teaster, P.B., Tyler, A.D., Mendiondo, M.S., Abner, E.L. Cecil, K.H., Otto, J.M., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, The National Committee for Prevention of Elder Abuse and The National Adult Protective Services Association. Prepared for the National Center on Elder Abuse (2006).
2. *Id.*
3. MetLife Mature Market Institute, *Broken Trust: Elders, Family, and Finances*, March (2009) at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>.
4. National Elder Abuse Incidence Study. 1998 Washington, D.C.: National Center on Elder Abuse at American Public Human Services Association.
5. Wei, G.S., Herbers, Jr, J.E., *Reporting Elder Abuse: A Medical, Legal and Ethical Overview*, 59 Journal of the American Medical Women's Association, No.4 (2004).
6. Real estate attorneys involved in disputes over property, prosecutors and defense attorneys involved in assault, forgery, larceny or murder cases, matrimonial attorneys whose

clients live in multi-generational households, transactional attorneys who work with designated powers of attorneys or represent families and finance-based attorneys who work with institutions that are attempting to safeguard against privacy violations, or loss or mismanagement of assets by family members are all faced with issues of elder abuse and exploitation.

Deirdre M.W. Lok is counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale, the nation's first elder abuse shelter in a long-term care facility, and a prevention, intervention and training resource on elder abuse for local agencies and government. Prior to joining The Weinberg Center, Deirdre was a Deputy Prosecuting Attorney in Oahu, Hawaii. Deirdre was the first prosecutor in Hawaii selected to manage the newly formed Mental Health courtroom and supervised and trained incoming deputy prosecutors on trial procedure in trial courtrooms. She spent three years as an Assistant District Attorney in the Queens County District Attorney's Office, investigating, prosecuting and trying a variety of cases, with a focus on domestic violence cases. Deirdre graduated magna cum laude from New York University and received her law degree from Brooklyn Law School, class of 2003. Deirdre is a frequent speaker on the issue of elder abuse and the law, and is a member of the New York City, Bronx, Brooklyn and Westchester County Elder Abuse Coalitions and co-chair of the New York City Elder Abuse Network.

Joy Solomon is currently the Director and Managing Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first comprehensive elder abuse shelter, located at the Hebrew Home at Riverdale in New York City. Joy is also the Director of Elder Abuse Programs at the Pace Women's Justice Center, a non-profit legal advocacy and training center based at Pace University Law School in Westchester County, New York. Prior to joining the Women's Justice Center in 1999, Joy investigated and prosecuted a variety of crimes including child abuse, fraud, and elder abuse as an Assistant District Attorney in Manhattan, where she served for eight years. After obtaining her B.A. from Syracuse University in 1986, Joy received her law degree in 1989 from the National Law Center at George Washington University. Joy is a frequent speaker on the issue of elder abuse to a wide range of professionals including testimony in front of the United States Congress' Special Committee on Aging.

Adult Day Health Care Services: A Community Option for the Elderly

By Sandra Butler

Attorneys are frequently helping clients deal with the difficult issues of nursing home placement, and the conflicts arising when families are having second thoughts about their decision to place a loved one into nursing home care. Adult Day Health Care Programs, which are available throughout New York State, offer an effective alternative for the elderly who otherwise can be cared for in the community with these services in place.



A. What is Adult Day Health Care?

Founded in the early 1990s, the statewide association represents 163 medical model adult day health care programs in NYS. Adult Day Health Care is a community-based long-term care program that provides comprehensive health care services in a congregate setting. Registrant needs are assessed and met through an individualized plan of care that is developed and implemented by an interdisciplinary team of medical professionals, including the registrant's personal community physician. Door-to-door transportation is provided.

As a so-called "one stop shopping" concept for many health care needs, which are assessed and met, or arranged for, the integrated care leads to stabilization of chronic health conditions and reduces costly emergency room visits. At the same time, it provides relief and peace of mind to the family. Registrants are provided with the medical and social services they need to safely remain at home and be part of their community. The concept of Adult Day Health Care also satisfies the Federal Olmstead Act to maintain individuals in the least restrictive community-based health care system.¹

B. What services are provided?

Adult Day Health Care programs are staffed with medical professionals, including licensed registered nurses, licensed practical nurses, NYS certified nurse aides, recreational therapists, social workers and physical, occupational and speech therapists. In addition, other professional services are often provided such as vision care, dental services, mental health services, podiatry, x-rays and phlebotomy.

Registrants are given nursing, case management, clinical management, medical, diagnostic, social, rehabilitative, recreational and personal care services on a regular basis. Recreational programs are varied which include community outings, arts and crafts, table games, computers, Yoga, Tai Chi, Meditation and many kinds of specialty groups. A continental breakfast, hot lunch and snacks are offered as are take home dinners for those who live alone.

C. How is the service regulated?

Medical Model Adult Day Health Care Programs in New York State are regulated by the NYS Department of Health and are subject to the DOH survey process every 3 years.

Under the authority vested in the State Hospital Review and Planning Council by section 2803 (2) of the Public Health Law, Parts 425, 426 and 427 were repealed and a new Part 425 was added and passed as permanent on March 15, 2004.² Parts 711 and 713 were amended in Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of NYS.³

Part 425, Adult Day Health Care, is under the Statutory Authority: Public Health Law, section 2803 (2). Part 425 sections include definitions, application, changes in existing program, general requirements for operation, adult day health services, admission and registrant assessment, registrant care plan, registrant continued stay evaluation, medical services, nursing services, food and nutrition services, social services, rehabilitation therapy services, activities, religious services and counseling, dental services, pharmaceutical services, services for registrants with AIDS, general records, clinical records, confidentiality of records and program evaluation.

D. What is the method of payment?

An individual must be Medicaid eligible (community Medicaid), willing to pay privately, or have a private insurance source that will pay for the service. Reimbursement rates under Medicaid are set by a formula of 65% of the nursing home case mix index and, as of a 2009 change, from a budget-based to a cost-based ADHC rate. The 2009 budget rate was based on 90% of the program's capacity in that year. To maximize reimbursement, many programs requested DOH administrative approval to reduce their capacity or have been forced out of business.

E. Who is eligible?

Adult Day Health Care is designed to meet the health care needs of the chronically ill, frail elderly and disabled adults who require primary, preventative, diagnostic, therapeutic, rehabilitative or palliative services. The program services many diagnostic groups which include the medically, mentally, developmentally challenged individuals of many adult age groups.

F. How does the family enroll?

A listing of local programs can be found on the ADHCC Web site, available at www.nyahsa.org/adult-dayhealth. Click on "finding services" and enter the county you are interested in.⁴ Upon a call to the local program, a registered nurse will conduct a comprehensive assessment to identify the individual's health care needs and the type and intensity of services required. This information is shared with the interdisciplinary team and the primary physician to determine if the ser-

vices required can be met by the program. The primary physician then writes medical orders about the care to be rendered which then begins the admission process.

Endnotes

1. *Olmstead v. L. C. ex rel Zimring*, 119 S.Ct. 2176 (1999).
2. New York State Adult Health Care § 425.
3. Title 10: Health, Official Compilation of Codes, Rules and Regulations of NYS.
4. New York Association of Homes & Services for the Aging, available at <http://www.nyahsa.org/>.

Sandra Butler, RN, MS is Director of the Nesconset Center for Nursing and Rehabilitation Adult Day Health Care Services at Middle Island Adult Day Health Services, 45 Rocky Point Road, Middle Island, NY 11953 and Islip Adult Day Health Services, 575 Clayton Street, Central Islip, NY 11722.

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Accessing Fair Hearing Decisions

By Melinda Bellus and Beth Polner Abrahams

From time to time, elder law, public benefit attorneys and advocates challenge a decision by the local department of social services through the use of a state level administrative review called the fair hearing.¹ Preparation for the fair hearing may include research in case law as well as witness preparation. A review of prior fair hearing decisions on your issue can be helpful to see how the same or similar issue was handled by another attorney or advocate.



Beth Polner Abrahams

The principle of administrative *stare decisis* requires the Office of Administrative Hearings to follow the rules established in its past decisions or to provide an explanation as to why it has not followed past decisions.² If you want to review and reference fair hearing decisions you will soon have a new source. The New York State Office of Temporary and Disability Assistance (OTDA) is about to initiate a Fair Hearing Decision Archive. The archive will contain every New York State fair hearing decision rendered as of January 2010. OTDA will edit each decision to remove identifying information such as names of appellants, case numbers and the names of family members.

When the system goes live the archive will be accessible at no cost and through the internet at www.otda.state.ny.us/oah/FHArchive.asp. It is expected that fair hearing decisions will be word searchable using a Google search engine. As with any legal research tool, the user may have to spend time familiarizing oneself with the site, including its search features and how to narrow the search. It is important to note the OTDA will not be selectively posting fair hearing decisions of interest; even simple or *pro forma* decisions based on withdrawal due to settlement or compliance will be posted. Another potential drawback for the archive is that decisions will be posted for only three years. At present, there are no plans by OTDA to further archive older decisions once the site is operating.

To find older and selected fair hearing decisions, a key resource is the Online Resource Center (ORC) Fair Hearing Bank administered by the Empire Justice Center and the Western New York Law Center (WNYLC). There is no cost to use the ORC Fair Hearing Bank but you must register and choose a user name

and password. You may do this through the internet at <http://onlineresources.wnylc.net>. Additionally, as a member of the New York State Bar Association, you may use your Bar Association “user id” and password to register as an authorized user. The ORC Fair Hearing Bank currently contains over 2,500 fair hearing decisions and there are regular efforts to keep it updated with new decisions.



Melinda Bellus

“[Y]ou will soon have a new source. The New York State Office of Temporary and Disability Assistance (OTDA) is about to initiate a Fair Hearing Decision Archive.”

How is the ORC Fair Hearing Bank updated? By you—private and public benefit attorneys and advocates. However, there is currently no funding for the ORC Fair Hearing Bank and your help is needed. The best method for keeping the Fair Hearing Bank updated is by uploading your own scanned fair hearing decision and then clicking the “submit” button at the ORC website at <http://onlineresources.wnylc.net>. When you submit a decision of interest, please take the time to complete the submission form by providing a summary of your decision. You may also highlight key words, statutes and category of assistance (such as Medicaid).³ Fair hearing decisions may also be submitted by fax to Susan Antos, Esq., at (518) 462-6687; or scanned and emailed directly to her at santos@empire-justice.org.

There are numerous advantages to the ORC Fair Hearing Bank and continuing its presence as a resource. First, the ORC Fair Hearing Bank contains archives of older fair hearing decisions. Second, the summaries of each decision are word searchable, although it takes some getting used to for selection of words and/or terms.

The Fair Hearing and Litigation Committee is currently working cooperatively with the Empire Justice Center/WNYLC to find ways to improve the technol-

ogy of the ORC Fair Hearing Bank including enhancing search ability and expanding indexing features. We believe there is a need to maintain the ORC Fair Hearing Bank because it archives important or interesting fair hearing decisions and provides an important research tool for fair hearing preparation, advocacy, and legal representation.

Endnotes

1. N.Y. Soc. Serv. Law § 22; N.Y. Comp. Codes R. & Regs. Tit. 18, § 358.
2. *Long v. Perales*, 172 A.D.2d 667, 670 (N.Y. App. Div. 1991); see also *Matter of Field Delivery Service*, 66 N.Y.2d 516, 520 (N.Y. 1985) (the failure of an administrative hearing decision to conform to agency precedent requires reversal as arbitrary even where there is substantial evidence to support the determination made).
3. After receipt of your decision and summary, the Empire Justice Center contacts OTDA which sends a redacted electronic copy of the fair hearing decision for posting.

Beth Polner Abrahams is chair of the Fair Hearing and Litigation Committee for the Elder Law Section of the New York State Bar Association. She is a solo practitioner with her law firm based on Long Island, New York. She also served as chair of the Nassau County Bar Association's Elder Law Committee.

Melinda Bellus is co-chair of the Fair Hearing and Litigation Committee for the Elder Law Section of the New York State Bar Association. She is the senior elder law attorney at Legal Services of the Hudson Valley in White Plains. She is also a member of the Westchester County Bar Association's Pro Bono Committee.

Thank you to Susan Antos for her assistance with this article. Ms. Antos is a senior staff attorney with Empire Justice Center's Albany office. Empire Justice Center is a statewide, multi-issue non-profit law firm focused on changing the "systems" that affect those trapped in poverty. Ms. Antos focuses on public benefits, including child care and child support issues facing low income families.

A Message from the Incoming Chair

(Continued from page 2)

to the right of election statute, working to put forth a proposal to modify the health care proxy law in view of the *Stein* case, advising our members with regard to ever-changing Medicaid rules and tax laws, informing our Section of the differences in the various counties with regard to Article 17A guardianship proceedings, working on improving the practice of Article 81 guardianship proceedings, participating in a fair hearing bank, promoting and assisting the special needs and mental health law practices of our members and providing timely information to our members regarding Surrogate's Court proceedings and litigation.

Our summer meeting in Philadelphia, Pennsylvania from August 5–8, chaired by Judith Raskin and Patricia Shevy, will provide a unique opportunity for you to address issues that impact on your practice and to learn cutting edge strategies with regard to the ever-changing Medicaid landscape and estate tax law rules. We will also address new developments in elder law, estate litigation, power of attorney litigation, annuities, promissory notes, waived programs, special needs issues, irrevocable income only trust provisions and Medicare set-aside trusts.

Our fall meeting in Westchester from October 28–30, chaired by Tammy Lawlor and Miles Zatkowsky, is in the planning stages as of the writing of this message,

but is sure to be informative and a benefit to you and your practice.

You will be kept informed, by email and publication, with up-to-the-minute news briefs of the important matters that affect our clients and our practice of law.

In planning the itinerary for our Section over the next year, my appeal to each of you is to become more involved and active within our Section. Bring the issues that affect your clients, or that impact on your practice of law, to the attention of the Section, join a committee and actively participate in the work of that committee. If you have an idea for an article, you can write an article for the *Elder Law Attorney*. You can also attend our Section meetings and participate in one of the many pro bono clinics run by the Section.

I look forward to my term as Chair of the Elder Law Section and to working with my fellow officers, the members of the executive committee and each and every one of the Section members, and urge every one of you to contact me to become more involved in our Section.

Sharon Kovacs Gruer

Advance Directive News: The Family Health Care Decisions Act

By Ellen G. Makofsky

Some things are a long time coming. The Family Health Care Decisions Act (“FHCDA”) has rattled around the New York State Legislature since 1993 when it was first proposed. For many years it lacked sufficient support for passage. Just when many thought it would never emerge from legislative chambers, the Senate and Assembly passed the bill by a wide majority.¹ On March 16, 2010 Governor David Paterson signed FHCDA into law. The Act became effective on June 1, 2010 and fills a previously existing legal gap for New Yorkers regarding surrogate health care decision-making. FHCDA allows family members and others close to an incapacitated person to make medical decisions where no advance directive is in place.



For a long time New York restricted the ability of a surrogate to make health care decisions to three specific circumstances: when an individual previously executed a health care proxy; when a court appointed an agent to make health care decisions for an incapacitated person; and when the health care decision involved cardiopulmonary resuscitation and a Do Not Resuscitate order (“DNR”) was signed.² The FHCDA significantly expands surrogate health care decision-making opportunities in New York State.

The FHCDA allows a guardian, family member, domestic partner or friend to make medical decisions for patients or residents of a hospital or nursing home who lack the capacity to make their own medical decisions. The legislation has limitations. FHCDA applies only to those who find themselves without capacity and in a hospital or nursing home.³ It does not apply to individuals who are mentally retarded, who have developmental disabilities or who reside in mental health facilities.⁴ It is not the legislative intent of FHCDA to dismantle pre-existing law in regard to surrogate health care decision-making. Where a health care proxy is in existence, the health care agent’s decision has priority over all other decision-makers. Where there is no designated health care agent pursuant to a health care proxy, FHCDA sets forth a prioritized list of those empowered to make decisions.

1. A guardian authorized to decide about health care pursuant to Article 81 of the Mental Hygiene Law.
2. The spouse, if not legally separated from the patient, or the domestic partner of the patient.⁵
3. A child who is 18 years of age or older.
4. A parent.
5. A sibling who is 18 years of age or older.
6. A close friend.

FHCDA sensibly allows a prioritized person to designate any other person on the list to be surrogate provided no one in a class higher in priority than the person designated objects.⁶

“FHCDA allows family members and others close to an incapacitated person to make medical decisions where no advance directive is in place.”

Where a patient is admitted to a hospital or residential health care facility and there is no health care proxy and no individual from the above list is available to serve as surrogate, FHCDA permits a physician to be the surrogate decision-maker. The specific procedures which must be followed are delineated in the statute and depend upon whether the decision involves routine medical treatment or major medical treatment and the location where the treatment is provided. Decisions to withhold or withdraw life-sustaining treatment are left to a court of competent jurisdiction where there is no health care proxy and no prioritized person is available to act as surrogate.⁷

The prioritized person has no authority to act until an assessment is made regarding the patient’s capacity. FHCDA establishes a protocol for the assessment which begins with the attending physician who must make an initial determination that the patient lacks decision-making capacity to a reasonable degree of medical certainty. The initial assessment must be followed by a second concurring independent opinion.⁸ Once an assessment concludes that the patient lacks the requisite capacity the prioritized person as a surrogate medical decision-maker has the authority to make any

and all health care decisions that the incapacitated patient could have made. The surrogate additionally has the right to receive medical information and the medical records necessary to make informed decisions about the patient's health care.

Similar to the requirements of the health care proxy, the surrogate decision-maker is required to act according to the patient's wishes.⁹ Where wishes are unknown there is a best interest standard.¹⁰ Under FHCDA additional conditions must be met before a surrogate has the authority to make a decision to withhold or withdraw life sustaining treatment. In these situations, the statute requires a physician's determination along with a concurring independent physician's determination that one of the following criteria is met:

1. Treatment would be an extraordinary burden to the patient *and* the patient is not expected to survive 6 months or is permanently unconscious; or
2. Provision of treatment would involve such pain, suffering or other burden that it would be reasonably deemed inhumane or extraordinarily burdensome *and* the patient has an irreversible or incurable condition.

Additionally, if a decision to withhold or withdraw life sustaining treatment is made by a surrogate in regard to a patient in a residential health care facility, the statute requires, as a condition precedent, that an ethics committee or a court of competent jurisdiction review the condition of the patient to determine whether the criteria listed above was met.¹¹

FHCDA provides safeguards to discourage inappropriate medical decision-making. While the FHCDA sets forth clear procedures for determining when the patient lacks the capacity to make medical decisions, it also allows the patient to opt out if the patient disagrees with the determination of incapacity, or to the choice of surrogate or to the health care decision made.¹² The FHCDA further protects the patient's interests by referring a disagreement between a treating physician and a surrogate to the hospital's ethics committee. Even after a surrogate has been appointed, any wishes that have been clearly expressed by the patient prior to losing decision-making capacity always take priority.¹³

The enactment of FHCDA is an enormous step. New York has finally joined the ranks of 35 other states with statutes that grant family members and others close to the patient the right to make medical decisions for those without capacity. In addition, the legislation

will help unclog our courts as fewer applications will be made for a personal care guardian to make decisions regarding an incapacitated person's medical care. No longer will incapacitated persons be denied appropriate treatment or be subject to burdensome treatments that violate their wishes, values or religious beliefs. Congratulations are in order to our Legislature and Governor for finally, after 17 years, doing the right thing.

Endnotes

1. A07729D and S3164-B.
2. Legislative Memo: Family Health Care Decisions Act (2010), available at <http://www.nyclu.org/content/legislative-memo-family-health-care-decisions-act-1>.
3. N.Y. Pub. Health Law § 2994-b(1).
4. N.Y. Pub. Health Law § 2994-b(3)(a)-(c) (Consol. 2010).
5. It is interesting to note that the term "domestic partner" is broadly defined within the statute. N.Y. Pub. Health Law § 2994-a(7) (Consol. 2010).
6. N.Y. Pub. Health Law § 2994-d(1)(a)-(f) (Consol. 2010).
7. N.Y. Pub. Health Law § 2994-g (Consol. 2010).
8. N.Y. Pub. Health Law § 2994-c(2)-(3) (Consol. 2010).
9. The statute directs that in considering a patient's wishes the surrogate should consider "the patient's religious and moral beliefs." N.Y. Pub. Health Law § 2994-d(4)(i) (Consol. 2010).
10. The statute directs that "An assessment of the patient's best interests shall include: consideration of the dignity and uniqueness of every person; the possibility and extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of the patient's suffering; and any medical condition and such other concerns and values as a reasonable person in the patient's circumstances would wish to consider." *Id.* at § 2994-d(4)(ii).
11. N.Y. Pub. Health Law § 2994-d(5) (Consol. 2010).
12. N.Y. Pub. Health Law § 2994-c(6) (Consol. 2010).
13. N.Y. Pub. Health Law § 2994-d(4) (Consol. 2010).

Ellen G. Makofsky is a partner in the law firm of Raskin & Makofsky with offices in Garden City, NY. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is a past Chair of the Elder Law Section of the New York State Bar Association ("NYSBA") and currently serves as an At-Large Member of the Executive Committee of the NYSBA. Ms. Makofsky has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc. She serves as Treasurer of the Estate Planning Council of Nassau County, Inc.

Recent New York Cases

By Judith B. Raskin

TAILORING ARTICLE 17-A TO NEEDS OF WARD

Petitioners sought appointment as 17-A guardians for their son with gifting authority. Denied. *Matter of John J.H.*, 2010 NY Slip Op. 20084 (Surr. Ct., New York County, March 8, 2010).

John J.H.'s parents sought appointment as Article 17-A guardians for their son including the authority to contribute John's income to charity. John, 22 years of age, was autistic and suffered from mental retardation. In spite of these difficulties, John was artistically talented. He earned a modest income from the sale of his artwork. Because John was well provided for financially through trust funds and his parents' considerable means, his parents wanted to donate John's income to charity which they believed would enhance John's self esteem.

The court denied the tailored relief requested, holding that Article 17-A does not give the court the authority to grant anything other than a plenary property guardianship. The court referred to prior decisions in the court which were distinguishable from the facts of this case and permitted specific gifting authority. However, this decision expressed doubt as to the court's authority in those cases. It strongly stated the need for amending 17-A to permit the court to tailor a guardianship for persons with mental retardation and developmental disabilities and referred to efforts under way to do so.

John's parents withdrew their petition with the intention of bringing the guardianship under Article 81.

A father sought appointment as 17-A guardian for his daughter where objectants expressed serious concerns regarding his appointment. Granted with restrictions and requirements in the guardianship order. *Matter of Yvette A.*, N.Y.L.J., vol. 243 (Surr. Ct., New York County, April 2, 2010).

Following his wife's death in 1969, Angel A. placed his daughter Yvette, then age 5, at the Willowbrook State School. In 1977, as a result of a class action regarding Willowbrook, she was transferred to Episcopal Social Services group home. Mr. A. had not seen Yvette for about 16 years until 2005, when he began visiting her and taking some interest in her care. Yvette suffered from severe mental retardation and could only make very simple decisions. In 2009, Mr. A. petitioned to be appointed her Article 17-A guardian. Several agencies and organizations concerned for Yvette's well being opposed the petition, expressing their concern that Mr. A. would not properly monitor Yvette's care. Mr. A. had proposed moving Yvette as issues had developed about



her care but did not have a plan in place or a sufficient understanding of her medical issues and needs. Mr. A. was considering a lawsuit regarding her care issues and the objectants were concerned about the proceeds from such an action.

The court appointed Mr. A. as guardian subject to requirements and restrictions set out in the decision. These

included regular reports to the court detailing Yvette's care and activities, required visits, and court approval of any change in living arrangements. The court also required notification of any legal action taken on Yvette's behalf and barred Mr. A. from taking control of any of Yvette's property without court approval. The CAB, an agency formed in the Willowbrook class action litigation, was to continue in its advocacy role for Yvette.

The court, in tailoring this 17-A guardianship to the needs of the ward, cited the statutory language in Sec. 1758 authorizing the court to take steps to provide for the welfare of the mentally retarded person and Sec. 1755 authorizing the court to tailor the guardianship when new circumstances arise.

ARTICLE 81 REQUIREMENT FOR COURT EVALUATOR'S REPORT

The AIP argued that the court evaluator's report should not be considered in determining the need for a guardian. The court evaluator's report was heard and taken into consideration. *Village of Patchogue v. Zahnd*, N.Y.L.J., March 12, 2010, p. 29, col. 1 (Sup. Ct., Suffolk County).

Petitioner Village of Patchogue sought guardianship for Alice Zahnd, who owned and resided in property located in the Village that had been cited for many violations of the Patchogue Village Code. The Village sought to have a guardian appointed to properly maintain the property. An attorney testified for the Village that one year prior he met with Ms. Zahnd and found her confused and unaware of the property concerns.

Ms. Zahnd's attorney moved to dismiss the petition. The court decided to reserve decision on that motion until the court evaluator made his report subject to questioning by both parties. Ms. Zahnd's attorney argued that the court evaluator's report should not be

considered. Although the court may choose not to appoint a court evaluator where there is court-appointed counsel for the AIP, the court did take the report into account and held that given the evidence presented, it was necessary to appoint a guardian to manage Ms. Zahnd's property. The court discussed whether it should consider the report and related testimony where Ms. Zahnd was represented by counsel and concluded that it was "at least well within its discretion, and may have been mandatory." The appointment of a court evaluator may be dispensed with to reduce costs if counsel is appointed. However, in this case the court evaluator was appointed and had prepared his report. As an independent investigator the court evaluator's report and opinion are likely to present valuable information to assist the court in its determination.

TIMING OF FAIR HEARING APPEAL

The ALJ in a Medicaid fair hearing requested specific expense information to determine gifts by the Medicaid applicant. The applicant appealed claiming the resource was not his. Denied. The ALJ had not yet issued a final decision in the fair hearing. *Simmons v. Daines*, 2010 NY Slip Op. 2053, 2010 N.Y. App. Div. LEXIS 2018 (App. Div., 3d Dep't, March 18, 2010).

Mr. Simmons and his wife applied for institutional Medicaid in 2007. Prior to the application their son deposited \$47,200 in his father's account and had withdrawn \$50,000 over the following 6 months. The

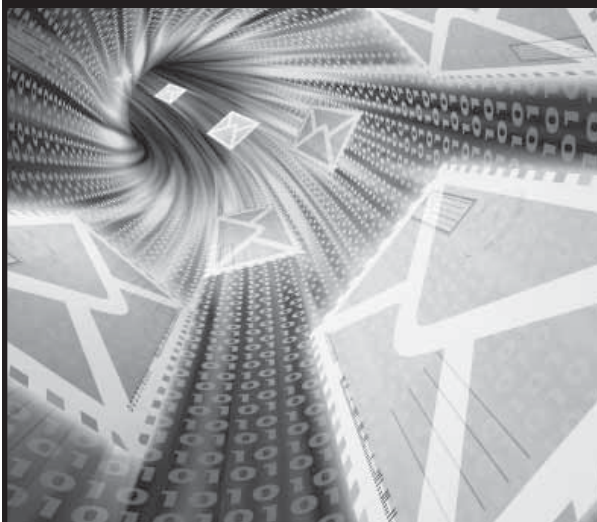
application was denied subject to the penalty period assessed for the transfers. At the fair hearing, the son testified that he had placed his funds in the account to avoid attachment of the funds in a possible lawsuit against his business. He also testified that he had withdrawn the funds to pay expenses including expenses for his father. The ALJ directed the petitioner to provide evidence of those expenses paid from the account that were used for his benefit.

Mr. Simmons appealed, arguing that the \$47,200 should not have been considered his resource. The Appellate Division dismissed the appeal because a final judgment was not yet issued in the fair hearing.

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

Judith B. Raskin is a partner in the firm of Raskin & Makofsky located in Garden City and practices in the areas of elder law and trusts and estates. She is a Certified Elder Law Attorney (CELA) by the National Elder Law Foundation. She maintains membership in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and the New York State and Nassau County Bar Associations. Judy is a past Chair and current member of the Alzheimer's Association, Long Island Chapter Legal Committee. Judy has been writing this *Recent New York Cases* column since 1995.

Request for Articles



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

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

www.nysba.org/ElderLawAttorney

Guardianship News: Court Evaluator's Redux

By Robert Kruger

In past articles, I have often stressed the role of the Court Evaluator as a critical component in the appointment process. I have, at various times, bemoaned the Part 36 income cap rules as disqualifying experienced and sophisticated attorneys in guardianship proceedings from serving as Court Evaluators, particularly in difficult and contested cases.

I have also asserted that in difficult cases, the expertise is being drained from the system at a considerable cost to the litigants and the alleged incapacitated persons. I certainly have mentioned instances where the presence of an inexperienced and very young Court Evaluator resulted in an unjust result. However, I do not believe that I have ever profiled a case to illustrate the constructive role a Court Evaluator can play.

I am now involved in a proceeding which offers a good illustration of the benefits of professionalism and experience in a Court Evaluator. The case is ongoing; I may grow to regret the praise that I am about to heap on to this particular Court Evaluator. Nevertheless, from my perspective, I could not ask for a better Court Evaluator than the one we have in this case. The basic reason for this praise is the very real possibility that the Court Evaluator's intervention will probably prevent endless bitter litigation.

Because the case is ongoing, I will not disclose the names and the venue of the proceeding. The proceeding involves a petition for a woman in her mid-80s who had achieved some success acquiring and managing real property during her lifetime. She, or the entities that she controls, own perhaps 12 Class B buildings in Manhattan, Brooklyn and the Bronx, most with Section 8 and economically challenged tenants. Her daughter worked with her for twenty years and became the de facto manager of the properties in 1995. The mother also owns the residence where she, her daughter and her daughter's children reside. The daughter's salary for managing the properties is a modest \$25,000 per year with certain perks such as free rent, use of a car and other less valuable amenities. In addition, the mother had been alienated from her son for over a decade and, as the mother declined, the son had not visited his mother for years. The mother had drafted a Will (I was the draftsman) in 2006 at a time when I



believe she was unquestionably lucid and competent, which left her entire estate to her daughter. She explicitly cut out her son and children from two predeceased children of hers.

The alleged incapacitated person was a domineering woman and a battler. The Court Evaluator literally, in a sidebar conference with the Judge, described her as a "battleaxe." He was not wrong; managing her was extremely difficult and the daughter probably survived under her mother's tutelage because she was more of a peacemaker and avoided conflict with her.

When the proceeding began, the mother needed care and assistance; however, there was no home care because the mother would not tolerate anyone in the house. The daughter, therefore, was trying to run her mother's real estate "empire" and care for an increasingly needy, demented and cantankerous mother. In addition, the mother was a hoarder; there was no room to house a 24-hour companion.

The Court Evaluator, after his first visit, informed me that the house absolutely required both cleaning and de-cluttering. In addition, he insisted that the mother have home care at least 6 to 8 hours per day because the daughter could not manage the real estate and her mother at the same time. She was on overload. His insistence was helpful in getting the daughter to accept help, whereas in the past, she did not challenge her mother's veto.

We then hired a geriatric care manager to start to put those recommendations into place. Over a period of a few months, we were able to clean up and de-clutter the house. A companion was then brought into the house to assist the mother, for 8 hours per day, 5 days per week.

What I have not mentioned to this point is that the son, who was alienated from his mother and who had been explicitly cut out of her Will, now appeared and cross-petitioned, using an attorney whose litigation style was scorched earth. The cross-petition alleged that the daughter abused and neglected the mother, that she was financially exploiting the mother and that she was mismanaging her mother's care and finances. The cross-petitioner demanded an audit of the mother's finances for the past three years and a deposition of the daughter, which was sure to be wide-ranging. The Court Evaluator supported the audit only. He could not do otherwise; if the charges were true, he needed to know that before he made any recommendation with respect to the appointment of a guardian for the

mother. Incidentally, everyone agreed that the mother needed a guardian.

The audit to be performed was an audit of an active on-going business. The job that was imposed upon the petitioner-daughter in collecting rent rolls, financial statements, tax returns, paid bills, cancelled checks, invoices and the like for a period of three years was daunting. As I write this article, the daughter has not yet completed the job. When the cross-petitioner's attorney complained that the daughter had failed to honor the deadline to produce financial records, the Court Evaluator informed the Court that managing the mother was an extremely difficult job and it was, therefore, not the daughter's fault that the financial records could not be produced in as timely a fashion as cross-petitioner's attorney requested and demanded. Then, and this is really my point, the Court Evaluator recommended to the Court that a forensic accountant be retained for the purpose of doing an analysis of the financial records to determine whether the daughter had, in fact, financially exploited her mother. What this did was take the interpretation of the financial history of the past three years out of the thrust and counter-thrust of contending attorneys and put it in the hands of a dispassionate expert, an accountant who would tell the Judge what had happened financially to the mother's affairs in the past several years. Therefore, the request of cross-petitioner's attorney to depose petitioner prior to the hearing is less likely to be honored because we have a dispassionate expert to translate the mother's financial affairs for the Judge. The deposition of the petitioner-daughter would have been torture because the affairs of twelve buildings would have come under the microscope and the daughter could have been asked questions about thousands of transac-

tions over the past few years that would have tested anyone's memory.

If, as I believe, the daughter was scrupulously honest with her mother's affairs, the charge of financial abuse and exploitation is neutered and the Court can proceed with the appointment of a guardian. Imagine, however, an inexperienced Court Evaluator, without both the experience and the self-confidence to put himself between two contending parties and take charge of the proceeding. This Court Evaluator took the proceeding out of the path of endless litigation, and put it on the path toward resolution without destructive depositions and hearings. Of course, if I am wrong and the daughter has been exploiting her mother, our goose is cooked. Nevertheless, in one case at least, family bitterness is less likely to produce endless litigation.

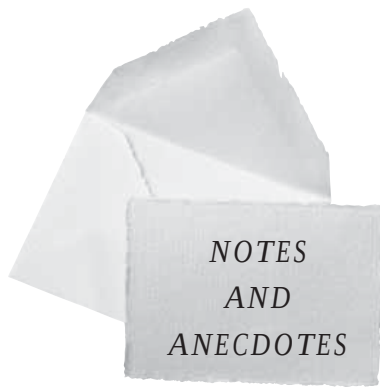
I can be reached at rk@roberkrugerlaw.com or (212) 732-5556.

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

ELDER LAW SECTION

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My Transition into Independent Living

By Elaine McGrath

NOTES AND ANECDOTES

Hi. My name is Elaine, I'm 85 years old, and four months ago I moved into an independent living facility—Atria Senior Living Group

in South Setauket, Suffolk County. This was not an easy decision for me or my family, but it was the right one.

In 1981, my husband Tom and I bought a house in Stony Brook. The neighbors became a second family to us and I still hear news from them, such as a child was just born to the family now living at my old house, the first ever to do so. My husband and I spent years decorating the house, making each room unique, special, and ours. Tom was an artist and his oil paintings filled the walls creating an atmosphere only our home could hold. When Tom passed away, I faced challenges. My walker made it difficult to get around and after an unfortunate infection I lost most sight in my right eye. Under pressure from my loved ones, I decided to make a change that was the best thing for me and my family.

I toured many different facilities across Long Island and made my decision based on location. I am nearby loved ones, doctors, and everything else you could imagine—shopping, movie theaters, restaurants, the shore! The staff was very accommodating and helped me through the entire process step by step. They now feel like family and are still there for me at all times.

I chose an unfurnished apartment so I could bring my own things with me, which helped me feel more comfortable. Everything in the apartment came from my house. I don't have things in storage, and I don't

really need much more than I have here. Even my beloved husband's paintings again adorn my walls. However, when I first moved, I was really depressed. I missed my house, I missed my neighbors and I missed my yard. My house was full of memories, each room cozy and welcoming, and full of such open space.

Trying to adapt, I attended every event possible, from clubs to parties, to dances and birthday celebrations. I had to give up my car because of the vision loss, but the facility provides transportation, so I was no longer stuck at home. My family comes to visit often and participates in community events.

Moving into independent living seems to be something people put off until the last second possible. This could be one of the biggest mistakes. The best advice I could offer to anyone considering this move, is do it now. It's inevitable you will need help when you get older, and you might as well live where you want while you can still choose. I think a lot of seniors see this as a step down or believe they are losing freedom or being sent off somewhere away from your family. But that's not it at all! Having help with the mundane tasks actually brings you more freedom and allows you to meet new people and experience new things. I hope this allows people to understand just what it means to move into an independent living facility.

Elaine McGrath moved into an assisted and independent living facility in 2009. Since her arrival, she has become known as "The Mayor," organizing and running new events each month. Elaine's infectious spirit and warm, kind heart have brought people together and inspired many.

Editor's Note

A Correction to the Spring 2010 Issue:

The article "The 'Improvement Standard'—A Barrier to Medicare Coverage for Chronic Conditions" by Alfred J. Chiplin, Jr., omitted the following credit: "This article is an adaptation of Gill Deford, Margaret Murphy, and Judith Stein entitled "How the 'Improvement Standard' Improperly Denies Coverage to Medicare Patients with Chronic Conditions," which was first published in 43 Clearinghouse Review: Journal of Poverty Law and Policy 422 (2010)."



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NYSBA

Elder Law Section Summer Meeting

The Ritz-Carlton, Philadelphia
Philadelphia, PA
August 5-8, 2010

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. The summer meeting has been approved for up to 11 MCLE CREDIT HOURS. THIS PROGRAM WILL EARN 8.0 CREDITS IN AREAS OF PROFESSIONAL PRACTICE, 2.0 CREDITS IN SKILLS AND 1.0 CREDITS IN ETHICS. ONLY THE CREDITS IN SKILLS AND ETHICS WILL QUALIFY FOR CREDIT FOR NEWLY ADMITTED ATTORNEYS. THIS IS NOT A TRANSITIONAL PROGRAM BECAUSE IT IS NOT A BASIC PRACTICAL SKILLS PROGRAM.



SCHEDULE OF EVENTS (MCLE MEETINGS)

Thursday, August 5

8:30 a.m. - 5:30 p.m.	REGISTRATION - Grand Ballroom Foyer, Concourse Level	
9:00 a.m. - 10:15 a.m.	EXECUTIVE OFFICERS' MEETING - John Hancock Room, 6th Floor	
10:30 a.m. - 1:00 p.m.	EXECUTIVE COMMITTEE MEETING AND LUNCHEON - Exchange Room, Lobby Level	
1:45 p.m. - 5:00 p.m.	GENERAL SESSION - Grand Ballroom, Concourse Level	
1:45 p.m. - 2:00 p.m.	WELCOMING REMARKS ELDER LAW SECTION CHAIR SHARON KOVACS GRUER, ESQ. Sharon Kovacs Gruer, PC Great Neck	PROGRAM INTRODUCTION PROGRAM CO-CHAIR JUDITH B. RASKIN, ESQ. Raskin & Makofsky Garden City
2:00 p.m. - 2:50 p.m.	ELDER LAW UPDATE – NEW DEVELOPMENTS IN ELDER LAW • New Developments • New Legislation • Health Care Reform and Other Hot Topics	
<i>Speaker:</i>	MARTIN S. FINN, ESQ. Lavelle & Finn, LLP Latham	
2:50 p.m. - 3:40 p.m.	LIFE'S CERTAINTIES: DEATH AND TAXES? • Estate Tax Law Overview in 2010 (including possible retroactive tax) • Issues for Estate Administration in Light of 2010 Estate Tax Changes • Planning for Carryover Basis and Drafting with Repeal • Advanced Estate Tax Planning • Highlights of Recent Income Tax Changes	
<i>Speaker:</i>	DAVID J. DEPINTO, ESQ. DePinto Nornes and Associates Melville	
3:40 p.m. - 4:00 p.m.	Refreshment Break with exhibitors - Grand Ballroom Foyer	
4:00 p.m. - 4:50 p.m.	ANNUITY v. NOTE • Open Forum • Which to Use • Issues Raised in Agency Denials • Follow Up During the Penalty Period • Challenges to Planning with Annuities	
<i>Moderator:</i>	PATRICIA J. SHEVY, ESQ. The Shevy Law Firm, LLC, Albany	
<i>Panelists:</i>	MICHAEL J. AMORUSO, ESQ. Amoruso & Amoruso, LLP Rye Brook	CORA A. ALSANTE, ESQ. Hancock & Estabrook, LLP Syracuse
6:00 p.m. - 7:00 p.m.	COCKTAIL RECEPTION - Ardan Mellon Balcony, 2nd Floor Join us for cocktails and hors d'oeuvres. Dinner is on your own.	

SCHEDULE OF EVENTS (MCLE MEETINGS)

Friday, August 6

- 7:30 a.m. - 12:30 p.m. **REGISTRATION** - Grand Ballroom Foyer, Concourse Level
- 7:30 a.m. - 8:30 a.m. **COMMITTEE BREAKFAST MEETINGS** - Exchange Room, Lobby Level
- 8:30 a.m. - 12:20 p.m. **GENERAL SESSION** - Grand Ballroom, Concourse Level
- 8:30 a.m. - 8:45 a.m. **WELCOMING REMARKS**
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- PROGRAM INTRODUCTION**
PROGRAM CO-CHAIR
PATRICIA J. SHEVY, ESQ.
The Shevy Law Firm, LLC
Albany
- 8:45 a.m. - 9:35 a.m. **DEFENSIVE WILL DRAFTING**
• Protecting You and Your Client from Unwanted Challenges
- Speaker:* **ANTHONY J. ENEA, ESQ.**
Enea, Scanlan & Sirignano, LLP
White Plains
- 9:35 a.m. - 10:25 a.m. **DRAFTING IRREVOCABLE INCOME ONLY TRUSTS**
• Open Forum
• Basic Trust Provisions
• Trust Protector
• Sprinkling Provision
• Annual Gifting
• Power of Substitution
• Lifetime and Testamentary Powers of Appointment
• EPTL 7-1.9
- Moderator:* **ELLEN G. MAKOFSKY, ESQ.**
Raskin & Makofsky
Garden City
- Panelists:* **JULIEANN CALARESO, ESQ.**
Burke & Casserly, P.C.
Albany
- FRANCES M. PANTALEO, ESQ.**
Walsh Amicucci & Pantaleo LLP
Purchase
- 10:25 a.m. - 10:40 a.m. **Refreshment Break with exhibitors** - Grand Ballroom Foyer
- 10:40 a.m. - 11:30 a.m. **LITIGATING A POWER OF ATTORNEY**
• Starting with *Ferrara* as Told From the Trenches
• Lessons as We Prepare Powers Under the New Law
- Speakers:* **EDWIN DAVID ROBERTSON, ESQ.**
Cadwalader, Wickersham & Taft, LLP
New York
- GEORGE A. SIRIGNANO, JR., ESQ.**
Enea, Scanlan & Sirignano, LLP
White Plains

SCHEDULE OF EVENTS (MCLE MEETINGS)

- 11:30 a.m. - 12:20 p.m. **MEDICARE SET ASIDE TRUSTS**
- Mandatory Insurer Reporting
 - Medicare Conditional Payments
 - Allocations, Approvals and Administration

Speaker: **RAFAEL GONZALEZ, ESQ.**
Chief Executive Officer
The Center for MSA Administration
Clearwater, FL

- 5:00 p.m. - 9:30 p.m. **NATIONAL CONSTITUTION CENTER TOUR, COCKTAIL RECEPTION AND DINNER**
Cocktail reception and dinner will take place in the Grand Hall Overlook.

Saturday, August 7

- 7:30 a.m. - 12:00 p.m. **REGISTRATION** - Grand Ballroom Foyer, Concourse Level

- 7:30 a.m. - 8:15 a.m. **You plan for everyone else.....Now plan for yourself!!!!** — Exchange Room, Lobby Level
True retirement planning can be a daunting endeavor... it doesn't have to be. Learn **"The realities, challenges, as well as the SOLUTIONS (tactics, strategies, and workable concepts) for achieving a financially comfortable retirement."** It is never too early and never too late to understand and plan for your future. Our presenter is Ron Weiner, CFP. Ron has been named one of the top 100 independent financial advisors in America for all three years that *Barron's* has been ranking advisors
In 2009 Ron's firm was named the best financial planning firm in Connecticut in a survey of attorney's by the *Connecticut Law Tribune*. Ron is a frequent guest on CNBC and Fox Business News. Ron is often quoted in many of the nation's prominent financial publications and news wires. This will be an entertaining, but more importantly, a very valuable session for you and your family.
A full breakfast will be served. Preregistration is required on the registration form.

- 8:20 a.m. - 11:50 a.m. **GENERAL SESSION** - Grand Ballroom, Concourse Level

- 8:20 a.m. - 9:10 a.m. **WAIVERED PROGRAMS AND MORE: HOW CAN WE BETTER ASSIST OUR CLIENTS IN THE COMMUNITY?**

- Nursing Home Transition and Diversion Waiver Program
- Medicaid Buy-In For People With Disabilities
- Traumatic Brain Injury (TBI) Program
- PACE Program and Other Managed Long-Term Care Programs
- Medicare Savings Programs (QMB, SLIMB and QI-I)

Speaker: **VALERIE J. BOGART, ESQ.**
Selfhelp Community Services Inc.
New York City

- 9:10 a.m. - 10:00 a.m. **SPECIAL NEEDS: RECENT DECISIONS AND THEIR IMPACT ON THE SPECIAL NEEDS PRACTICE**
- Update: Current Cases and Interpretations
 - Autism Waiver Programs

Speaker: **BETH POLNER ABRAHAMS, ESQ.**
Law Office of Beth Polner Abrahams
Carle Place

SCHEDULE OF EVENTS (MCLE MEETINGS)

Saturday, August 7 *continued*

10:00 a.m. - 10:15 a.m. **Refreshment Break with exhibitors** - Grand Ballroom Foyer

10:15 a.m. - 11:05 a.m. **MEDICAID INTERACTIVE SESSION**
• Open Forum
• Perplexing Issues Raised for Discussion

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

Panelists: **JUDITH D. GRIMALDI, ESQ.**
Grimaldi & Yeung, LLP
Brooklyn

DEBORAH A. SLEZAK, ESQ.
Ciofffi Slezak Wildgrube P.C.
Niskayuna

11:05 a.m. - 11:55 a.m. **ETHICS UNDER THE NEW RULES**
• Drafting a Retainer Agreement
• Advertising
• Are You a Specialist?
• Referral Fees

Speaker: **TAMMY ROSE LAWLOR, ESQ.**
Miller & Milone, P.C.
Garden City



Philadelphia Skyline at Dusk



The Liberty Bell

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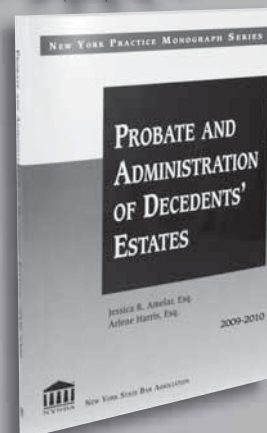
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