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Elder Law Attorney

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

Message from the Chair

At the recent NYSBA Annual Meeting, we in the Elder Law Section gave awards to Bob Witmer, David Schraver and Dan Hurteau. They are all attorneys in the firm of Nixon Peabody, LLP. The reason they received the awards is that they acted as attorneys for the bar in the successful effort to overturn Section 4734, which would have prohibited us from communicating otherwise legal Medicaid planning advise to our clients.

We gave this award to them because their efforts were intensive and time consuming, and pro bono. They took the project on, not because they practice in the Elder Law field, not because the consequence of the law would have any effect on their firm finances, but rather because they are attorneys and members of the bar. They saw their responsibility and went at the project with the same enthusiasm and hard work as they would have for their best paying client.

Continuously we see attorneys who do their part when the need arises. Unfortunately, most of these individuals never get awards, and often don't even get recognition. Such is the nature of awards. It does not mean, however, that the contributions of others are not appreciated. Walter Burke, who chaired our Section during the litigation, may very well have

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spent more time on this matter than anyone. Similarly, the litigation was one of the highest priority projects of then bar president, Josh Pruzansky.

Litigation is not the only thing which has consumed the non-billable hours of our Section members. The efforts have been herculean. Just for example, very few realize the time and efforts which have been expended by Bob Abrams on behalf of the Section. Aside from chairing the Section, he has edited this newsletter up until the end of 1999. He was the tireless editor of *Guardianship Practice*, a book which he continues to work on for revisions. In addition, he has never turned down a project which he was asked to handle. Our Section survives on herculean efforts. Our committee chairs help develop positions of the Section, draft proposed legislation and follow it through to conclusion. They monitor government actions and proposed actions, and keep us on top of our practice area. Our Section attorneys spend innumerable hours organizing, preparing for and presenting continuing education programs. Our Chair-elect, Bernie Krooks, and his brother Howard have certainly stood out in that regard. They are both found on the panels of almost every educational program, regardless of where they are presented. They take this on in spite of the demands otherwise put on them, Bernie as Chair-elect, and Chair of our recent annual meeting program and Howard as Co-chair of the Medicaid Committee. When the next crisis arises, they will still be the first to raise their hands to help.

The New York State Bar Association and the Elder Law Section cannot provide the benefit they do to members simply by having paid staff. While staff is certainly a critical element of the work, the heart of the effort must come from the volunteer attorneys. In order to keep that heart beating, each of us must get involved and stay involved. In addition to our own efforts, we must encourage younger attorneys in our offices or in our communities to also get involved. Only in that way will there be a constant supply of new bearers to carry this elephant.

Our greatest thanks go to all those who give so generously without any awards. Thanks!

Michael E. O'Connor

FOR MEMBERS ONLY!

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Editor's Message

This is my first edition as Editor of the *Elder Law Attorney*. I would like to thank our Chair, Michael O'Connor, and our Chair-elect, Bernard Krooks, for offering me this challenge and opportunity to make a difference. I would also like to join our current Chair, Michael O'Connor, in thanking and praising my predecessor, Robert Abrams, for his outstanding work as Editor of this newsletter over the past two years. Robert's shoes are large and I am humbled by the task of living up to his energy and vision. I would also like to thank Robert personally, for his advice, for sitting down with me and making this transition so easy, as well as for his kind words in his last Editor's message.

My vision of our newsletter is twofold; I believe that it should serve as a platform for large sweeping ideas that affect our profession and our clients as well as provide timely news on a variety of elder law subjects.

On the latter note, I have expanded the section of our newsletter which presents regular columns of interest from four to ten (and counting). In the past we have enjoyed, from time to time, a case update, tax tips, practice tips and a fair hearing corner. I, for one, always looked forward to these articles because I was familiar with the writers and the quality and timeliness of their work. At least for the next year, the following news topics and writers will appear regularly in each issue:

1. Case News by Judith Raskin
2. Legislative News by Steven Stern and Howard Krooks
3. Practice News by Vincent Russo
4. Tax News by Ami Longstreet and Anne Ruffer
5. Technology News by Stephen Silverberg
6. Fair Hearing News by Ellice Fatoullah and René Reixach
7. Health Care Continuum News by Patrick Formato and Ellyn Kravitz
8. Regulatory News by Louis Pierro and Edward Wilcenski
9. Publication News by Daniel Fish
10. Bonus News by anyone who has something important to say

In addition to the regular columns above, it is my intent to dedicate each issue to either a particular practice area or some greater goal or idea; some thought or direction to help us all continue to make a difference in the lives of New York's senior citizens and their families.

This edition is dedicated to re-establishing our connection with our roots. Elder Law emerged from Poverty Law. Before the official field of Elder Law was born, there existed public interest attorneys throughout the country who daily advised the elderly on a variety of subjects, including government benefits, incapacity issues and housing options. These dedicated attorneys were, for the most part, employed by not-for-profit agencies. Their credo was that economically disadvantaged seniors must have a voice in the legal system. For the purpose of this article I will call these attorneys, "Public Elder Law Attorneys."

The story is familiar to all of us from this point. Medical advances created a corps of older and frailer senior citizens. Ease of transportation and communication have led younger generations to spread their wings, enabling them to settle all throughout our great nation, but perhaps not near the home of their elderly parents. A traditional family today comprises two working parents. These factors, and many others, have lead to an expansion of the need for quality legal advice for seniors, for those poor and middle class alike.

As the demand grew for middle class seniors needing advice on topics of interest to them, the first wave of "private" elder law attorneys emerged from the ranks of the Public Elder Law Attorney community. This first wave of elder law attorneys naturally was very familiar with the variety and inner workings of the not-for-profit model.

As time went on, the practice of elder law soon attracted many private practitioners with a passion for working with the elderly. For example, many Private Elder Law Attorneys emerged from traditional trusts and estates practices. Having never worked in the public or not-for-profit sector, this second wave of Elder Law Attorney did not and does not have an appreciation for the inner workings of the Public Elder Law Bar or its history. This lack of appreciation actually swings both ways, as many Public Elder Law Attorneys today do not understand the motiva-

tion and inner workings of a Private Elder Law firm, short of pursuing profits.

The time has come to pursue a greater good. Both Public and Private Elder Law Attorneys need each other to adequately serve the population to which we have all dedicated our professional lives. This edition contains several articles which I believe take an important first step in uniting all Elder Law Attorneys. The more we know about each other, the more we will be able to team up to solve our clients' problems. It is my sincere hope, that this edition of the *Elder Law Attorney* will especially inspire all Elder Law Attorneys to form new working models of cooperation as we together provide poor, working and middle class senior citizens access to justice and the government system.

To the private Elder Law Attorney: The next time a client comes to you for advice, and they either cannot afford to obtain your services, or the issue is to big for your law firm, who will you turn to for help? We must all turn to the Public Elder Law Bar for help in these circumstances.

To the Public Elder Law Attorney: In this time of shrinking revenues, it is impossible for you to solve the problems of every senior citizen in your jurisdiction. The Private Elder Law Bar is committed to pro bono services and education and is ready for your next phone call. I hope this edition will foster this attitude.

I wish to take this opportunity to thank all of the dedicated writers of this edition. However, a special thanks is being offered to Ellen Makofsky. When I first settled on the theme of this edition, I called Ellen for help when I learned that she was our Section's official Liaison to the Legal Services Community. One simple phone call led to a tireless effort on her part, with help from Anthony Cassino, the head of the New York State Bar Association's Department of Pro Bono Affairs, to create a chart of Public Legal Services in New York. This resource is now an invaluable addition to our Elder Law library.

I hope you enjoy reading this edition of our newsletter. It was fun to work on.

All my best! Keep smiling!

Lawrence Eric Davidow

Request For Articles

If you would like to submit an article, or have an idea for an article, please contact

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Lawrence Davidow, Esq.
Davidow, Davidow, Siegel & Stern
One Suffolk Square
Suite 330
Islandia, NY 11722
(631) 234-3030

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION SUMMER MEETING
AUGUST 9-13, 2000
SILVERADO RESORT, NAPA VALLEY, CA

We have arranged for an outstanding program on estate planning and document drafting for the elderly client, highlighted by presentations by Jonathan G. Blattmachr, Esq. and Louis A. Mezzullo, Esq. Both Jon and Lou are nationally recognized estate planning experts and this is a unique opportunity to hear both of them speak. Each has agreed to present for over three hours, allowing for sufficient time to address the pertinent subject matter. Lou will be speaking on IRA and retirement distribution planning and Jonathan will be speaking on estate planning using trusts, including life insurance trusts, and marital/bypass trust planning.

Our own Denise Cambs will complete our all-star panel of speakers. Denise's topic will be drafting trusts in light of recent Medicaid fair hearing decisions. Denise will focus on drafting issues as well as tax considerations.

Please save the dates. You will not want to miss this program.

To register, watch for the Section mailing which will arrive soon.

Just 45 minutes north of San Francisco in California's renowned Napa Valley lies Silverado. Silverado is an historic 1200-acre destination resort set in the rolling, sunny hills of the wine country.

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Please plan to join us for what promises to be one of our greatest educational and social events!!

Air Travel to San Francisco

August 9-13, 2000
United Airlines offers non-stop service from JFK and EWR airports. Both United and USAir offer one-stop service from upstate New York.

Carlson Travel can offer a 5% discount off of the lowest applicable fare and 10% off of full coach. If reservations are booked at least 60 days out, Carlson can offer a 10% discount off of discounted coach and 15% off of full coach. For reduced fare reservations, call Carlson Travel Network at 800/666-2929 or 518/292-9000.

A Great Venue for MCLE!!
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Watch for Registration Materials.

Confessions of a Former Legal Services Attorney

By Charles Robert

My Elder Law practice began in 1980 after being an attorney in a Legal Services Act program. That transition from the public bar to the private bar would permanently mark the next 20 years of a private Elder Law practice.

The Legal Services Years

During law school from 1972-1975, I worked at the Nassau Law Services Committee. This was a heady time for a Legal Services program that had a dedicated staff which embarked upon ambitious "test" case litigation regarding entitlements. This provided me with the opportunity to work on class action suits, appellate cases, and learn the need for a long-range litigation strategy.

The 1965 Medicaid program was evolving whereby the Department of Social Services was honing its "just say no" litigation strategy. The 1965 Medicare program was embarking upon a cost containment program which consisted mainly of denying Medicare beneficiaries their benefits. President Nixon had begun implementing the new 1974 Supplemental Security Income (SSI) program and there were legal issues to be decided as the aged, blind, and disabled were transferred from the State welfare categorical programs to the allegedly "more user friendly" federal program.

After law school graduation, I became a staff attorney at what had now become the Nassau-Suffolk Law Services Committee. The Older Americans Act was enacted and provided funding for special Senior Citizens Projects. In 1978, I became the Attorney-in-charge of the Nassau-Suffolk Law Services Committee's Senior Citizen's Project.

The Senior Citizens Project was inundated with the legal problems in the Medicaid program as an aging population needed increasing medical services. This was especially the case because the Medicare program never expanded from its 1965 promise to comprehensively meet the medical needs of Senior Citizens who now had to rely upon the Medicaid program to pay for any catastrophic medical needs. The Nassau-Suffolk program also developed a nursing home patients' program through the use of "CETA" workers from President Carter's Comprehensive Employment Training Program.

The Private Bar Years

In 1980, it was time to develop a private law practice with the knowledge gained as a Legal Services attorney who had had a guaranteed salary and an unlimited client base of poor senior citizens. As of 1980, there were no attorneys who had a private practice that concentrated in the legal needs of senior citizens who were not Trust and Estates attorneys. Thus, the ambitious plan to support a family by privately representing senior citizens was based on a mixture of a leap of faith and an eye on aging middle class demographics.

In the early 1980s, no one ever heard of "Elder Law." Needless to say, the description of the practice as "poverty estate planning" was not an effective marketing tool. Since the practice's main income production was from legal advise as to application of the Medicaid transfer of assets statute, the practice was viewed by many as being on the edge of legality. As given the paucity of lawyers practicing in the field, there was no need for the "Granny's attorney goes to jail" legislation that would be enacted at the end of the 1990s.

However, there was an unstated hostility by the government agencies whose denial decisions were being challenged by clients who now had access to private counsel. In my case, because federal raw-edged nerves were touched by litigation challenging the government's nonacquiescence policy, I became the "target" of a three-year civil and criminal "Fraud Upon the Government" investigation. The "Fraud" was counseling the clients to challenge the government's denial of entitlements. The fact that my clients were being interviewed, ex parte, in their homes by Special Agents from the federal government was not helpful to the growth of a private practice.

Notwithstanding government agencies' displeasure with senior citizens suing the government to receive government entitlements based on federal and state statutes, the practice grew. Indeed, more and more attorneys realized that it was possible to establish a private practice representing senior citizens. In the end of the 1980s, the practice of "Elder Law" was legitimized by the establishment of the National Academy of Elder Law Attorneys (NAELA) and the creation of the State Bar Elder Law Section.

Lessons Learned from Legal Services

The most important lesson learned from the legal services was that to be involved in test case litigation, you followed the issue and not the billing clock. The government agencies implemented a litigation attrition strategy to drag cases out for the longest possible time. The government lawyers knew that litigation challenging government policies was complex and difficult, and, if the case lasted long enough, there was a good chance the Legal Services Attorney who began the case would leave the program and move into private practice.

As a legal services attorney, I also learned of the insidious nonacquiescence policy and practice of Executive Branch counsel. The government attorneys knew that they could "lose" one case and then *not* change the policy and practice that the plaintiff successfully challenged. This was accomplished by the government attorney's *not* appealing the case favorable to the plaintiff, as the payment of benefits would be only to that one plaintiff. Meanwhile, the "incorrect" standard would continue to be used to deny other seniors their benefits. Thus, there was Executive Branch "acquiescence" to that case, but no change in the "incorrect" legal standard applied to any other case.

More recently, the government agencies have been emboldened in their implementation of this nonacquiescence policy with the restrictions on the Legal Services Corporations prohibiting class action suits. Indeed, with Congress appropriating less moneys to the Legal Service Corporation, the Legal Service programs have not been as successful in retaining experienced attorneys who could follow the legal issue, rather than the billable hour clock.

Lessons Learned in Private Practice

The most important lesson learned in private practice is that you followed the billing clock, and not the legal issue. The tyranny of the billing clock makes "test" case litigation almost impossible because it is so time-consuming. The luxury of a guaranteed salary as a Legal Services attorney is not present as each hour working on an appeal is a billable hour that may never be collected.

I have been most fortunate as my law partner Steve Lerner and my law-life partner Joan Robert, have had the patience and self sacrifice to allow me not to abandon "test" cases in the face of government agencies' war of attrition litigation strategy. Without understanding partners, difficult and time consuming cases involving government entitlements cannot be pursued by the private bar, as the amount of time needed to follow the issue can overwhelm the best intentioned private attorney.

The Needed Marriage of the Private and Public Bar

What is needed is a shotgun marriage between the private and public bar. This would allow the private attorney to retain an interesting issue that needs to be tested in the courts by establishing a liaison with the public bar. Then the enormous time consumption of a "test" case can be somewhat absorbed by the public bar based on their experience and freedom from the "billable hour" pressure.

The State Bar Elder Law Section increases the probability of these public and private bar liaisons by exposing each bar with each other's strengths and weaknesses. With increased use of the internet, communication linkages can be enhanced which can allow both the private and public bar to practice law more efficiently. The private bar can identify the legal problems of a client that affects many other senior citizens and the public bar can offer possible litigation backup. With this marriage of strengths, there will be an increased probability that the government will equally apply the law to all senior citizens, knowing that there is a public and private bar capable of initiating litigation to prevent the government from *not* following the law and *not* acquiescing to unappealed court decisions.

Charles Robert is the founding member of Robert, Lerner & Robert, a law firm practicing exclusively in the areas of elder law and disability law. Mr. Robert is a graduate of Northwestern University, Roosevelt University and Hofstra Law School. Mr. Robert is the past chair of the Nassau County Bar Association Elder Law/Social Services, Health Advocacy Committee and is a past Director of the Nassau County Bar Association. He is a member of the executive board of the New York State Bar Association Elder Law Section and a member of NAELA. Mr. Robert is the author, along with Hon. Edwin Kassoff, of *Elder Law and Guardianship Practice in New York State*, published by West Publishing in 1997. Among Mr. Robert's many publications are articles concerning Supplemental Needs Trust Funds for the disabled and Medicare and Medicaid planning options.

From Poverty Law to Elder Law . . . A Twenty-Year Perspective from the Public Sector

By George L. Roach

"What a long strange trip it's been . . . " (TRUCKIN' by the GRATEFUL DEAD). October 29, 1979 is my anniversary date at the Legal Aid Society of Suffolk County's Senior Citizen Division. On that date I left the private sector practice of law to temporarily take a job at the Legal Aid Society. I had also just turned down a commission in the United States Marine Corp's Judge Advocate General's Office. It was one of those turning points in one's life and I am often reminded of Robert Frost's poem, "The Road Not Taken." Here I am at the turn of the century having completed twenty years of legal practice dedicated to older persons. I guess it's true when they say "time flies when you're having fun."

If you are not already aware, most of the funding for programs benefiting the elderly in our society comes from Congress under the Older Americans Act (42 U.S.C. § 3001, *et seq*.). Passed by Congress in 1965 as one of then-President Lyndon Johnson's Great Society programs (along with Medicare), it mandates that certain services are to be made available to the elderly portion of our population solely by virtue of their age. Certain services including legal, nutrition and transportation are designated as mandated services under Title III-B of the Act. In theory, as such, they are required to be funded. Whether or not the political composition of a particular Congress chooses to fund or re-authorize that funding is a different matter. Therefore, it is congress that appropriates the money that eventually funds programs such as the one that employs me. Congress makes that money available to the fifty states, with each state making a grant proposal to obtain the funding for that state. Here in New York, the New York State Office for the Aging obtains the federal funds to distribute throughout the sixty-two counties. When distributed to the various counties under similar grant proposals, the State of New York adds additional funds to those provided by the federal government. But by no means is it a match. Each individual county then applies for the federal/state funds in order to fund and operate the programs authorized under the Older Americans Act. All such programs, including the Senior Citizen Division of the Legal Aid Society, are funded through the Suffolk County Office for the Aging. Again, when the county distributes the funds, it adds its share to the total; but again it is by no means a match.

The Legal Aid Society of Suffolk County is, therefore, the contract agency chosen to receive those federal/state/county funds to provide the legal services to the senior citizens of Suffolk County. Some of the confusion arises by virtue of the fact that different contract agencies are chosen to receive the Older American Act funding throughout the state. For example, in our contiguous neighbor to the west, Nassau County, the legal services to their seniors are provided not by the Legal Aid Society of Nassau County but rather by Nassau/Suffolk Law Services, the local legal services provider whose 'parent' is the Law Services Corporation (L.S.C.), a creation and creature of Congressional whim. Some of the confusion arises among our brethren in the private sector as to who provides what legal services in Nassau and Suffolk Counties. In both Nassau and Suffolk Counties, Nassau/Suffolk Law Services provides civil legal services to those who, when properly screened, cannot afford them regardless of age. There is no civil division of the Legal Aid Society either in Nassau or Suffolk County. Remember . . . there is no constitutional right to a lawyer in a civil case, a fact not lost on those who could provide funding for such programs. If you are poor, but not old, and you are in need of a lawyer in a civil case and cannot afford to hire one, then you are forced to go it alone if Nassau/Suffolk Law Services cannot take your case. Many litigants are forced to be wait-listed if they cannot obtain representation through the pro bono efforts of both the Nassau County and Suffolk County Bar Association's Pro Bono Foundations.

The legal service providers under the Older Americans Act are coordinated by the New York State Office for the Aging. They fall primarily into three categories: either the Legal Aid Society, a law services corporation agency such as Nassau/Suffolk Law Services or by a private attorney specializing in Elder Law. Although we are an aging society, the elderly population in New York State varies greatly. New York City, its five boroughs, and Nassau and Suffolk Counties concentrate the bulk of the seniors but by no means do they receive enough funding to

cover the population they serve. Many of our upstate counties are so rural and sparsely populated that one legal service provider may cover two or more adjoining counties. There are counties upstate whose aging population lives primarily upon Native-American reservation land and whose legal needs vary greatly from those of their downstate urban and suburban counterparts.

Here in Suffolk County, I am the only full-time attorney designated to handle the legal needs of approximately 250,000 people (that's a quarter of a million people) who are at least sixty years of age and reside in Suffolk County. The only requirements under the Older Americans Act are that a person be at least sixty years of age and be a resident of Suffolk County. There is no financial means test. We handle civil matters only and we are defense-oriented. Program guidelines, ethical considerations and the sheer volume of seniors limits what we can handle. We do not take fee-generating cases such as accident or negligence cases. We do not handle commercial matters, the purchase or sale of real property, divorce, or bankruptcy. We do not handle estates or draft wills for clients. Ethical considerations arise where the senior citizen is a landlord seeking advice on how to evict someone. We do not involve our program or resources in guardianship proceedings. We advise, counsel, advocate and represent a senior, where appropriate, at fair hearings concerning government benefits and entitlements (e.g., Medicare, Medicaid, Social Security) or in the local district, state or federal courts.

Given the extremely limited resources to handle the overwhelming burgeoning senior population in Suffolk County, it has become necessary to be innovative in trying to meet the legal needs of all seniors. Sometimes it is necessary to triage, taking the most direct cases first, those involving food, clothing, shelter and government benefits to meet their medical needs. There are days when you feel like Davy Crockett at the Alamo . . . "Don't take any prisoners!" The senior who is demanding the merchant return her down payment for a custom-made brass whale which she no longer wants will just have to wait. (An actual case by the way!) One of the ways I have attempted to meet this need is by partnering with the private Elder Law bar of our bar association. The Elder Law Committee of the Suffolk County Bar Association is the largest committee we have. There are over one hundred fifty members throughout Suffolk County. Twice I have been its committee chair. As with most Elder Law practitioners, we are not as adversarial as our brethren in other areas of the law and more readily share information. This leads to greater opportunities for seniors to obtain legal advice and representation in the private sector who might not be able to obtain it elsewhere because of the sheer numbers. It is a delicate balance. The ultimate goal is to make sure the legal needs and problems of that older person are met satisfactorily. It reflects on all of us as a profession. It has been my own personal policy to make myself available to any judge or attorney seeking advice and counsel on behalf of an elderly client. It is simply another way of meeting a need rather that have that need go unmet. Sometimes people fall between the cracks. We are only lawyers, not miracle workers. I have two signs up in my office . . . one says " Unless it's fatal it's no big deal!" and the other says "I'm not guilty because I'm doing the best I can!"

In conclusion, I enjoy what I do (the 'psychological paycheck') and I like the people I work with. What I have done for the past twenty years gives me purpose and the feeling that what I do does make a difference. I am grateful for the opportunity to have looked into the crystal ball and glimpsed the future. I have come to know the secret of successful aging!

George L. Roach received his B.A. in government *cum laude* from Manhattan College and his law degree from St. John's University School of Law. He has been with the Legal Aid Society of Suffolk County for the past twenty years, dealing exclusively with the problems of the elderly and the elderly poor. He is attorney-in-charge of the Legal Aid Society of Suffolk County's Senior Division.

Mr. Roach is a former Dean of the Suffolk Academy of Law and has also served as Associate Dean of the Academy. He was the first chairperson of the SCBA's Elder Law Committee, a committee that he helped to launch, and has also served as chair of the Federal Court Committee. Mr. Roach received the Association's highest award, its President's Award, for his contributions in legal and public education. He is also a member of the American Bar Association, the New York State Bar Association and the National Academy of Elder Attorneys. He is licensed to practice law in both New York and Hawaii.

In May 1998, Mr. Roach was chosen as the Suffolk County Office of the Aging's Community Leader of the Year. This honor was bestowed upon him by Suffolk County Executive Robert J. Gaffney.

The Samuel Sadin Institute on Law

Brookdale Center on Aging of Hunter College

A Legal Support Center for Advocates who Serve the Elderly

This article was prepared by the Co-directors of the Samuel Sadin Institute on Law: Sia Arnason, CSW and Ellen P. Rosenzweig, JD. They can be contacted for more information at the Brookdale Center on Aging of Hunter College, 425 East 25th Street, New York, N.Y. 10010 by phone at: 212-481-4433 or by email at: sarnason1@aol.com and erosenzw@shiva.hunter.cuny.edu or visit the website at: www.brookdale.org.

Introduction

Sia Arnason

> Too often our elderly are deprived of their rights because no one is available to explain technical language of Federal regulations, or the requirements of witnessing a will, or the qualifications to be met in a pension plan, or the tax implications of retirement programs. Many of these "legal" problems require lawyer's help, but others require only that competent paralegal or nonlegal advice be available. . . .[1]
>
> The second most important area of need involved negotiating the system . . . , and the relatively high proportion of persons mentioning need in the area of advocacy and intervention, mirrors the problems faced by the inner city elderly in dealing with large scale bureaucracy. . . .[2]

These two quotes supplied the rationale for the initial proposal for the establishment of an "Institute For the Legal Rights of Older Adults." The successful proposal generated the first three-year grant from the Brookdale Foundation in 1977 for the establishment of a legal support and training department at the Brookdale Center on Aging of Hunter College of the City University of New York (BCOA).[3]

The founders of the Institute on Law and Rights of Older Adults at the BCOA were Samuel Sadin, an accountant and businessman, and Dr. Rose Dobrof, a member of the faculty at the Hunter College School of Social Work and the Executive Director of the BCOA, both of whom had participated in a conference on "You and Your Aging Parent" in 1976 sponsored by the American Jewish Committee. Neither was trained as a lawyer, but both were aware of the legal needs of the elderly because of their personal and professional experiences. Today, the Samuel Sadin Institute on Law (as it was renamed in 1977), is staffed by four attorneys, one of whom is also a registered nurse, two social workers, two administrative staff, and one part-time senior volunteer entitlement counselor. Limited law student internships are available during the academic year or the summer.

Ellen Rosenzweig

Background

The growth in the number of older people in the United States, and the recognition that their middle-aged children, the "sandwich generation," have formidable caregiving responsibilities as their parents age and become physically and mentally frail, were the catalysts that first focused the attention of academics, legislators and public policy makers on the special environmental, social, income, health care, and legal needs of the elderly and their caregivers. During the 1970s, a period of dynamic social research, program innovation, and policy development in the field of aging occurred in the wake of the 1965 enactments of the Older Americans Act, Medicare and Medicaid. At the same time, two professional subspecialties came into being: "elder law" (in 1977 the ABA Commission on Legal Problems of the Elderly was established in Washington, DC) and "gerontological social work," primarily practiced in large family service and community-based agencies.

Elder law came of age with the establishment of the National Academy of Elder Law Attorneys (NAELA) when the private bar saw the need for "lifetime planning" in addition to estate planning. The birth of a specialized and private elder law practice set the tone for social workers who followed with

a private practice model of their own that was not based on clinical social work but on social work advocacy. This new model is now referred to as professional geriatric care management, and the National Association of Professional Geriatric Care Managers is co-located with NAELA in Tucson, Arizona. The birth of the two professional associations further fostered increased collaboration between the two.[4]

The Samuel Sadin Institute on Law

From the start, the Law Institute, located in New York City, was designed as a multi-disciplinary legal support program with a focus on the legal concerns of the impoverished elderly in New York State. Further geographic expansion occurred in 1991 when the Institute opened a satellite office in Albany to facilitate training and outreach in upstate counties. The primary role in the early years was to be a training and resource center for non-legal advocates: social workers and others, who served the elderly and who were case managers or community outreach workers. In the beginning, the Institute limited its attention to the primary income and health care benefits for the elderly poor and to adult protective services, which continue to be core concerns.

As part of the Brookdale Center on Aging, the Law Institute soon became a source for technical information on the legal concerns of the elderly for academics, private and public agencies and policy makers. As early as 1980, the staff was involved in the design of the so-called "Short Term Involuntary Protective Services Orders" (STIPSO).[5] The needs and rights of incapacitated persons had been a major concern of the Law Institute, and as the Institute aged, its reputation in this area grew. In January of 1989, the Institute co-sponsored a working conference with the New York State Law Revision Commission on "Reforming New York State's Conservatorship Law" which eventually led to the enactment of Article 81 of the Mental Hygiene Law.[6] Since then, the Institute has conducted or participated in numerous conferences on Guardianship and has trained scores of Article 81 court evaluators and guardians.

During the last ten years the Law Institute has broadened its target audience to include the legal services bar, the private elder law bar, the Office of Court Administration, and the judiciary. As a result, increasing numbers of paralegals and attorneys new to the field of elder law are now trained by the Institute. Continuing legal education is further facilitated by the publication of the NEW YORK STATE ELDER LAW HANDBOOK, first published in 1993 by the Practising Law Institute and updated annually by Law Institute staff and guest authors. The HANDBOOK is a much acclaimed legal publication that is written in an accessible style so that non-attorneys can also benefit from it.

The subject matter of the Law Institute's expertise has similarly expanded and now includes: long term care, prevention of elder abuse, advance directives and health care decision-making, guardianship, and legal issues in grandparent caregiving. In November of 1999, the Institute submitted an *amicus curiae* brief in support of grandparent visitation rights to the United States Supreme Court.[7]

Funding for the Law Institute was initially obtained from private foundation grants (with a very substantial proportion being contributed each year by the Brookdale Foundation) and New York State training contracts. Foundation support has increasingly been replaced with funds from the sale of our publications, advertising, training fees, individual donations and our annual Chinese New Year Dinner and endowment income. Today, the annual budget of the Law Institute consists of one-third from fees and individual donations; one-third foundation grants and endowment income; and one-third State and other training contracts, including IOLA support. Hunter College provides substantial in-kind support in the form of free space, telephones and some printing which enables us to dedicate almost all of our income to salaries and benefits which are comparable to those of legal services attorneys and staff.

Our highly motivated staff continues to be interdisciplinary with lawyers and social workers working closely together as a team. Both professions have benefited from this collaboration: the social workers have learned legal research and case analysis skills, the attorneys have learned to view legal problems in a more holistic fashion, by looking not only at the facts of a case but also at the metaphysical and psycho-social factors that play a role in human affairs, so well illustrated by Clifton B. Kruse, Jr., NAELA's "Peripatetic Essayist" in: "Is My Bed Still There?," May 1996.[8]

Working in an interdisciplinary setting can also be challenging. Questions such as: "who is the client" will be answered differently by lawyers and social workers, with the social worker more professionally inclined to view a couple or a family unit as a "client," whereas most attorneys view this expansive approach with consternation and continue to debate this issue.[9] Other inter-professional conflict may

occur when staff members view "advocacy" in different ways: social workers tend to be inclined toward mediation and compromise, and may focus on what is in the "best interest of the client" seen as the entire family, while attorneys see their role as zealous advocacy for their individual client, requiring them to represent only that client's perspective.

Since the Law Institute does not provide direct services, we have the luxury of debating the merits of our professional differences without restraint. This holistic approach is of benefit to the training programs and the manuals, and is what makes our telephone consultation service unique in the state and the country.

The menu of legal support services that are offered by the Institute include:

Professional Education—Monthly Medicaid seminars; bi-monthly Medicare seminars; bi-annual Advocacy Training Centers in New York City and Albany; annual Guardianship Certification conferences in New York City and the Mid-Hudson area; participation in Bar Association training programs; and in-service training for social service agencies and health care providers. The training programs are approved for Continuing Legal Education credits.

Publications for Professionals—Bi-monthly, *The Brookdale Senior Rights Report*, a newsletter on legal developments in law and aging; nine continuously updated *Entitlement Advocacy Training Manuals*; the annual *Benefits Checklist for Older New Yorkers* (available in a New York City and upstate version); THE NEW YORK ELDER LAW HANDBOOK, undated semi-annually, published by and available from the Practising Law Institute; and various pamphlets and informationals. The Brookdale Center will also distribute books and publications from others for a fee.

Telephone Case Consultations for Attorneys and Social Workers—Telephone consultations concerning difficult cases and the particulars of provisions of entitlement laws or administrative rules, ethical dilemmas, conflicts of interests and case strategies with legal services attorneys, the private bar and of course, non-attorney advocates for the elderly.

Technical Assistance for Legislative Staff and Others—Assistance in analyzing aging issues upon request from state legislators, officials and others.

Publications for the General Public—*HELP for Seniors* (a simple guide to the main income and health care programs in New York State); *HELP for Caregiving Grandparents* - six volumes, available in English and Spanish; *ON GUARD: Now You are a Guardian*; and *HOME CARE: A Guide for Dummies*.

To subscribe to *The Brookdale Senior Rights Report*; for further information; or to be added to our mailing list, contact the Brookdale Center on Aging of Hunter College at 212-481-4433 or visit our website: www.brookdale.org.

Endnotes

1. Opening Statement by Senator John V. Tunney at the Joint Hearing on "Improving Legal Representation for Older Americans," U.S. Senate, Los Angeles, June 14, 1974.
2. Cantor, Marjorie H. and Mayer, Mary J., "Factors in Differential Utilization of Services by Urban Elderly," Paper presented at the 28th Annual Scientific Meeting of the Gerontological Society, Louisville, Kentucky, October 29, 1975.
3. The Brookdale Foundation, with its headquarters in New York City, is a major charitable source of funding in the field of aging. The Foundation should not be confused with the Brookdale Center on Aging, which is a beneficiary of the Foundation but is otherwise a separate entity, that operates under the auspices of Hunter College of the City University of New York as a not-for-profit educational program.
4. See also: two research papers from the Wisconsin-based Center for Public Representation: "*Meeting Legal Needs Without Lawyers — An Experimental Program in Advocacy Training*" and "*Legal Research for the Lay Advocate*," both published in 1977; "*The Rights of the Aging: Perspectives for the 1980s*," proceedings of a conference sponsored by the Brookdale Institute on Aging and Adult Human Development and the Center for the Study of Human Rights at Columbia University in the City of New York, 1981; "*Special Issue on Legal Services*," AGING, No. 360, 1990; "*Elder Law*," CLEARING HOUSE REVIEW, Vol. 27, No. 6, October 1993.
5. New York Social Services Law, Section 473-a.
6. *See also*, Rose Mary Bailly in an unpublished background paper for conference participants: "*Reforming New York's Conservatorship Law*," prepared under the auspices of the New York State Law Revision Commission and the Brookdale Center on Aging of Hunter College, January 19, 1989.
7. Gerard Wallace, *In The Matter of the Visitation of Natalie Anne Troxel and Isabelle Rose Troxel, Minors, Jennifer and Gary Troxel, Petitioners, v. Tommie Granville, Respondent*, Brief For The Grandparent Caregiver Law Center of The Brookdale Center On Aging As *Amicus Curiae* In Support of Petitioners. Supreme Court of the United States, November Term 1999, No. 99-138.
8. In recent years, increasing numbers of lawyers are viewing their work in a similar holistic fashion. *See e.g.*, Arnason et al., "*The Successful Marriage of Law and Social Work*," CLEARINGHOUSE REVIEW, 450, Summer 1989; Commission on Multidisciplinary Practice of the ABA *Report*, debated at the Annual Conference of the ABA in August of 1999; "*Collaboration between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*," by Paula Galowitz, Clinical Professor of Law, New York University School of Law, published in the FORDHAM LAW REVIEW, Vol. 67, 1999; "*A Holistic Approach to Legal Services: Grantees Join Broad-Based Collaboratives*," IN THE WORKS, the IOLA Fund of the State of New York, Winter 1999; and "*Models of Collaboration:*

Renewing Old Alliances Between the Public and the Private Elder Law Bar," by A. Frank Johns, President of the National Academy of Elder Law Attorneys, published in the Journal of Poverty Law and Policy, CLEARINGHOUSE REVIEW, September-October 1999.

9. *See also,* Special Issue on "*Ethical Issues in Representing Older Clients*," FORDHAM LAW REVIEW, Volume LXII, No. 5, March 1994, which consist of the proceedings of the Conference on Ethical Issues in Representing Older Clients, co-sponsored by the American Association of Retired Persons, the ABA Commission on Legal Problems of the Elderly, the ABA Section on Real Property, Probate and Trust Law, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, and Fordham Law School's Stein Center for Ethics and Public Interest Law.

Ellen P. Rosenzweig is an attorney and Co-director of the Samuel Sadin Institute on Law at the Brookdale Center on Aging of Hunter College, a multidisciplinary gerontology center. The Sadin Law Institute is a legal resource center for social workers, attorneys and other professionals working with elderly clients. The Law Institute provides telephone consultation services, educational programming and publications which include a newsletter, *The Brookdale Senior Rights Report* and the NEW YORK ELDER LAW HANDBOOK, published by the Practising Law Institute. She is also a member of the New York State Bar Association Elder Law Section, the National Academy of Elder Law Attorneys and the Association of the Bar of the City of New York Committee on Legal Problems of the Aging and has spoken and written extensively on Medicaid, Medicare and home care issues. Ms. Rosenzweig graduated from Brooklyn Law School and practiced trust and estate law for nine years before coming to the Brookdale in 1987.

Sytske A.D. Arnason (Sia) is the co-director of the Institute on Law and Rights of Older Adults of the Brookdale Center on Aging of Hunter College. Ms. Arnason, who has a Masters Degree in Social Work from Fordham University, has been with the Law Institute since 1980. She has dedicated her professional career to the development of interdisciplinary programs of law and social work in the service of elderly persons. Her special areas of interest include: long term care planning; prevention of elder abuse and neglect; guardianship; and health care decision-making in New York State. Ms. Arnason has written extensively and is the co-author of: *The Legal Rights of the Elderly* (1995), published by the Practising Law Institute. She has also prepared numerous training materials to train social workers about various aspects of law and aging. Ms. Arnason is a member of the Board of Directors of Choice in Dying, a national organization that promotes the use of Advance Directives in health care.

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The Medicare Rights Center: Empowering Consumers, Helping Professionals

By Joe Baker

Anyone who has tried to help a client, family member, friend, or co-worker with a Medicare problem knows how difficult it can be to get even the simplest questions answered. Maneuvering through the Medicare maze can be a daunting task, even for the most sophisticated legal professional. And with the advent of new health care options through the Medicare +Choice program, there are even more rules, regulations, denials of health services, and ultimately more frustration and confusion.

For over a decade, the Medicare Rights Center (MRC), a New York City-based, national, not-for-profit has worked to help older adults and people with disabilities on Medicare, their family members and professionals understand Medicare, appeal denials of care, and to make Medicare accountable and responsive to consumer needs. Starting with one attorney, Diane Archer (now MRC's President), and a telephone, MRC has grown to 16 employees and 17 devoted volunteers in order to provide counseling and assistance to people with Medicare unable to afford private counsel but who desperately need help securing benefits that they cannot afford to be without.

Last year, MRC received over 59,000 calls, worked on over 10,000 cases and provided 170 professionals and organizations with technical assistance involving Medicare-related issues, such as: choosing Medicare insurance options, denials of care by Medicare HMOs, premature home health care terminations, doctor's overcharges, skilled nursing home admissions and hospital discharges. Further, through our national HMO Appeals Hotline—the only one of its kind in the country—we handled 445 cases in which we helped Medicare HMO members appeal denials of care and coverage. Through this hotline, MRC secured much needed care for our clients and saved them over $210,000 in out-of-pocket health care costs.

MRC has received significant funding from a number of foundations, including the Robert Wood Johnson Foundation's Center for Medicare Education, the Kaiser Family Foundation and the Retirement Research Foundation, to develop Medicare training programs and education materials for consumers and professionals. MRC's training programs have given thousands of professionals nationwide, including those from the legal profession, government aging agencies, corporate human resource departments, unions, and nonprofit organizations, the knowledge and tools they need to help older and disabled clients get the health care they are entitled to receive through Medicare. Additionally, MRC has distributed thousands of pieces of educational literature and recently developed "Let's Learn Medicare!," a do-it-yourself Medicare reference and presentation manual for professionals who want to assist their clients and conduct training programs themselves.

Not content to simply react to Medicare consumer information needs, MRC has also become a leading consumer advocate in the public policy debate on Medicare, promoting Medicare changes aimed at empowering consumers, supporting informed choice and addressing systemic issues. MRC analyzes problems in the Medicare program that it identifies through our hotlines, develops policy recommendations addressing these issues, and leads efforts to raise public awareness about the problems and potential solutions. MRC's consumer perspective, informed and strengthened over the past decade through our experience, has enabled us to represent consumers through presentation of testimony at Congressional hearings, and participation in the Department of Health and Human Services' Advisory Committee on Medicare Education, HCFA's National Medicare Education Partners, the National Association of Insurance Commissioners, and the Consumer Advisory Council of the National Committee for Quality Assurance.

MRC's strategy to help older and disabled adults access quality, affordable health care includes disseminating our consumer health messages to the public through the press. Consequently, we are fre-

quently featured in national and local print and broadcast media outlets, such as: *The New York Times*, *The Washington Post*, and CNN.

How can MRC help you—elder law attorneys and your clients? You can refer your clients to the MRC hotline at 1-800-333-4114 or 212-869-3850 (New York City), which is open Monday through Thursday from 9:00 a.m. to 2:00 p.m. Better yet, you can take advantage of our expertise by becoming a Professional Member. This program provides professionals—individuals and organizations—with several resources to help you counsel your clients on Medicare matters. Professional Membership includes the following benefits:

- One hour of telephone counseling with a MRC professional who can provide up-to-date information quickly, including how to appeal Medicare HMO decisions and Medicare denials of payment for services;
- A subscription to Medicare Watch, our biweekly fax covering late-breaking Medicare news—an easy way to keep up with Medicare issues;
- A subscription to MRC News, our quarterly newsletter about MRC's advocacy work;
- A Medicare Survival Kit, which includes the following MRC publications:

  Medicare Basics
  Medicare and Employer Health Insurance: How They Work Together
  Medicare Supplemental Insurance Buyer's Guide
  Medicare HMO: Your Rights and Responsibilities
  Your Appeal Rights Under Medicare Part A
  Your Appeal Rights Under Medicare Part B
  Your Doctor's Bills: A Medicare Road Map
  Programs that Help People with Low Incomes
  How to Receive the Medicare Home Health Benefit
  The Medicare Home Health and Hospice Benefit
  Medicare Options Traffic Light

- *Medicare Changes, Medicare Choices* and *The ABC's of HMOs*, MRC's new booklets about Medicare health insurance options;
- *HMO Flash:* MRC's series of 28 fact sheets about Medicare HMOs
- Discounted rates on MRC publications: *Survival Kits* at $15 each (regularly $25) and 20% discount on all other publication orders over $50.

The yearly fee for Professional Membership is $225 and may begin at any time during the year.

To learn more about MRC, how to become a Professional Member, or how to get technical assistance, visit the MRC web site at www.medicareright.org, call me at 212-869-3850x15 or write to me at jbaker@medicarerights.org.

Joe Baker, an attorney, has been Executive Vice President of Medicare Rights Center since 1994. He is currently a Consumer Representative and a Consumer Member of the Board of Trustees of the National Association of Insurance Commissioners, and a member of the Consumer Advisory Council of the National Committee for Quality Assurance. From 1995 through 1997, Joe was the co-chair of the Governmental Programs Subcommittee for the Elder Law Committee of the New York State Bar Association.

Joe's noteworthy publications include *Medicare Appeals Primer, Medicare Basics for People with AIDS*, *Medicare Nuts and Bolts*, *Medicare as a Funding Source for Assistive Technology*, and *Medicare Managed Care Nuts and Bolts*.

He is a member of the Coordinating Committee of New Yorkers for Accessible Health Coverage, the Steering Committee of the Actor's Fund Insurance Resource Center, the Policy Committee for Cancer Care, and the Advisory Council of the New York State Assembly Standing Committee on Aging.

He has appeared in national print and broadcast media including CBS Evening News, ABC World News Tonight, CNBC, The Wall Street Journal Report, Pacifica Radio, *The New York Times*, *The Wall Street Journal*, *Forbes*, *Kiplinger's Personal Finance Magazine*, and other media outlets.

Joe received a B.A. and a J.D. from the University of Virginia.

Touro Law Center—Elder Law Clinic Introduction

By Tom Maligno

Law school clinics have become an important component of law school education. During the past thirty years law schools have increased opportunities for students to work with "live" clients and gain valuable practice skills.

Elder Law clinics have become a popular vehicle in the downstate area with Brooklyn Law School, CUNY Law School, St. John's and Touro all providing opportunities for students to work with senior citizens.

Touro's Clinic is representative of this clinic format. At Touro the Elder Law Clinic introduces students to the special challenges of practicing law on behalf of the elderly. With supervision by faculty, the students provide legal advice and representation to senior citizens in a wide range of legal matters. Representation provided for the elderly include health care, advance directives for health care, Medicare, Medicaid, Social Security and other government entitlements, wills, elder abuse, age discrimination, and consumer rights. Emphasis is placed on utilizing social, supportive, and advocacy services for the elderly and mobilizing community resources for the protection of the rights and enhancing the life of our aging population.

The clinical course is a weekly seminar designed to discuss the assigned cases and prepare students for the practice of law, as well as the applicable substantive law. The students in this program are prepared for and develop skills in case planning, interviewing, negotiation, preparation for administrative hearings, factual investigation, presentation of direct testimony, cross-examination and oral argument. The seminar functions as a case review session and enables the students as a group to discuss legal issues, ethical matters, problems of poverty and disability as well as case planning, and tactics and strategy needed.

The clinical course work requires students to designate a weekly schedule of clinical hours when they are expected to be at the clinic or engaged in legal work for clients. Each student is expected to work a minimum of twelve hours weekly and is required to maintain a complete log of all work done on each case. The Law Center provides extensive facilities for litigation support and includes an extensive law library.

Cases are referred to our clinic from senior citizen centers, the Social Security Office and other organizations. Clients seeking service are pre-screened by the legal secretary for all the information concerning the case. Cases are assigned by the Clinic Director to maximize the opportunity for students to have a variety of experiences and to ensure that adequate time and resources are devoted to the case. Students generally handle no more than three cases at any given time.

The Clinic Director accompanies the student at each stage of the case, including client interviews and hearings. In addition to ongoing case supervision, the student meets with the Clinic Director on a regular basis each week to review the planned progress and strategy of the case. All clinic interns work under a Student Practice Order pursuant to Sections 478 and 484 of the Judiciary Law of the State of New York.

Also, private attorneys are called upon to host students in their firm as part of an externship. The practical everyday skills learned in the externship benefit the mentor/volunteer as well as the student.

The private attorney benefits from a student who participates in weekly elder law seminars, thus becoming a more productive member of the law firm. The students gain by adding "real world" experience to the theory that is taught in class. The additional benefit to the community when more senior citizens have access to legal service make this partnership of private attorneys and law school clinics a positive situation for everyone.

Private attorneys who are interested in doing their pro bono work in conjunction with an elder law clinic can be an excellent resource for law students. Frequently, while drafting a will or advising clients on normally routine matters students will be confronted with novel, complex or unusual issues of law. Private attorneys are often called upon to mentor students and advise them on proper courses of action.

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Tom Maligno is the Director of the Career Development at Touro Law School. Prior to that he was the Director of Nassau/Suffolk Law Services. He is a member of the NYSBA President's Access to Justice Committee and the immediate past Chair of the NYSBA Legal Aid Committee.

Directory of Civil Legal Services for the Elderly

By Ellen G. Makofsky

As an Elder Law attorney in private practice, I try to assist each person who contacts my office for legal advice, counsel or help with a thorny problem. Most times the caller will make an appointment for a legal consultation but there are occasions where the legal issue, or the client, is not a good match for the services my office provides. Sometimes the client lacks the funds to tackle the legal issues at hand, or it does not make economic sense to right the particular legal wrong facing the senior. When this happens the public Elder law Bar can often be of significant help to the elderly. There is an ongoing partnership between the private and public Elder Bars. A good referral by the private Elder Law Bar to thepublic Elder Law Bar is often an invaluable service to the elderly person with a pressing legal problem. In turn, pro bono attorneys from the private bar staff portions of many of the public Elder Law Bar programs.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
STATEWIDE					
Legal Services For the Elderly Special Project: The New York Pension Hotline	Intake person Within New York City Tel: (212) 997-7714 Outside New York City Tel: (800) 355-7714	New York State	Advice and referrals in regard to pensions and fringe benefits.	No financial criteria applied	Calls are taken by voice mail and returned within two weeks. The hotline provides information, advice and referrals to New York State residents. regardless of income, relating to their pensions or other fringe benefits, including health and long term care. The hotline also provides legal, actuarial, accounting and financial counseling.
DOWNSTATE					
The Association of the Bar of the City of New York, Elder Law Project 42 West 44th Street, NY,NY 10036	Carol Bochner Tel:(212) 382- 6708 Jenevieve Habert-Fajardo Tel:(212) 382-6629 e-mail colp@abcny.org	New York City metropolitan area	Preparation and execution of basic wills, advanced healthcare directives, and powers of attorney. Provides information in regard to housing issues and public benefit programs but will not appear in court or at fair hearings on behalf of clients.	Intended for low income individuals, actual eligibility is determined by formula.	Most of the organization's efforts are directed to organizing community forums with volunteer speakers and providing legal clinics although individuals who call directly will receive services if they meet the financial criteria.
New York Legal Assistance Group, Inc. ("NYLAG") 130 East 59th Street NY, NY 10022	Intake Attorney (212) 750-0800	New York City	Direct legal services in the area of entitlement programs, (such as Medicaid, Medicare, home care, disability, food stamps, social	Indigent persons whose eligibility is reviewed on a case by case basis.	NYLAG will represent clients in litigated matters.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
			security or public assistance), health care, guardianship, abuse, neglect, consumer matters, simple wills, durable powers of attorney and health care proxies.		
Volunteers of Legal Service 54 Greene Street NY,NY 10013	Oscar S. Straus III Tel: (212) 966-4400 e-mail: Volsprobono@ Worldnet.att.net	New York City	Provides referrals to seniors with legal problems. Emphasis on life planning issues such as wills, powers of attorney and health care proxies.	Client must be 60 years or older on a fixed income and receiving no wages of any kind. Assets less than $30,000. (Residence not included)	Initial inquiry calls from an attorney or social worker are preferred. Following intake interview with client to identify legal issues, referrals are made to pro bono panel or where appropriate, to other legal services offices.
BLS Legal Services Corp. Senior Citizen Law Office 1 Boerum Pl. 3rd Fl. Brooklyn, NY 11201	Olga R. Perez Tel: (718) 488-7448	Manhattan	Provides advice, counsel and representation for housing issues, government entitlement benefits, consumer and health matters. Preparation of simple wills, powers of attorney and advance directives.	Client must be over 60 and live in Manhattan. Emphasis is placed on serving the socially and economically disadvantaged client.	This program is run in conjunction with Brooklyn Law School whose students work as interns under three staff attorneys.
Harlem Legal Services, Inc. 144 West 125th St. NY, NY 10027	Shirley Traylor Tel: (212) 348-7449	Manhattan, the service area is bounded by 110th St, Bronx County Line, 5th Avenue, Riverside.	Advice counsel and representation in the areas of Landlord/tenant and public benefits such as social security, SSI, Medicaid and Medicare.	Intended for low income individuals	
Legal Aid Society: Harlem Neighborhood Office 2090 Adam Clayton Powell, Jr. Blvd. NY, NY 10027	Intake attorney Tel: (212) 663-3293	Manhattan, the service area is bounded by: East- Lexington West-Riverside Dr. South-West 110th North- 169th St.	Advice counsel and representation in the areas of housing which includes issues such as non-payment petitions, holdovers, eviction problems and senior citizen rent increase exemptions, government benefit programs, nursing home and consumer issues.	Intended for low income individuals.	Client intake by telephone. Intake screening calls taken at (800) 335-0049 Thurs. 9:00 to 11:00 a.m. only.
Legal Aid Society: Lower Manhattan Neighborhood Office 90 Church St. NY, NY 10007	Janet Sabel Tel: (212) 577-3300	Manhattan, south of 34th St. from East River to Hudson River. City-wide coverage for health law issues, including Medicaid managed care.	Advice counsel and representation in the areas of housing, public benefits, social security, SSI, disability discrimination and health.	Income no higher than 125 % of the federal poverty guidelines.	Telephone intake for clients is done on Monday 9:30 to 11:00 a.m. The telephone intake number is: 1-888-218-6947

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
MFY Legal Services, Inc. 299 Broadway, 4th Fl. NY, NY 10007	Peggy Earisman Tel: (212) 417- 3700 e-mail: mfylegalservices@spacelab.net	Manhattan, East and West side between 34th and 110th Streets.	Advice, counseling and representation in the areas of housing, public benefits, social security and SSI.		Also serves certain categories of people with mental illness throughout the 5 boroughs.
New York County Lawyers' Association 14 Vesey Street NY,NY 10007	Lois Davis Tel: (212) 267-6646	New York County	Provides representation for Article 81 Guardianships; provides legal advice in the areas of landlord/tenant, consumer bankruptcy and family law.	Low income individuals with assets below $1,500 .	Legal representation is provided through referrals to a panel of volunteer lawyers.
Northern Manhattan Improvement Corp. 76 Wadsworth Ave. NY, NY 10333	Kenneth Rosenfeld Tel: (212) 568-9166	Manhattan, Washington Heights and Inwood neighborhoods from 155th St. to Marble Hill.	Advice, counseling and representation for housing issues such as eviction prevention and holdover proceedings.	This is a private community based not-for profit corporation with no income guidelines or immigration status restrictions.	New clients are only seen on Wednesday and must sign in prior to 9:00 a.m. Clients who have previously been to the office may sign in for a new appointment prior to 9:00 a.m. on Mondays.
Bronx Legal Services, Office of the Elderly 2605 Grand Concourse Bronx, NY 10468	Liz Shollenberger Tel: (718) 220-0300 e-mail: bronxlegalservices@cwixmail.com	Bronx	Representation in areas of housing, public benefits such as Medicare and Medicaid, health law, family law, consumer law, nursing home patient rights, pensions and age discrimination. Preparation of simple wills, powers of attorney, and advance directives.	No financial eligibility criteria applied. Clients must be 60 years or older and must reside in the Bronx. Clients are accepted on a case by case basis.	Will arrange for home visits if client is unable to travel.
Legal Aid Society: Bronx Neighborhood Office 953 Southern Blvd. Bronx, NY10459	Ian F. Feldman Tel: (718) 991-4600	Bronx county	Counsel, advice and representation in regard to housing, divorce, and government benefits such as, public assistance, Medicaid, Medicare, social security, SSI, and SSDI.	Eligibility is dependent upon the number of people living in the household and income. A family of 1 to 4 people may have income ranging from $15,450 to $31,313.	Appointments are made by phone. Intake for different legal issues is done on varying days. Clients will be given directions on how to make an appointment when they call.
Brooklyn Bar Association Volunteer Lawyers Project, Inc. 123 Remsen Street Brooklyn, NY 11201	Nina Nsilo-Swai Tel:(718) 624-3894 e-mail : bklynvlp@aol.com	Brooklyn	Preparation of wills, health care proxies, living wills and powers of attorney; some foreclosure prevention representation.	Single person income ranging from $10,300 - $15,450 depending upon circumstances. Married person Income ranging from $13,825-$20,738 depending upon circumstances.	This program is a stand alone non-profit organization that represents indigent residents of Brooklyn.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
Brooklyn Legal Services Corp. A Williamsburg Office 256-260 Broadway Brooklyn, NY 11211 East Brooklyn Office 80 Jamaica Ave. Brooklyn, NY11207	Geraldine A. Kennedy Tel: (718) 487-1300 e-mail: GKennedy@bka.org Geraldine A. Kennedy Tel: (718) 487-1300 e-mail: GKennedy@bka.org	Northern sections of Brooklyn Zip codes: 11206, 11211,11222, 11237 Eastern sections of Brooklyn Zip codes: 11203, 11208, 11236, 11207, 11212, 11239	Advice, counsel and/or representation in the areas of housing and related issues, SSI and other government benefits.	Intended for low income individuals.	Emphasis is on preventing seniors from becoming homeless
Brooklyn Legal Services Corp. B South Brooklyn Office 105 Court Street Brooklyn, NY 11201	John C. Gray, Jr. Tel: (718) 237-5500	Zip codes: 11210,11203, 11205, 11209, 11210, 11214, 11215, 11217, 11218, 11220, 11223, 11224, 11226, 11228, 11229, 11230, 11231, 11234, 11238	Advice, counseling and representation in the areas of housing, government benefits, consumer and health issues. Also provides citizenship counseling.	Income no greater than 125% of the federal poverty guidelines.	Call-in questions are answered on weekly scheduled hotlines organized by topic: Welfare: (718) 237-5561 Tues. 3 – 4 p.m. Housing: (718) 237-5559 Mon.,Tues., Wed. 3 - 4:30 p.m. Consumer, Health and Employment: (718) 237-5560 Every other Tues. 2 – 4 p.m. Family Law: (718) 237-5563 Thurs.10-12p.m. SSI: (718) 237-5562 Thurs.2- 4 p.m.
Legal Aid Society: Brooklyn Neighborhood Office 166 Montague Street Brooklyn, NY 11201	Intake Attorney Tel: (718) 722-3100	Brooklyn	Advice, counsel and representation in regard to government benefits such as public assistance, food stamps, Medicaid, SSI, and social security.	Intended for low income individuals.	SSI and social security appointments are made by telephone. All other appointments are made in person on Tuesdays. Walk- ins begin at 8:30 a.m.
Legal Aid Society, Brooklyn Office for the Aging 111 Livingston St. 7th Floor Brooklyn, NY 11201	Diane Lutwak Tel: (718) 645- 3111	Brooklyn	Advice and representation on all civil matters affecting seniors with emphasis on eviction prevention and government benefit preservation and maximization.	No financial eligibility criteria are applied, except that priority is given to those seniors with the most limited income and resources. Clients must be 60 years or older and must reside in Brooklyn.	Intake is by telephone only, no walk-ins.
Legal Services For New York City – Brooklyn Branch 186 Joralemon Street, Brooklyn, NY	Steven Bernstein Tel: (718) 852-8888	Zip Codes: 11203, 11204, 11211, 11213, 11219, 11226	Advice, counsel and representation in the areas of housing, government benefits, health and consumer issues.	Intended for low income individuals.	Appointments are made by telephone weekdays 9:00 a.m. to 1:00 p.m.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
11201			Also provides citizenship counseling for Brooklyn, Manhattan and Staten island.		
Legal Aid Society: Queens Neighborhood Office **120-46 Queens Blvd., Kew Gardens, NY 11415**	April A. Newbauer Tel: (718) 286-2450	Queens county (excluding the Rockaway Peninsula)	Provides representation in matters concerning housing law, government benefits such as social security, Medicaid and Medicare, health law and employment law.	Income no greater than 150% of the federal poverty guidelines.	Telephone appointments are made on Monday, Wednesday and Friday 9:00a.m. to 12:00p.m.
Legal Aid Society: Rockaway Neighborhood Office 20-11 Mott Avenue Far Rockaway, NY 116 91	April A. Newbauer Tel:(718) 337-4900	The Rockaway Peninsula of Queens County	Provides representation in matters concerning housing law, government benefits such as social security, Medicaid and Medicare, health law and employment law.	Income no greater than 150% of the federal poverty guidelines.	
Legal Services for the Elderly in Queens 97-77 Queens Boulevard, Ste.600 Rego Park, NY 11374	Donna Dougherty Tel: (718) 286-1500	Queens County	Provides civil legal services in matters concerning housing issues, government benefit programs, civil litigation, social security and elder abuse.	No financial eligibility criteria are applied. Clients must be 60 or older and residents of Queens. Cases selected on a case by case basis. Priority is given to those in the most economic and social need.	
Queens County Bar Association, Queens Volunteer Lawyers Project, Inc. 90-35 148th St. Jamaica, NY 11435-4097	Ivan L. Werner Tel: (718)739 657-1789	Queens County	Provides representation in Housing Court to avoid or delay eviction; provides counseling for denial of Medicaid, Medicare and public assistance issues; representation in foreclosure issues; bankruptcy uncontested divorces and matters of consumer law.	Income no greater than 125% of the federal poverty guidelines.	
Queens Legal Services Corp. South Jamaica Office 89-00 Sutphin Blvd. Jamaica, NY 11435 Long Island City Office 42-15 Crescent St. Long Island City, NY11101	Carl Callender Tel: (718) 657-8611 Tel: (718) 392-5646	All of Queens.	Advice, counsel and representation in the areas of HIV advocacy, housing, government benefits, and health and consumer issues.	Income no greater than 125% of the federal poverty guidelines.	

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
Legal Aid Society: Staten Island Office **60 Bay Street, Staten Island, NY 10301**	Christopher Lamb Tel: (718)273-6677	Staten Island	Representation in matters concerning housing issues, government benefit programs such as Medicare, Medicaid and social security.	Intended for low income individuals.	Clients must call for appointments on Mondays 9:00a.m. to 4:00p.m.
Nassau/Suffolk Law Services Committee, Inc. 1 Helen Keller Way Hempstead, NY 11550	Daniel Okrent Susan Kemp Tel: (516) 292-8088	Nassau County	Social Security, Medicaid and Medicare fair hearings and appeals; simple wills, powers of attorney and advance directives; mortgage foreclosures, senior citizen tax exemption problems and consumer law issues; Landlord/tenant eviction proceedings.	No financial eligibility criteria are applied for telephone advice. Clients must be Nassau residents who are 60 and older. Clients are accepted on a case by case basis.	Telephone hotline for legal advice (516)292-8100
Legal Aid Society of Suffolk County Senior Citizen Division 5 Shore Lane Bayshore, NY 11706	George Roach Tel: (516) 854-0401	Suffolk County	Advice, counseling and representation in appropriate civil matters. Cases accepted are defense oriented. Will represent clients at fair hearings and in court.	No financial eligibility criteria are applied. Clients must be 60 years or older and must reside in Suffolk County. Clients are accepted on a case by case basis.	This program is staffed by one full time attorney and two part time paralegals who serve a population of approximately 250,000 Suffolk County residents over the age of 60. Internal guidelines and restrictions are used to select the caseload.
Westchester/ Putnam Legal Services 4 Cromwell Place White Plains, NY 10601	Intake Unit Tel: (914) 949-1305 x 233	Westchester and Putnam counties PADD and PAIR programs serve Westchester, Putnam, Rockland, Orange and Sullivan Counties	Representation in civil matters concerning housing, public benefits such as Medicare, Medicaid, food stamps and SSI disability claims, disability discrimination, HIV/AIDS, domestic violence and mental health issues. "PADD" and "PAIR" programs provide information, referrals and representation to those with developmental disabilities.	Financial determination of eligibility made on case by case basis	
UPSTATE					
Dutchess County Office for the Aging	Paul Weinberger Tel: (914) 486- 2555	Dutchess County	Provides advice and counsel in regard to consumer issues, housing,	Clients must be over the age of 60 and residents of Dutchess County.	No representation for court appearances is available.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
27 High Street Poughkeepsie, NY 12601			government benefit programs. Preparation of simple wills, powers of attorney and advance directives.		
Legal Services of Dutchess County Westchester/ Putnam Legal Services 29 N. Hamilton St. Poughkeepsie, NY 12601	Intake Unit Tel: (914) 471-0058	Dutchess County	Representation in civil matters concerning housing, public benefits such as Medicare, Medicaid, food stamps and SSI disability claims, disability discrimination, HIV/AIDS, domestic violence and mental health issues.	Financial determination of eligibility made on case by case basis	Client intake M-F 9a.m.-11a.m.
Legal Aid Society of Northeastern New York, Inc. Albany Office 55 Columbia St. Albany, NY12207 Saratoga Office 10 Lake Avenue Saratoga Springs, NY 12866	Intake Receptionist Tels: (518) 587-5188 (800) 462-2922 Intake Receptionist Tels: (518) 587-5188 (800) 870-8343	Albany, Schenectady, Washington and Warren counties Saratoga, Columbia, Greene, Rensselaer counties	Advice and counsel for all civil matters. Provides representation in the areas of housing, government benefits such as Medicaid, social security and SSI, health care issues. Pro bono referrals are made in the area of disability,, health, tax. consumer issues, bankruptcy, landlord/tenant, real property and wills.	Income less than 125% of the Federal poverty level.	Clients are seen on a first come first served basis
Senior Legal Services Program of the Legal Aid Society of Northeastern New York, Inc. 55 Columbia Street Albany, NY12207	Anne-Marie Malak Tels: (518) 462-6765 (800) 462-2922	Albany county	Provides advice counsel and representation for matters such as social security, SSI, public assistance, landlord/tenant issues, Medicare, Medicaid, grandparent's rights and consumer issues.	No financial eligibility criteria applied. Clients must be 60 years or older and must reside in Albany county.	Appointments can be made by telephone Monday to Friday 11:00a.m. to 5:00 p.m.
Capital District Women's Bar Association Legal Project, Inc. 2 Tower Place Executive Park Albany, NY 12203	Wendy Durand Tel: (518) 435-1770 e-mail: legalwba@ aol.com	Albany, Rensselaer and Schenectady counties	Organizes 5 legal clinics per month to provide participants with legal options and information on civil legal matters. Runs program for domestic violence and provides representation in Family Court for orders of protection and custody matters and representation on other civil legal	No financial eligibility criteria are imposed but in the domestic violence program higher income clients may be required to pay a reduced fee in lieu of pro bono services.	Provider of a variety of legal workshops targeted to seniors.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
			matters arising out of the domestic violence.		
Legal Aid Society of Mid New York, Inc. 255 Genesee St. Second Floor Utica, NY 13501 189 Main St. Oneonta, NY 13820 1170 Riverfront Center Amsterdam, NY 12010	Paul Lupia Tel: (315) 732-3202 e-mail plupia@wnylc.com Daniel Peckham Tel: (607) 433-2600 Peter Lenz Tel: (518) 842-9466	Herkimer, Lewis, Madison and Oneida counties. Otsego and Delaware counties. Fulton, Montgomery and Schoharie counties.	Advice, counsel and representation in regard to government benefits such as Medicaid, Medicare, social security, and SSI, housing issues, consumer matters, bankruptcy, debtor creditor issues. Preparation of simple wills, powers of attorney and advance directives.	Clients accepted on a case by case basis. Income and assets are considered in certain cases.	
Volunteer Legal Services Project of Monroe County, Inc. 80 St. Paul St., Suite 640 Rochester, NY 14604	Hanna Cohn Tel: 716 232-3051 e-mail: vlsp@worldnet.att.net	Monroe County	Provides representation for consumer matters such as frozen bank accounts or consumer scams; guardianship and other custody related matters for grandparents taking care of grandchildren; preparation of health care proxies and powers of attorney (people with terminal illness); pension, real estate and tax matters, estate problems (small estates).	Income up to 187.5% of federal poverty index (e.g. $15,540 for one person household). Asset guidelines also apply.	This program matches the client with a pro bono attorney who will provide the client with a full range of services including representation at fair hearings and in Court.
Monroe County Legal Assistance Corporation 80 St. Paul Street, Suite 700 Rochester, NY 14604	Loretta Callahan Scheg Tel: (716) 325-2520	Monroe County	Advice, counsel and representation in matters concerning government benefits programs such as Medicare, Medicaid, social security, and SSI, housing, nursing home, home health care issues and subsidized housing advice. Outside referrals made for clients with other legal issues.	No financial criteria applied. Clients must be 60 years or older and must reside in Monroe County.	In some instances outside referrals are made to legal services or to a panel comprised of private attorneys.
Rural Law Center of New York, Inc. 56 Cornelia Street Plattsburgh, NY 12901	Susan L. Patnode Tel: (518) 561-5460 e-mail: rlc@capital.net	New York's 44 rural counties	Will give advice and information by telephone and make referrals where appropriate: provides legal representation in	Low income New Yorkers who live in the 44 rural counties.	Focus is on providing educational presentations on legal matters.

IDENTITY	CONTACT PERSON	AREA SERVED	TYPE OF LEGAL SERVICES PROVIDED	CLIENT ELIGIBILITY CRITERIA	COMMENTS
			matters concerning real estate, foreclosures, consumer fraud, and social security.		

Note: My thanks to Anthony Perez Cassino, Director of the New York State Bar Assciation Department of Pro Bono Affairs, who pointed me in the right direction to find resources for free legal services around New York State. Two pamphlets were also particularly helpful: *Pro Bono Opportunities: A Guide for Lawyers in New York City* (May 1999), a publication of the Association of the Bar of the City of New York, 42 West 44th Street, New York, NY 10036-6689 and *Directory of Civil Legal Services Offices in New York City* (March 1998), a publication of the Legal Aid Society, Civil Division, Civil Administration, 90 Church Street, 15th Floor, New York, NY 10007.

Ellen G. Makofsky is a cum laude graduate of Brooklyn Law School. She is a partner in the law firm of Raskin & Makofsky with offices in Garden City, New York. The firm's practice concentrates in elder law, estate planning and estate administration.

Ms. Makofsky is a member of the New York State Bar Association ("NYSBA") and serves on its Elder Law Section's Executive Committee. She is Chair of the Liaison to Legal Services Community Committee of the Elder Law Section. She is also a member of the NYSBA's Trusts and Estates Law Section. Ms. Makofsky is a member of Nassau County Bar Association, Elder Law, Social Services and Health Advisory Committee and the Surrogate's Court Trusts and Estates Committee. She is a member of the National Academy of Elder Law Attorneys, Inc. ("NAELA").

Ms. Makofsky serves on the Long Island Alzheimer's Foundation ("LIAF") Legal Advisory Board and is the current president of the Gerontology Professionals of Long Island, Nassau Chapter. She is the former co-chair of the Senior Umbrella Network of Nassau. Ms. Makofsky is a member of the Board of Trustees of the Port Jewish Center in Port Washington, New York.

Ms. Makofsky makes an effort to share her knowledge with the general public and those who advise and service the elderly. She writes on Elder Law and trust and estate topics frequently and co-authored, "Balancing the Use of Public and Private Financing for Long Term Care," and "The New Look of Long-Term Care Financing in the '90's" which appeared in the *Journal of the American Society of CLU & ChFC*. Ms. Makofsky has appeared on the radio and television and is a frequent guest lecturer and workshop leader for professional and community groups.

Scenes from the 1999 Elder Law Section Summer Meeting Montreal, Canada

Michael O'Connor and Kate Madigan

Paula Pierro, Lou Pierro and Ira Miller

Bernie Krooks

Anne Golden, Liz Goldfarb, Robert Kruger, David Goldfarb

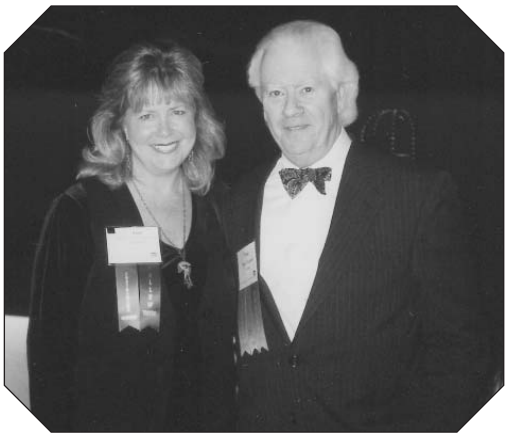
Rita Gilbert, Bruce Gilbert, Sharon Kovacs Gruer

Peter Cambs, Morgan Cambs, Tom Rice

Sheila Rice, Tara Rice and Denise Cambs

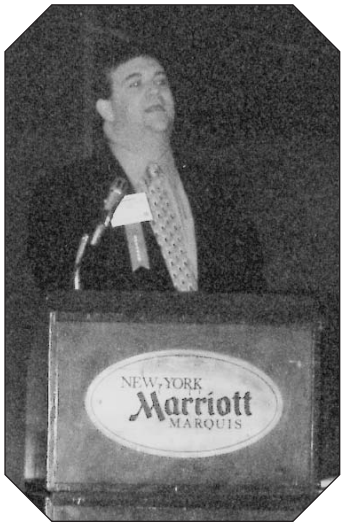
Bernie Krooks, Steve Silverberg, Steven Stern, Howard Krooks

Scenes from the 2000 Elder Law Section Annual Meeting New York Marriott Marquis



Kate Madigan and Paul Michael Hassett

Cora Alsante, Bernie Krooks, Walter Burke



Lawrence Davidow

Ira Miller and Robin Krooks

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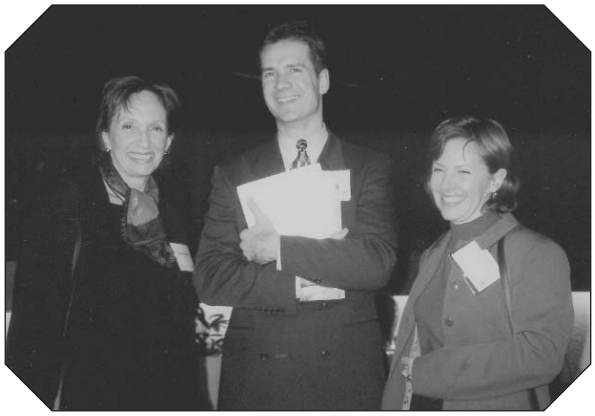

Barbara Kislack, Lou Pierro, Lorese Phillips

Peggy Bomba, John Pitzzuto, Skit Rabbino, Connie Kerwick, Mitch Rabbino, Bill Kerwick

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Case News

By Judith B. Raskin

Medicaid Eligibility

In an article 78 proceeding, petitioner appealed the denial of her deceased husband's Medicaid application for excess resources. Her income was below the MMMNA but DOH denied a request to raise her CSRA by the amount of her husband's excess resources. Denied. *In re Rauch v. De Buono*, __ A.D.__, __ N.Y.S. 2d __ (4th Dep't, 1999).

The decedent's application for medical assistance was denied based on his excess resources. Although his wife's income fell below the monthly allowance (MMMNA), DOH refused the applicant's request to raise his wife's community spouse resource allowance (CSRA) by the amount of his excess resources in order to generate additional income for his wife.

DOH interpreted SSL Sec. 366-c(8)(c) and 18 N.Y.C.R.R. 360-4.10(c)(71) to mean that the CSRA would be raised "only when the additional resources produced income at the time of decedent's application. . . ."

On appeal, the Appellate Division (where this matter was transferred) held that this interpretation was reasonable.

MEDICAID RECOVERY

DSS appealed from a decision that Medicaid benefits paid in error were correctly paid and not subject to recovery. Reversed. *Oxenhorn v. Fleet Trust Co. and Estate of Judson*, ___ A.D.2d ___ (1st Dep't, 1999).

Marion Judson's application for Medicaid institutional benefits included a copy of the trust that she had created. The trust agreement gave her the right to all of the income of the trust and discretionary distributions of principal by the trustee. The latter provision should have resulted in a denial of her Medicaid application for excess resources but Columbia County DSS approved the application in error. At Ms. Judson's death, the trust funds were distributed to her heirs.

DSS brought an action to recover its costs. The defendants claimed that in the absence of fraud or misrepresentation, the benefits were correctly paid and DSS had no claim.

The Supreme Court held, inter alia, that the payments were incorrectly paid. DSS could recover from the trustee because the decedent had a beneficial interest in the trust corpus at the time Medicaid benefits were provided.

On appeal, the Appellate Division reversed, holding that the payments were correctly paid.

The Court of Appeals reversed, reinstating the decision of the Supreme Court. Social Services Law Sec. 369 (2)(b)(i) limits recovery to payments correctly made but does not define that term. Sec. 106-b provides that all steps must be taken to correct overpayment including payments made to ineligible persons. The Court found the case the defendants relied upon, *In re Akullian*, was wrongly decided. In that case, the Appellate Division held that where there was no fraud or misrepresentation, benefits were correctly paid.

Supplemental Needs Trust

Co-guardians sought appointment as trustees of a supplemental needs trust for the benefit of their son where they were remaindermen. Granted. *In re Pace*, __ Misc. 2d __, __ N.Y.S. 2d __ (1999). (Sup. Ct., Suffolk County).

Mr. and Mrs. Pace were appointed article 81 co-guardians for their 29-year-old son. They were granted the authority to create a supplemental needs trust for their son's benefit but the court reserved decision on their appointment as trustees.

DSS argued it would be a serious conflict of interest for a family member who is a remainderman to serve as trustee and cited *DiGennaro v. Community Hospital of Glen Cove*, 204 A.D.2d 259 (2nd Dep't, 1994) for denying such appointment. Petitioners argued that 1) the proposed trust had significantly different provisions, 2) subsequent legislation had added protections for the beneficiary, and 3) article 81 does not prohibit such appointment.

The court appointed the petitioners as trustees. Subsequent legislation has provided added safeguards for the beneficiary in such situations. Unlike the trust in *DiGennaro*, this trust provided first for reimbursement to the state upon the death of the beneficiary as now required under federal and state

legislation. Recent legislation also provides safeguards to assure proper fiduciary management such as notice requirements to the social services district as set forth in 18 N.Y.C.R.R. 360-4.5 (b)(5). Parents who stand to inherit from their incapacitated children are often appointed as article 81 guardians with similar roles as that of trustee. The court concluded, ". . . it is determined that a family member, who is also a contingent remainderman of a supplemental needs trust, should not automatically be excluded from serving as a trustee of said trust."

An article 81 guardian sought to establish a court-ordered supplemental needs trust with the IP's monthly SSDI payments. Denied. *In re Lynch*, __ Misc. 2d __ , __ N.Y.S. 2d __ (1999) (Surr. Ct., Onondaga County.)

Robert Lynch received medical assistance and contributed $293 per month of his SSDI payments to the state to maintain his eligibility for the program. His guardian sought to create a court-ordered supplemental needs trust for the full amount of his SSDI benefits. While the court found the intent behind the petition well meaning and commendable, it denied the petition. "It is not the purpose of such a trust to be used as a vehicle to isolate entitlement funds in order to enhance an individual's eligibility for greater governmental benefits. . . . such a proposed hoarding of entitlement funds flies in the face of the rationale supporting entitlement programs and is against public policy."

Article 81

A hospital sought appointment of an article 81 guardian for a patient no longer receiving acute care but refusing to leave the hospital. Denied. *In re Louis Koch*, N.Y.L.J. November 29, 1999 (Sup. Ct., Queens County).

After refusing recommended amputation of his leg while at Mount Sinai Hospital, Louis Koch was discharged to a rehab center and nursing home. When his wound became infected, he returned to the hospital. The hospital again advised amputation but Mr. Koch refused. After rehabilitation and laser therapy, the insurance company refused to pay for continuing non-acute hospital care. Despite the lack of payment, Mr. Koch refused to leave the hospital.

The hospital brought this proceeding for the appointment of an article 81 guardian, arguing that Mr. Koch was unable to make proper health care decisions or handle his finances. The Court Evaluator testified that Mr. Koch was stubborn but was aware of the ramifications of his decisions. He knew that home care was not an option because his apartment was unlivable. He firmly believed, based upon his past experiences, that he would get the best care by remaining in the hospital. Finances were managed with the help of friends.

The court denied the petition while recognizing the hospital's dilemma. The evidence failed to establish that Mr. Koch was functionally impaired or that he lacked understanding of the consequences of his actions and decisions.

Power of Attorney

Attorney respondent appealed from a decision reducing his contingency fee and voiding a power of attorney, both granted to him by an attorney in fact for her principal. Reversed. *In re Application of Khoubesserian*, __ A.D.2d __ (1st Dep't, 1999).

In 1987, Madeline Minassian appointed her sister, Adrienne, as her attorney-in-fact under a power of attorney. The document included the authority to handle all claims and litigation, insurance matters and the "full and unqualified authority to delegate any or all of the foregoing powers to any person or persons whom my attorney(s) in fact shall select." In 1993, Adrienne was in ill health. To relieve herself of the burdens imposed by her appointment as agent, she delegated her authority to her attorney, Spiegel, in a power of attorney. Adrienne agreed that Spiegel's fees would be one third of any assets he collected on her sister's behalf. In 1994, Spiegel collected $100,000 from employment-related insurance to cover Ms. Minassian's nursing home expenses from a bankrupt Pan Am. Adrienne died prior to the receipt of these funds. Spiegel deducted $33,332.12 as his fee.

In 1996, the petitioner successfully sought appointment as article 81 guardian for his aunt, Madeline Minassian. In reviewing Ms. Minassian's finances, the court evaluator found the large payment to Spiegel and the petitioner challenged the payment as unauthorized. The Supreme Court found Spiegel's actions proper but the fee unreasonable and overreaching and reduced his compensation to $3,000. The Court also ordered that the power of attorney be voided because the attorney's authority came not from Ms. Minassian but from her deceased sister who was no longer able to supervise his actions.

The Appellate Division reversed. Spiegel continued to handle Ms. Minassian's finances in a careful, accurate and thorough manner. While his fee was large, if not for his efforts, no funds would have been collected. The court stated, "We do not rule, as a mat-

ter of law, that a power of attorney necessarily survives beyond the death of the principal. However, on this set of facts, where Spiegel continued to work on behalf of his late principal's principal, we hold there was no evidence of overreaching or unreasonable exercise of that power."

Judith B. Raskin is a member of the law firm of Raskin & Makofsky, a firm devoted to providing competent and caring legal services in the areas of Elder Law, Trusts and Estates and Estate Administration.

Judy Raskin maintains membership in the National Academy of Elder Law Attorneys, Inc.; the New York State Bar Association where she is a member of the Elder Law and Trusts and Estates Sections; and the Nassau County Bar Association where she is a member of the Elder Law, Social Services and Health Advocacy Committee, the Surrogate's Trusts and Estates Committee and the Tax Committee.

Ms. Raskin shares her knowledge with community groups and professional organizations. She has appeared on radio and television and served as a workshop leader and lecturer for the Elder Law Section of the New York State Bar Association as well as numerous other professional and community groups. Mrs. Raskin writes a regular column for the *Elder Law Attorney*, the newsletter of the Elder Law Section of the New York State Bar Association, and is a member of the Legal Committee of the Alzheimer's Association, Long Island Chapter. She is past president of Gerontology Professionals of Long Island, Nassau Chapter.

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Fair Hearing News

By Ellice Fatoullah and René Reixach

We actively solicit receipt of your Fair Hearing decisions. Please share your experiences with the rest of the Elder Law Section and send your Fair Hearing decisions to Ellice Fatoullah, Fatoullah Associates, 2 Park Avenue, New York, NY 10016 or René Reixach, Woods, Oviatt, Gilman, Sturman & Clarke LLP, 700 Crossroads Building, 2 State Street, Rochester, NY 14614. We will publish synopses of as many relevant Fair Hearing decisions as we receive and as is practicable.

Copies of the Fair Hearing decisions analyzed below may be obtained by writing to Joyce Kimball at the New York State Bar Association, One Elk Street, Albany, NY 12207-1096, or by calling her at (518) 487-5561.

In re Appeal of Antoinetta G.

Holding

Ellice Fatoullah

Where the appellant is the grantor of an irrevocable trust pursuant to which she is entitled to receive all income of the trust, but is expressly prohibited from receiving any of the principal, and the appellant retains a limited testamentary power of appointment over the trust principal, the agency may not count the principal of the trust as a resource available to the appellant.

Facts

On February 8, 1999, an application for nursing home Medicaid was submitted to the agency on behalf of the appellant, a 78-year-old single woman who had resided in the nursing home since 1994. By notice dated May 10, 1999, the agency notified the appellant that her application had been denied on the grounds that she had resources in excess of the allowable Medicaid standard, namely the corpus of a trust that had been established by the appellant on January 19, 1996.

The appellant was the grantor of an irrevocable trust which provides that the Trustee shall pay the appellant or apply to her benefit the income of the trust, but the Trustee is expressly prohibited from using any of the principal of the trust for the appellant. The trust agreement also provides:

> The Grantor reserves, during her lifetime, the power of appointment to designate in her Last Will and Testament, the beneficiaries of the trust corpus and any undistributed income thereon, to a class consisting of any one or more of the lineal descendants of the Grantor or to any charitable organization and association or foundation which qualifies for the charitable deduction under the federal estate tax law. Such power shall be exercisable by the Grantor's will, and the power granted herein must be specifically referred to in such will in order to be exercised. Such appointment may be outright or in further trust, and need not be equal or proportionate. No such appointment shall be made to the Grantor, the Grantor's creditors, estate or estate creditors.

René Reixach

In addition, although not reported in the fair hearing decision, the trust agreement gave the trustee the traditional power to make loans of the trust corpus. Specifically, the trust agreement provides:

> This authorization includes the power to extend such loans beyond maturity, with or without renewal, and without regard to the existence or value of any security, to facilitate payment of such loans, to change the interest rate thereof, and to consent to the modification of any guaranty relating thereto.

The agency presented no information at the hearing as to the amount of the trust principal, stating only that the resources must have been over the resource limit. The fair hearing decision found that the appellant's representative did not contend that the value of

the trust was less than the Medicaid resource limit, the principal of the trust was considered to be over the Medicaid resource limit.

On June 9, 1999, the appellant requested this fair hearing to review the agency's determination that the principal of the trust was a resource available to her in excess of the Medicaid resource limit.

Applicable Law

A person 65 years of age or older who has income or resources which exceed the standards of the Supplemental Security Income (SSI) program but who is otherwise eligible for SSI may be eligible for Medicaid, provided that the person meets the financial and other eligibility requirements for Medicaid. N.Y. Social Services Law § 366.1(a)(5).

To determine eligibility, income and resources are compared to the applicable income and resource levels. If an applicant's net income is less than or equal to the applicable monthly standard of need, and resources are less than or equal to the applicable standard, full Medicaid coverage is available. If the applicant's resources exceed the resource standard, the applicant will be ineligible for Medicaid until he or she has incurred medical expenses equal to or greater than the resource standard. 18 N.Y.C.R.R. § 360-4.1; Administrative Directive 91 ADM-17.

Resources are defined in 18 N.Y.C.R.R. § 360-4.4(a). They include property of all kinds, including real and personal property, both tangible and intangible. An applicant's available resources include:

> a) All resources in the control of the applicant, including any resources in control of anyone acting on the applicant's behalf such as a guardian, conservator, representative or committee; and
>
> b) Certain resources transferred for less than fair market value as explained in subdivision (c) of 18 N.Y.C.R.R. § 360-4.4.

Section 366.5(d) of the Social Services Law and section 360-4.4(c)(2) of the regulation govern transfers of assets made by an applicant and/or his or her spouse on or after August 11, 1993. Generally, in determining Medicaid eligibility of a person receiving nursing facility services, any transfer of assets for less than fair market value made by the person or his or her spouse within or after the "look-back period" will render the person ineligible for Medicaid coverage for nursing facility services. The "look-back period" in the case of payments to or from a trust which may be deemed assets transferred by an applicant is a 60-month period immediately preceding the date that the person receiving nursing facility services is both institutionalized and has applied for Medicaid.

Unless such an uncompensated transfer meets certain exceptions, it will cause an applicant to be ineligible for nursing facility services for a period of months equal to the total cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average cost of care to a private patient for nursing facility services in the region in which such person seeks or receives nursing facility services on the date the person first applies for Medicaid.

Regulations at 18 N.Y.C.R.R. 360-7.5(a)(1) provide that payment for services or care under Medicaid may be made to a recipient or the recipient's representative at the Medicaid rate in effect at the time such care or services were provided when an erroneous determination of ineligibility by the agency is reversed. Such erroneous decision must have caused the recipient or the recipient's representative to pay for medical services which should have been paid for under Medicaid. Note: the policy in the regulation limiting corrective payment to the Medicaid rate at the time such care or services were provided has been enjoined by *Greenstein v. Dowling* (S.D.N.Y.) with respect to Medicaid recipients in the City of New York. In a stipulation of settlement of that case, no reimbursement under this section of the regulations may be paid to the extent such expenditures exceed a reasonable amount, and any payment that does not exceed 110% of the Medicaid rate shall be deemed reasonable. When actual expenditures exceed 110%, the New York City agency shall determine whether the expenditure is reasonable, and in making this determination the agency may consider the prevailing private pay rates in the community at the time the services were rendered and special circumstances of the recipient.

Section 360-2.4(c) of the regulations provides that an initial authorization for Medicaid will be made effective back to the first day of the first month for which eligibility is established. A retroactive authorization may be issued for medical expenses incurred during the three-month period preceding the month of application for Medicaid, if the applicant was eligible for Medicaid in the month such care or services were received. During such a period of retroactive coverage, 18 N.Y.C.R.R. 360-7.5(a)(5) provides that payment may be made to a recipient or the recipient's representative at the Medicaid rate and that the med-

ical care and services were furnished by a provider enrolled in the Medicaid program. The provisions of this regulation limiting reimbursement for paid medical bills only to provider enrolled in the Medicaid program when such bills were incurred has been declared invalid in the courts in *Seittelman v. Sabol*, 91 N.Y.2d 618, 697 N.E.2d 154, 674 N.Y.S.2d 253 (1998) and *Carroll v. DeBuono* (N.D.N.Y. 1998), but the court in *Seittelman* held that limiting reimbursement to the Medicaid rate was permissible for such period.

Fair Hearing Decision

The agency's determination to deny the appellant's application on the grounds that the appellant has resources in excess of the allowable Medicaid standard was not correct and is reversed. However, the agency is directed to determine whether the trust established in January, 1996 constituted an uncompensated transfer to qualify for Medicaid benefits for nursing home care, and to provide the appellant an opportunity to rebut the presumption that the transfer was made in order to qualify for Medicaid for nursing home care. The agency is directed to provide the appellant with a notice of its new determination, and if the appellant is eligible, the agency is directed to provide her with Medicaid benefits based on her February, 1999 application date.

Discussion

At issue is the agency's position that the appellant retains control over all of the assets in the trust she created in 1996. The trust provision at issue gives the appellant a limited testamentary power of disposition over the trust corpus, and the agency contends that this means the appellant has control over the entire trust corpus and that therefore the entire trust is available to her. This contention is without merit. The trust agreement specifically provides that the appellant may not designate herself, her creditors, her estate or her estate's creditors as beneficiaries. She may designate only lineal descendants or charities. Therefore, according to the terms of the trust agreement, the trust corpus is not available to her.

While the agency's determination as to the appellant's resources cannot be upheld, it is noted that the trust was created less than 60 months prior to the date of her application for Medicaid for her nursing home care. Therefore, the agency must examine whether this constituted a transfer of resources without compensation in order to qualify for nursing home care. The agency must provide the appellant with an opportunity to rebut this presumption and must make a new determination as to the appellant's eligibility.

Editor's Comment

The Department of Health has finally reached the legally correct result on the issue of whether a limited testamentary power of appointment makes the entire corpus of a trust available to the grantor for purposes of determining Medicaid eligibility. And although not expressly referred to in the decision, the trust did contain the traditional language giving the trustee unencumbered power to make loans of the trust corpus, as quoted above. This most recent decision is in contrast to prior decisions which reached the opposite conclusion, e.g., *Appeal of James H.*, discussed in the Spring, 1999 issue, and *Appeal of Laura S.*, discussed in the Fall, 1999 issue. Those decisions ignored the language of the regulation defining what is an "available resource" countable by Medicaid, 18 N.Y.C.R.R. § 360-4.4(b)(1): "all liquid or easily liquidated resources in the control of the applicant/recipient." Clearly property which is only subject to disposition at the applicant's direction upon her death is neither liquid nor easily liquidated. In this regard, the Appellate Division, Fourth Department recently held that assets which were to be distributed to a Medicaid applicant from an estate, but had not yet been distributed in the normal administration of the estate, were not "actually available" to her. *In re Little*, 256 A.D.2d 1152, 684 N.Y.S.2d 124 (4th Dep't 1998). Assets subject to distribution only pursuant to a testamentary limited power of appointment are no more available.

In light of this most recent decision, should the Department of Health revert to its prior position in any subsequent fair hearing decisions, the appellant would have an excellent Article 78 claim that the decision was arbitrary and capricious. In this regard, *In re Field Delivery Service*, 66 N.Y.2d 516, 488 N.E.2d 1223, 498 N.Y.S.2d 111 (1985), requires that an agency must articulate a reason for a change in policy if an adjudicative decision is contrary to prior decisions. This principle has been followed in the social services context in *Richardson v. Commissioner, N.Y.C. Dep't of Social Services*, 88 N.Y.2d 35, 665 N.E.2d 1059, 643 N.Y.S.2d 19 (1996). Fortunately for the appellant in this hearing, the local agency has no right to judicial review of fair hearing decisions adverse to it, *Beaudoin v. Toia*, 45 N.Y.2d 343, 380 N.E.2d 246, 408 N.Y.S.2d 417 (1978), so that argument is only available to a fair hearing appellant, and in any event, the rationale must be set forth in the administrative decision, not in a post-decision response to a court challenge. *Lafayette Storage & Moving Corp.*, 77 N.Y.2d 823, 567 N.E.2d 240, 566 N.Y.S.2d 198 (1991).

The testamentary powers of appointment contained in the *Hazeldine* and *Laura S.* trusts did not contain the express prohibition that "No such appointment shall be made to the Grantor, the Grantor's creditors, estate or estate creditor's" as contained in the trust at issue in the instant matter. Is this a material distinction, or a distinction without a difference?

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Ms. Fatoullah was the founding Chair of the Elder Law Committee of the New York County Bar Association, founding Chair of the Public Policy Committee of the Alzheimer's Association—NYC Chapter, and a member of its board for seven years. In 1996, she served on the New York State Task Force on Long-Term Care Financing. She writes and lectures regularly on issues of concern to the elderly and disabled.

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Mr. Reixach has been an Adjunct Assistant Professor in the Department of Health Science at SUNY Brockport. He also appeared as an expert witness on Medicaid eligibility for the New York State Supreme Court. Mr. Reixach is a member of the Monroe County, New York State and American Bar Associations. In addition, he is a member of the American Health Lawyers Association, and National Academy of Elder Law Attorneys. Mr. Reixach also has served on many advisory committees, including the New York State Department of Health Certificate of Need Reform Advisory Committee, and the Community Coalition for Long Term Care.

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Legislative News

By Howard S. Krooks and Steven H. Stern

New Legislation Penalizes Transfers of Assets for SSI Benefits

Howard S. Krooks

Towards the end of 1999, Congress enacted H.R. 3443, known as the Foster Care Independence Act of 1999. Consistent with its title, most provisions of this legislation apply to foster care programs. However, the Act also makes significant changes to the Supplemental Security Income program (SSI). Perhaps most importantly, the new law includes numerous "anti-fraud" provisions such as new penalties for false and misleading statements, computer match procedures, and overpayment recovery requirements. Of particular interest to attorneys who represent the elderly and disabled are the new provisions as follows:

— Section 206 of the Act discusses the treatment of trust assets. For those trusts established on or after January 1, 2000, trust assets will be considered available resources, regardless of whether the trusts are revocable or irrevocable, the purposes for which they are established, whether the trustees have discretion, or any restrictions on the use of distributions. Assets transferred to specific types of trusts would continue to be exempt, including supplemental needs trusts ((d)(4)(A) payback trusts) and pooled trusts ((d)(4)(C) trusts). In addition, the new law does not apply to those trusts created by will. These changes essentially mirror the current Medicaid laws regarding the availability of trust assets.

— Section 205 imposes transfer penalties for uncompensated transfers of resources. There is now a thirty-six (36) month look-back period starting with the later of the date of the SSI application or the date of the transfer. The duration of the period of ineligibility is the amount of the transfer divided by the SSI federal benefit rate plus the applicable SSI state supplement. The maximum period of ineligibility is thirty-six months.

Example: Mrs. Senior is 66 years old and lives alone. She transfers $11,980 to her son on January 2, 2000. She applies for SSI benefits on January 2, 2001, which is within the thirty-six month look-back period. $11,980 divided by $599 (the maximum SSI benefit in New York State) results in a 20-month period of ineligibility period, beginning with the month of the transfer. Mrs. Senior is not eligible for SSI until September 1, 2001.

Steven H. Stern

Transfers of resources on or after December 14, 1999 for less than fair market value are covered under the new law. However, many types of transfers are exempt. These excluded transfers of resources are similar to those under current Medicaid law:

- resources transferred exclusively for a purpose other than to quality for SSI;
- a denial of eligibility would work an "undue hardship";
- the individual intended to dispose of the assets for fair market value;
- all resources transferred for less than fair market value have been returned to the individual;
- exempt transfers provided in 42 U.S.C. Section 1396p(c)(2).

Charitable Split-Dollar Planning

On November 17, 1999, Congress passed H.R. 1180, the Tax Relief Extension Act of 1999. This legislation includes an important provision regarding charitable split dollar techniques used in estate planning. Such plans include personal benefit contracts under which there is a payment, or expectation of payment, of premiums on any life insurance, annuity or endowment contract that directly or indirectly benefits the donor or his family. This includes family trusts and family partnerships, and similar entities controlled by the donor. The underlying theory of this type of plan is that a donor makes a gift to charity and claims an income tax deduction for the full amount. The recipient charity then uses the gift to purchase a life insurance policy, whereby on the death of the donor, only a minority portion of the life insurance proceeds would go to the charity. It is the donor's heirs who receive the majority of the bene-

fits, free of estate tax. Due to widespread abuse, such plans have been targeted by the IRS and Congress, with this legislation denying income, gift and estate tax deductions where there has been a transfer of assets to a charitable organization, combined with a purchase of a life insurance policy, by or on behalf of the charity, benefiting the donor or the donor's family. The new law prohibits a charitable deduction for contributions to charity made after February 8, 1999 under such charitable split-dollar arrangements.

In many cases, this development will have disastrous results for both life insurance policyholders and charities. Donors may be forced to release all rights to death benefits, and several charitable organizations will release their rights to policy benefits in order to remove the taint. This specific issue, and others which are similar, are of particular importance to elder law attorneys. What seems like sophisticated tax and estate planning advice can at times be nothing more than scams against the elderly. Seniors and their families must be advised that if a planning scheme sounds too good to be true, it probably is.

Proposed Bill Would Reinstate Provisional Medicaid Eligibility for Individuals Making Reasonable Efforts to Sell Non-Liquid Property

New York State Bill A04762 was introduced in the New York State Assembly on February 16, 1999 and was referred to the Social Services Committee on January 5, 2000 for consideration. The bill, which has yet to be voted on, forbids non-exempt real and personal property from being taken into consideration and applied toward payment of the cost of Medicaid assistance so long as the applicant and/or recipient makes and continues to make reasonable efforts to liquidate the property. The bill would amend Social Services Law § 366(2)(7) to allow an applicant for Medicaid to provisionally receive benefits until excess non-liquid assets can be sold.

The following policy underlying the bill is contained in the Sponsor's Memorandum in support of the bill:

> In 1996 New York State reversed a long-standing rule which allowed individuals "provisional" eligibility for Medicaid as they sought to liquidate non-exempt real property or other non-liquid assets which if counted in their resource tally would render them ineligible for Medicaid. This change has caused considerable pain, anxiety, and suffering among cash poor Medicaid applicants, including seniors, who are being denied Medicaid coverage.

Prior to October 9, 1996, New York permitted provisional eligibility for Medicaid. A person was provisionally eligible for Medicaid coverage under the condition that when the non-liquid resource was sold, the proceeds from the sale were assigned to the social services district or a lien was imposed against the excess resources under another section of the law.

The 1996 discontinuation of "conditional" or "provisional" Medicaid was based on an incorrect interpretation of federal law. Nothing in the federal regulations precludes New York from granting provisional Medicaid eligibility, although the repayment provisions in the old New York rule did violate federal policy. In fact, similar conditional eligibility provisions exist in other federal programs such as the Supplemental Security Income program and in New York's Family and Safety Net Assistance.

This bill will restore provisional Medicaid eligibility at the same time eliminating the provisions violative of federal law. This bill creates a rule that will allow recipients a reasonable time to sell excess property while they receive benefits. It will insure that once the property is sold, the amount received is counted as income in the month received and as resources afterward. This would render the individual ineligible for Medicaid in the month(s) in which he or she has the funds. The individual would be required to pay for health care out of her/his funds during this period.

The inability of a person to obtain provisional eligibility under Medicaid is making life difficult for many seniors. The problem frequently arises when a person must enter a nursing home for long term care and the family home must be sold to comply

with applicable regulations. If the family home is unmarketable, that person will be ineligible for Medicaid. In many areas of the state, a home cannot be sold quickly, causing cash poor persons to do without needed health benefits. This bill would allow applicants to be provisionally eligible for benefits while efforts to sell the property are made.

Proposed Legislation to Provide Prescription Drug Coverage for Medicare Beneficiaries

No matter what clients' income and resources are, they are still interested in Medicare coverage because Medicare is an entitlement program and is not based on financial need. Medicare usually pays for hospitalizations, doctor visits and medical supplies, but does not cover long-term care costs or prescription drugs. President Clinton has recently made a number of proposals that would affect the Medicare program and begin to tackle the problem of prescription drug coverage.

Presently, some of the largest out of pocket expenses for the elderly are for outpatient prescription drugs. Even though many seniors have access to prescription drug coverage through their supplemental or Medigap policies, it is often limited and expensive.

This prescription drug benefit would be phased in beginning in 2002 at an additional premium of $22 a month. The premium would cover 50% of prescription costs up to a $2,000 cap. By the year 2008, this prescription coverage benefit would cover 50% of prescription costs up to an increased cap amount of $5,000 a year. The monthly premium, however, would also increase to $44 per month. A deductible would not be required during or after the phase in of this program. Furthermore, the Clinton proposal would establish a sliding scale as a determinant for calculating the prescription drug premiums for those individuals whose income levels range between 135 and 150 percent of the federal poverty level. For those seniors whose income levels are below 135%, premiums shall be paid on their behalf. This would set the precedent of means testing the Medicare program.

The President has also proposed changes to Medicare to facilitate funding of the prescription drug program. For example, he has suggested that 15% of the budget surplus be allocated for the continuance of the Medicare program. In addition, the Medicare Part B deductible, which is currently $100, would be adjusted annually for inflation. Lastly, a 20% co-payment would be required for all clinical laboratory tests. This 20% co-payment would add revenue to the program since Medicare presently covers 100% of these clinical tests. However, the savings to Medicare recipients from the prescription drug benefit program would outweigh and offset any of these proposed increases in the co-payment.

To date, Medicare has only been available for seniors age 65 and older or for disabled individuals. A segment of the President's proposal would allow persons between the ages of 55 and 65 to "buy in" to Medicare. Premiums would be based on age. The President hopes that by including such a provision in his proposal, the number of those who are uninsured would be greatly reduced. Furthermore, it is often our older Americans who are unable to find or afford private coverage based on their age and their health. The proposal would allow unemployed individuals between the ages of 55 and 62 and all Americans between 62 and 65 to "buy in" to Medicare.

Traditional Medicare beneficiaries presently have unfettered access to health care providers. The emergence of the HMO has made access to customer choice providers an important concern for most Americans. The President has proposed the creation of preferred provider Medicare organizations which would consist of providers agreeing to charge less for their services and in turn, their claims would be processed and paid quicker. This arrangement could decrease the amount of co-payments for Medicare beneficiaries, however, the medical care choices for participants could be reduced. President Clinton's proposal would encourage Medicare to use competitive bidding for Part B items and services, with the exception of physician services. Select providers and suppliers would be able to negotiate with Medicare for the prices of their items and services. If physicians' services are ever brought into the arena of negotiation, the options of medical care would become limited.

Elder law attorneys should know about some of the other bills which have been introduced regarding prescription drugs: H.R. 1495, which would add an annual drug benefit up to $1,700, with annual co-pays and deductibles, plus 100% coverage above $3,000; S. 731/H.R. 664, a bill which would mandate large-volume discount prices at retail pharmacies for

Medicare beneficiaries; and S. 1191/H.R. 1885, allowing pharmacies to import prescription medications at reduced prices from foreign countries.

Although health care is on the agenda for the 2000 presidential campaign, we may need to wait some time before we see any meaningful reforms to the Medicare program.

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Regulatory News

Skilled Care Coverage Under Medicare—Still Worth Fighting For

By Louis W. Pierro and Edward V. Wilcenski

Louis W. Pierro

Most elder law practitioners are familiar with the distinctions between "custodial" and "skilled" care in the context of Medicare reimbursement for skilled nursing facility services. Medicare will pay for up to 100 days of skilled care (with a co-payment for the last 80 days) following a hospital stay of three days or more (42 CFR §§ 409.30(a), 409.61(b)). When a doctor (or, more frequently, a therapist) determines that a patient's care needs have diminished, however, such that additional services would be "custodial" in nature, Medicare coverage will cease before the full 100-day period has run. Thus, when clients are informed that Medicare "will pay for 100 days of care" in a rehabilitation or skilled nursing facility, a very important qualifier is missing: the care must be "skilled" for the entire 100 days.

The "skilled vs. custodial" distinction is also important for individuals who become disabled as a result of an accident or unforeseen illness. Typically, the non-elderly disabled rely on their primary health insurance plans to pay for rehabilitation, initially in a rehabilitation facility, and often followed by a stay in a skilled nursing facility pending a return to the community. These private health insurance plans offer "skilled nursing care" benefits for varying periods of time, and generally reference "Medicare guidelines" in determining whether a particular service or therapy is covered under the plan. An adverse determination by a private insurance company can be even more troublesome than the same determination by Medicare, because unlike a Medicare recipient, who has a right to challenge the decision through reconsideration and an administrative hearing before the Social Security Administration (42 CFR §§ 405.710 *et seq.*), a patient facing a denial by a private insurer must sue the insurance company to obtain coverage.

Should such an adverse decision be challenged? The preliminary question, of course, is a financial one. If the client has long-term care insurance or has already qualified for Medicaid, then a challenge would be less critical. However, most Medicare patients must wait out a spend-down period before Medicaid is available. Even the disabled client, who if under 65 years of age could use a Supplemental Needs Trust to establish immediate Medicaid eligibility, will need time to restructure ownership of his or her assets, especially if the restructuring is effected through a guardianship proceeding. As such, both types of clients will likely incur a private pay obligation.

Edward V. Wilcenski

In counseling clients on Medicare nursing home coverage, the practitioner must address the preliminary question "what constitutes skilled care?" The rules governing post-hospital skilled nursing facility coverage under the Medicare program are found in the federal regulations at 42 CFR §§ 409.30 *et seq.* The regulations contain specific examples of therapies and procedures that are considered skilled, and thus covered under Medicare, as well as general guidelines for making coverage decisions. Unfortunately, a very important subsection of these regulations was deleted as part of the implementation of the Balanced Budget Act of 1997. An interim final rule, effective July 1, 1998, appears at first glance to remove coverage for certain types of skilled care by deleting 42 CFR § 409.33(a)(1)-(3), which listed *overall management and evaluation of a care plan, observation, assessment, and patient education* as examples of skilled nursing services.

The "evaluation and management" provisions described in 42 CFR 409.33 (a)(1)—(3) were crucial when challenging a denial of skilled care coverage for a patient whose treatment consisted of services that could be performed by non-skilled personnel, but which required the oversight of skilled personnel to detect any deterioration in condition. These provisions were especially useful when responding to a facility's position that because a patient is no longer improving ("the patient has hit a plateau"), and because services will no longer be provided by a skilled therapist, the level of care has become "custodial." Often the adverse decision rested solely on the fact that services were not being provided by a therapist or registered nurse, which under former section

42 USC 409.33(a)(1)—(3) should not have been the end of the inquiry. Specifically, *former* section 409.33(a)(1) read, in part:

> . . . if the patient's overall condition would support a finding that recovery and safety can be assured only if the total care is planned, managed, and evaluated by technical or professional personnel, it would be appropriate to infer that skilled services are being provided [even if administered by non-skilled personnel].

The *current* version of 42 CFR 409.33, in which the above language and the rest of subsection (a) were deleted in their entirety, includes only brief references to plan oversight and management in the section discussing "skilled rehabilitation services." Query—Did the deletion of subsection (a) mean that "overall care management and evaluation" is no longer considered a skilled service eligible for reimbursement?

This question was presented in an inquiry by the Center for Medicare Advocacy, which asked the Health Care Financing Administration (HCFA) to clarify the changes to the prospective payment system as they concerned SNF-level care determinations. In her written response dated April 28, 1999, HCFA Administrator Nancy-Ann Min DeParle explained that,

> We did not intend that our deletion of care plan management/evaluation, observation, assessment and patient education would indicate that we no longer regard these services as appropriate examples of skilled care. Rather, we made this revision in the belief that such services need no longer be separately identified in the administrative criteria since they are already effectively captured by the clinical proxies utilized in the Resource Utilization Groups, version III system of resident classification used under SNF PPS.

HCFA's clarification that overall plan management and evaluation by skilled personnel continues to be a "skilled service," eligible for reimbursement, should be welcome news for elder law practitioners. This broad definition provides a key to advocacy, and a more realistic interpretation of a patient's care plan. It may also provide additional weeks or months to allow a client to plan, and if necessary, access the Medicaid system to pay for extended care.

Louis W. Pierro is a graduate of Lehigh University and Albany Law School of Union University, Mr. Pierro was admitted to the bar in January 1984, and is licensed to practice in all New York State and Federal Courts. His practice focuses on representing individuals, families and small business owners on Estate Planning, Long-Term Care Planning, Estate and Trust Administration and Business Succession Planning. Mr. Pierro is also a frequent lecturer and author on the topics of Estate Planning, Estate and Gift Taxation and Elder Law, and served as adjunct professor at Siena College from 1988-1995. Mr. Pierro is Vice-Chair of the New York State Bar Association Elder Law Section, and past chair of its Committee on Insurance for the Elderly (1995-1998). He was appointed to serve on the Task Force on Long-Term Care Financing, formed by Governor Pataki and legislative leaders to study long term care issues in New York State. Mr. Pierro also chairs the New York State Bar Association Trusts and Estates Law Section Committee on Taxation, and serves as a member of that section's Executive Committee. Mr. Pierro is a member of the Estate Planning Council of Eastern New York, the National Academy of Elder Law Attorneys and the American Bar Association, Probate and Trust Section: He serves on the Board of Directors of the Capital Area Consortium on Aging and Disability, Senior Services of Albany and McAuley Living Services.

Edward V. Wilcenski practices in the areas of Estate Planning and Administration, Elder Law, and Future Care Planning for Persons with Disabilities. Mr. Wilcenski is a graduate of Albany Law School of Union University. He received his Bachelor of Science in Economics magna cum laude from Siena College in Loudonville, New York. Mr. Wilcenski is a member of the Board of Directors of PLAN of Northeastern New York, Inc., a nonprofit organization which advises members on traditional estate and financial planning, and assists with the development of "quality of life" plans for use by fiduciaries and guardians administering to the needs of individuals with disabilities. Mr. Wilcenski is a member of the National Academy of Elder Law Attorneys, the New York State Bar Association Elder Law Section and Committee on Mental and Physical Disability, and the Estate Planning Council of Eastern New York. He is a volunteer for the New York State Commission on Quality of Care's Surrogate Decision Making Committee, and serves as a panel member for the New York State Office of Mental Retardation and Developmental Disabilities task force on the use of supplemental Needs Trusts to create independent housing options for the disabled.

Practice News

Elder Law Resources

(National and State Not For Profit Organizations)

By Vincent J. Russo

There is a wealth of information which can help us in our practice of Elder Law. In fact, we are on information overload. We need help, but we need to be able to receive information which is pertinent to the matter at hand. We need to be able to talk to someone who is an expert in the area that we need to address. Our clients cannot wait. It could be life and death for them as well as for us.

Do not despair. Yes, you can get direction and sometimes even answers. The key is to know where to go for this help. This article will focus on a few of the many vital resources available for the practitioners—Not for Profits that provide legal support services.

Right to Die Issues

When Henry came into our office, I had last seen him six years ago. He looked very upset. He immediately informed me that over the past six years, his wife had been on life support systems and that at this time it would appropriate to withdraw the feeding tubes. As with many clients, he and his wife failed to execute advance directives. The nursing facility was refusing to withdraw the feeding tubes because there was no Health Care Proxy or Living Will.

In a situation like this one, I immediately had my office contact *Choice in Dying* to obtain the latest state of law with regard to this issue. More importantly, we were able to receive real practical advice as to what steps could be taken in the alternative to meet our clients' desires. In this particular case, we were able to arrange for Mrs. X to be transferred to another facility which was willing not to provide antibiotics to her, thus indirectly accomplishing our client's desires. Needless to say, this was a very difficult type of case and Mr. X loved his wife very much. At the same time, with the assistance of *Choice in Dying*, we were able to help this client.

SSI Eligibility

Frank and Mary recently came into our office in December with regard to Mary's SSI benefits. She was going to receive an inheritance from her uncle's estate and was concerned about her ongoing eligibility for SSI and Medicaid. Through the *National Senior Citizens Law Center's Washington Weekly*, we were aware of the proposed changes in SSI eligibility rules. Further, we received a recent issue which informed us that Congress passed HR3443, the Foster Care Independence Act of 1993, which included changes in the SSI's eligibility rules. We were then able to follow up with the National Senior Citizens Law Center and ascertain that the bill was signed into law by the President. We were also able to obtain additional information on the interpretation of various provisions which allow us to provide timely and competent advice to Frank and Mary.

Medicare Benefits

Charlie came into our office regarding the need for additional home care services and received a notice of termination of those services with regard to his wife. Having the resources of the *Medicare Rights Center* available to us, we were able to ascertain from the Center what coverages are available to Charlie's wife and were provided materials with regard to the appeal process under Medicare. We were then able to have a discussion with the Center on the appropriate steps to be taken. With the Center's help, we were able to obtain ongoing coverage for Charlie's wife.

Working With Out of State Elder Law Attorneys

As we live in a more mobile society, we are constantly faced with planning for family members who reside outside of New York or planning is for an individual who resides in New York but family members reside out of state. In this regard, I was privileged to be involved as a founding member of the National Academy of Elder Law Attorneys. At that time, the Academy was most interested in connecting attorneys throughout the country in this new field of Elder Law both from an educational and networking

standpoint. With this in mind, the National Academy of Elder Law Attorneys continues to grow as a resource for attorneys throughout the country. This is evidenced by their growing membership of over 3,500, their experience registry which is a listing of attorneys who have self-certified a certain level of experience in a particular sub area of Elder Law and also by the certification of Elder Law attorneys through the National Elder Law Foundation.

As an example of how important this resource is, I received a call from a California attorney, Michael Gilfix, regarding a matter in which his client was trustee of a trust and resided in California. The trust was set up for the benefit of the client's sister who was disabled and resided in New York. The trust was established by the client's mother under Florida law. One of the many issues before us was to review the trust as to whether the trust provisions would adversely affect the beneficiaries' right to government benefits in New York. Since this was not solely a New York issue, Michael Gilfix and I both agreed that we would contact Ira Wiesner, a Florida Elder Law attorney, to advise us with regard to the Florida laws and interpreting the trust. Through the joint effort of the three of us, we were able to successfully navigate the Medicaid maze as to the beneficiary's eligibility for government benefits in light of the state laws that were applicable. This case was complicated by the fact that there was an amendment to the Florida trust and a question as to its validity under Florida law.

The above is only a sampling of the types of cases in which I have benefited by the Elder Law resources that are available to us both locally and nationally. I strongly urge everyone to take advantage of these resources and to support these organizations so they can continue their fine work.

List of National Organizations in the Field of Elder Law and Senior Advocacy

The development of Elder Law has been a national occurrence. The following is a list of some national organizations that have played and continue to play an active role in the field of Elder Law and in Senior Advocacy.

Alzheimer's Disease and Related Disorders Association, Inc.
919 N. Michigan Avenue, Suite 1000
Chicago, Illinois 60611
Tel: 1-800-272-3900
Fax: (312) 335-1110

ALZHEIMER'S ASSOCIATION
New York City Chapter
420 Lexington Ave., Suite 610
New York, New York 10170
Tel: (212) 983-0700
Fax: (212) 696-6158

ALZHEIMER'S ASSOCIATION
Long Island Chapter
66 South Street, 1st Floor
Patchogue, New York 11772
Tel: (516) 289-6335
Fax: (516) 289-6453

The Association is a non-profit charitable organization involved in public awareness, family support, research and advocacy. These chapters are part of over 200 chapters nationwide, affiliated with the National Alzheimer's Association, working with family members, health professionals and researchers in the fight against this silent epidemic.

AMERICAN BAR ASSOCIATION
Commission on Legal Problems of the Elderly
740 15th Street, N.W., 8th Floor
Washington, D.C. 20005
Tel: 202-662-8690
Fax: 202-662-8698

The purpose of the Commission is to examine and respond to law-related needs of older persons in the United States.

The Commission:

- Has sponsored or co-sponsored over 45 ABA policy positions adopted by the House of Delegates;
- Testifies regularly before congressional and executive branch committees;
- Follows legislation and regulation in priority areas, such as health care decision-making and guardianship, and provides technical assistance to policy-makers and advocates;
- Has developed or supported model legislation and regulation in areas such as nursing home reform, regulation of home and community-based long-term care, guardianship, and health decisions law.

Center for Medicare Advocacy, Inc.
P.O. Box 350
Willimantic, Connecticut 06226
Tel: 860-456-7790
Fax: 860-456-2614

The Center for Medicare Advocacy, Inc., staffed by attorneys, paralegals, and technical assistants, provides legal advice, self-help materials, and representation of the elderly and disabled who are unfairly denied Medicare coverage. The Center's advice, written materials, and legal services are free to Connecticut residents. A complete list of materials is available from the Center upon request. In addition, the Center is involved in education, training and litigation activities of importance to Medicare beneficiaries nationwide.

FRIA (Friends and Relatives of Institutionalized Aged)
11 John Street
New York, NY 10038
Tel: 212-732-4455
Fax: 212-732-6945

FRIA assists families who are seeking nursing home placement for an elderly person or who are experiencing difficulty securing quality care for a nursing home resident. FRIA publishes "Eldercare in the 90's: A Consumer Guide for New York Relatives and Friends" which provides essential information on nursing homes and long-term care options for the elderly in the New York City metropolitan area.

Brookdale Center on Aging of Hunter College
425 East 25th Street
New York, New York 10010-2590
Tel: (212) 481-4426
Fax: (212) 481-5069

The Brookdale Center on Aging of Hunter College of the City University of New York addresses with academic rigor issues and problems relating to aging in the United States and instructs those seeking careers in the field. However, the Center is more than a "think tank" and more than a training ground for careers in gerontology. From its inception in 1974, the Brookdale Center has tested theories and approaches by translating them into programs which the Center operates and supervises.

Legal Counsel for the Elderly
601 East Street, NW, A4
Washington, D.C. 20049
Tel: (202) 434-2120
Fax: (202) 434-6464

Legal Counsel for the Elderly, Inc., sponsored by the AARP and the AARP Foundation, provides legal services to D.C. residents 60 years of age or older. Utilizing a variety of different advocacy methodologies such as legal hotlines, staff attorneys, pro bono attorneys and law firms, volunteer paralegals, senior volunteer attorneys, and a long term care ombudsman program, LCE has been a pioneer in the design, implementation, and replication of innovative delivery systems for legal services and aging advocacy programs nationwide.

NATIONAL ACADEMY OF ELDER LAW ATTORNEYS (NAELA)
1604 North Country Club Road
Tucson, Arizona 85716
Tel. (520) 881-4005
Fax (520) 325-7925

NAELA is a professional association of attorneys concerned with improving the availability and delivery of legal services to older persons. NAELA is striving to define the areas of practice, establish practice standards, and create an information network for elder law practitioners. NAELA was formed in 1987 and currently has over 2500 members. Members receive a monthly newsletter, *NAELA News*, and the *NAELA Quarterly*, which contains more detailed articles on legal issues of interest to members. NAELA also publishes a directory of its members which is available.

NATIONAL ACADEMY OF ELDER LAW FOUNDATION (NAELF)

See NAELA listing above for address, phone and fax.

NAELF was founded by NAELA in 1993 for the purpose of advancing the certification of Elder Law as a specialty recognized by judicial authorities and the organized bar. It created a Board of Certification which has been accredited by the ABA's Standing Committee on Specialization.

National Association of Professional Geriatric Care Managers (GCM)
1604 North Country Club Road
Tucson, Arizona 85716
Tel: (520) 881-8008
Fax: (520) 325-7925

This national association is an organization of geriatric care managers whose goal is the advancement of dignified care for the elderly and their families. Since its inception in 1986, GCM has become a recognized leader nationally. GCM members participate in national coalitions and at professional meetings around the country.

NATIONAL CITIZEN'S COALITION FOR NURSING HOME REFORM (NCCNHR)
1424 16th Street., N.W., Suite 202
Washington, D.C. 20036-2211
Tel. (202) 332-2275
Fax (202) 332-2949

2639 S. La Cienega Blvd.
Los Angeles, California 90034
Tel: (310) 204-6015
Fax: (310) 204-0891

National Citizen's Coalition for Nursing Home Reform is to accomplish quality through:

- informed, empowered consumers;
- effective citizen groups and ombudsman programs;
- the best practices in care delivery;
- public policy responsive to consumer needs;
- enforcement of consumer-related health and living standards.

NATIONAL SENIOR CITIZENS LAW CENTER (NSCLC)
1101 14th Street, Suite 400
Washington, D.C. 20005
Tel: (202) 289-6976
Fax: (202) 289-7224

Established in 1972, the National Senior Citizens Law Center helps older Americans to live in dignity and freedom from poverty. The Center works with a nationwide network of advocates and lawyers to provide quality advice and service to clients. It researches, analyzes and publishes timely reports and materials about aging issues, including proposals for change in current programs. It advocates for older minorities, older women and all low-income individuals. The Center is a unique resource for lawyers and advocates, and for national and local officials in a wide range of programs affecting the elderly.

Vincent J. Russo is the Managing Shareholder of the law firm of Vincent J. Russo & Associates, P.C. of Westbury and Islandia, New York. He is a Co-author of NEW YORK ELDER LAW PRACTICE published by West Group. Mr. Russo is certified in elder law by the National Elder Law Foundation, has a Masters of Law in taxation and is licensed to practice law in New York, Florida and Massachusetts. He is a Founding Member and Past Chair of the Elder Law Section of the New York State Bar Association (NYSBA) and a Founding Member, Fellow, and Past President of the National Academy of Elder Law Attorneys (NAELA). Vincent is also a Co-founder and Officer of the Theresa Alessandra Russo Foundation, which is dedicated to the needs of children with disabilities. He is a former Adjunct Professor at The City University of New York Law School, and is Chair of the Guardianship Program, as well as a former Board Member of the United Cerebral Palsy Association of Nassau County.

Real Estate Committee Update

The real estate committee of the Elder Law section is preparing for a presentation on topics critical to all of our practices. We will be examining issues related to the transfer of real property subject to life estates. Topics include: Is there necessary language, can we use this technique with our co-op when the board refuses to consent, can we use an irrevocable trust instead of a life estate? In addition, we are studying the array of alternative living arrangements available and becoming available. We will examine contractual arrangements and related topics. Our committee may have participation from the staff of the New York State Attorney General's office. If you are interested, please contact Neil T. Rimsky at 914-761-1300; fax: 914-761-5372 and e-mail at NRIMSKY@CFWLAW.com

Tax News

New York's Sop Tax: What Do We Do Now?

By Ami S. Longstreet and Anne B. Ruffer

Ami S. Longstreet

New York adopted new estate and gift tax legislation effective August 7, 1997, which dramatically affects the New York State estate and gift tax structure. This law followed the lead of 35 other states that impose no independent estate tax, and 45 other states that impose no gift tax. Prior to the 1997 change in the New York law, New York imposed its own independent estate and gift tax on transfers in excess of only $115,000. The New York State Estate and Gift tax rates were also very high, reaching a maximum rate of 21%. This was part of the reason that many wealthy individuals were establishing residency in other states, such as Florida, that did not impose these onerous taxes.

The New York law gradually phased in the repeal of New York's gift tax and the reduction of New York's estate tax to the amount allowed as a credit against the Federal Estate tax (often termed a "sop," "pick-up," or "sponge" tax). In other words, the tax imposed by New York State after the new law is completely phased in is the equivalent of the credit allowed on the Federal Estate tax return for any state death tax paid. If no Federal Estate tax is due, then no New York State Estate tax is due. New York only receives what the decedent is allowed on the Federal Estate Tax return as a credit for tax paid. Therefore, no additional tax is being paid.

The New York State Estate and Gift tax legislation is fully phased in as of February 1, 2000. New York State's unified credit equivalent changed from the previously existing $115,000 to $300,000 in the case of decedents dying on or after October 1, 1998. In the case of decedents dying on or after February 1, 2000, the threshold for filing a New York State Estate tax return increases to the federal level for filing a return. The amount of the New York State estate tax will be determined by computing the federal credit for state death taxes on the federal return.

For gift tax purposes, the gift tax is repealed in the case of gifts made on or after January 1, 2000. What this means is that there are no New York State gift tax consequences to gifting during lifetime regardless of the type of gift made. Only federal gift tax consequences need to be addressed.

Anne B. Ruffer

New York State Estate tax filing requirements have also changed. For estates of decedents dying from October 1, 1998 through January 31, 2000, ninety (90%) percent of the New York tax must be paid within seven (7) months of the date of death, rather than the former six month requirement, with the balance payable and the tax return (ET-90) filed within nine (9) months of the date of death. For a decedent dying February 1, 2000 or after, the estate must file Form ET-706 (if filing is required), New York State's new estate tax return, and pay the tax due to New York State within nine (9) months after the decedent's death.[1] New York filing is only required if federal filing is required.

Effective February 1, 2000, a person required to file an estate tax return with the New York State Tax Department, may be required to file a copy of the tax return with the Surrogate's Court in the county where the petition for probate of a will or for administration in intestacy was filed, depending on the local rules of the Surrogate's Court.[2] The provision requiring a fee for such filing has been repealed effective February 1, 2000.[3]

Furthermore, effective February 1, 2000, the requirement of obtaining tax waivers in order to collect a decedent's assets is repealed, simplifying estate administration. In addition, for decedents dying on or after February 1, 2000, the New York deduction previously available for the value of the decedent's principal residence is no longer available or necessary.

In order to fully understand the impact of these sweeping changes, it is important to understand the Federal Estate and Gift Tax structure and its change. The Federal Estate and Gift Tax is imposed on transfers, either during life or at death, over the Federal applicable exclusion amount. Under Federal law the applicable exclusion amounts are as follows:

Year	Applicable Exclusion Amount
2000 and 2001	$675,000
2002 and 2003	$700,000
2004	$850,000
2005	$950,000
2006 and thereafter	$1,000,000

As an example of the impact of the changes in New York's estate and gift tax structure, if an individual died on January 31, 2000, with an adjusted taxable estate of $675,000, the New York Estate tax would be $30,000. Ninety (90%) percent of that amount is due seven (7) months from the date of death of the decedent. An ET-90 must be filed, and the remaining tax must be paid within nine (9) months from the date of death. If that same individual instead died on February 1, 2000, there would be no New York State Estate tax due. No tax return needs to be filed in this case, as there is no federal tax due, and thus no state death tax credit.

These dramatic changes in the New York State Estate and Gift Tax laws is an opportunity for planning as well as requiring review of all previously drafted Wills which contain a trust to shelter the applicable exclusion amount. Many wills containing these so called "credit shelter" trusts included a provision that any federal credit for state death taxes be added to the calculation of the credit shelter amount. Before the change in New York's law, this provision resulted in removing $42,424.24 worth of assets from the surviving spouse's estate and only increased the New York State estate tax by approximately $2,500. Because under the new law there will be no New York State Estate tax on amounts up to the applicable exclusion amount, the overall tax is increased significantly by taking the state death tax credit into account.[4] Language in wills containing this provision should be revised, either to remove the credit for state death taxes, or to provide that the credit for state death taxes should only be taken into account to the extent that it does not result in an increase in the overall tax due.[5]

Further, wills or trusts that refer to the unified credit (or applicable exclusion amount) by reference to a dollar amount should be redrafted to provide that the applicable exclusion amount will increase as the phase-in takes effect.

The impact of this new legislation cannot be overemphasized. Our clients are now able to gift in unlimited sums with no New York State gift tax consequences. Also, the vast majority of estates in New York that were previously taxable no longer will be, especially with proper planning to utilize the applicable exclusion amount of both spouses, in a two spouse situation.

Thus, if you have a client who is contemplating establishing residency outside of New York State because he or she heard that better estate and gift tax treatment is available elsewhere, that client should be reminded that New York is now on par with many other states that offer the most optimum gift and estate tax planning available.

In addition, if you have a client who is gifting using his or her applicable exclusion amount, he or she may now make said gifts with no gift tax due in New York. The new law does not provide for a gift tax refund for gift taxes paid on transfers made before the gift tax was repealed.[6]

Endnotes

1. New York Tax Forms and Instructions including the new Form ET-706, may be downloaded from the New York State Department of Taxation and Finance website, www.State.NY.US.
2. New York State Tax Law § 972(c); Uniform Rules for Surrogate's Court § 207.43.
3. New York Surrogate's Court Procedure Act § 2402.
4. This tax cost will increase as the applicable exclusion amount increases.
5. The Trusts and Estates Law Section of the New York State Bar Association has proposed legislation to be presented to the New York State Bar Association Executive Committee, to add a new § 2-1.12 to the Estates, Powers and Trusts Law that would provide that, any reference to the federal credit for state death taxes contained in a credit shelter bequest formula in all pre-February 1, 2000 wills, be deemed deleted.
6. Upon repeal of the New York estate tax, New York's Estates, Powers and Trusts Law § 2-1.12, dealing with apportionment of taxes for QTIP trusts has been repealed, effective February 1, 2000, on the erroneous assumption that elimination of New York's estate tax made the apportionment provision unnecessary. This was a mistake. As discussed above, the New York estate tax is not completely eliminated; and apportionment of the tax due (i.e., the state death tax credit on the federal return) is still necessary. Therefore, a new Estates, Powers and Trusts Law § 2-1.8(d-1) was added (§ 2-1.8 being the general tax apportionment statute), effective February 1, 2000, preserving the salient provisions of EPTL § 2-1.12.

Ami S. Longstreet is an attorney at MacKenzie Smith Lewis Michell & Hughes, LLP, and is also a Certified Public Accountant, admitted in Vermont. She was an adjunct professor at Syracuse University College of Law from 1996 through 1999 teaching Elder Law and she is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association. Mrs. Longstreet concentrates her practice in the areas of Estate Planning, Estate Administration, Trusts and Elder Law.

Anne B. Ruffer is an attorney in the law firm of Mackenzie Smith Lewis Michell & Hughes, LLP. She practices in the firm's Trusts and Estates Department. She is a member of New York State Bar Association's Elder Law and Trusts and Estates Sections. She is a graduate of the University of Wisconsin-Madison and Syracuse University College of Law. She specializes in estate planning and administration, elder law and a variety of business matters.

Health Care Continuum News

By Patrick Formato and Ellyn S. Kravitz

Ellyn S. Kravitz

As our population ages, an ever-increasing number of individuals will require assistance with their activities of daily living (ADL). ADLs include but are not limited to: toileting, transferring, grooming, bathing and eating. The type of care required will determine where that individual will receive those services.

The continuum of care varies with the level of assistance required. There services can fall into two categories: (1) non-medical and personal care services and (2) skilled care or nursing services. Below we have summarized the types of care that an Elder Law Attorney should be familiar with when discussing planning options with an elderly client.

Non-Medical and Personal Care Services

(1) ***Social Day Care Program***. These programs provide social interaction and activity for an individual in a supervised setting.

(2) ***Respite care***. This type of care can be provided in an adult home or at home on an as needed short term basis. Respite care allows caregivers the opportunity to care for themselves without the worry of caring for their loved one.

(3) ***Adult home***. A facility such as this provides personal care and homemaking assistance in a residential/institutional setting. See 18 N.Y.C.R.R. § 487.

(4) ***Expanded In-Home Services for the Elderly Program (EISEP)***. This program provides supportive services to an older individual in his or her home or apartment.

(5) ***Enriched housing***. This type of housing provides transportation, homemaker assistance and limited personal care in a residential setting. See 18 N.Y.C.R.R. § 488.

(6) ***Residence for Adults***. The residence provides case management, activities and supervision. However, these residences do not provide personal care. See 18 N.Y.C.R.R. § 490.

(7) ***Family-type Homes for Adults***. This is a smaller version of an adult home for four or less residents. See 18 N.Y.C.R.R. § 489.

(8) ***Adult Foster Homes***. This type of program provides limited personal care services in a family setting.

(9) ***Shared Living Residence***. This living arrangement consists of three to ten unrelated persons living in the same dwelling unit.

(10) ***Accessory apartments***. The apartment is attached to a dwelling such as a mother/daughter house.

(11) ***Elder cottages***. A residence located on the property of a family member or other individual who does not require care.

Skilled Care or Nursing Services

(1) ***Licensed Home Care Services Agency (LHCSA)***. The agency provides personal care services, nursing services and other skilled care at home. See Public Health Law § 3602.

(2) ***Certified Home Health Agencies (CHHA)***. The agency provides nursing and home health aide services and medical supplies as well as either physical or occupational therapy, speech pathology, nutritional services and social work services. The CHHA is distinguished from a LHCSA because of the stricter regulations of CHHA and the comprehensive nature of the services provided and the need for a coordinated care plan. See 10 N.Y.C.R.R. § 763.3.

(3) ***Long Term Home Health Care Program (LTHHCP)***. This program provides nursing services, home health aide services, physical, occupational and respiratory therapy, speech language pathology, audiology, social work, nutritional services, personal care and homemaker services. See 18 N.Y.C.R.R. § 505.21 and 10 N.Y.C.R.R. § 763.3.

A LTHHCP can only be provided by a CHHA, RHCF or hospital. See 10 N.Y.C.R.R. § 762.1.

(4) ***Medical Model Adult Day Care***. This program is provided in a Residential Health Care Facility in accordance with an individualized health care plan including medical, nursing and social services. See 10 N.Y.C.R.R. § 425.

(5) ***Assisted Living Programs***. This program combines home health services with an adult home or enriched housing services. The home must either be a CHHA or a LTHHCP or contract with a CHHA or a LTHHCP. See 18 N.Y.C.R.R. § 494.

(6) ***Residential Health Care Facility (RHCF)***. This is a traditional nursing home.

(7) ***Assisted Living Facility***. This type of facility provides residential, personal care, meal preparation and housekeeping. The individuals live in independent units. The facility will provide personnel to assist a resident with his or her activities of daily living.

(8) ***Life Care Communities***. This program provides comprehensive services along with a continuum of care from housing to skilled nursing care. See 10 N.Y.C.R.R. § 900.

(9) ***Continued Care Retirement Communities***. This community is similar to the Life Care Community which will include a range of care including nursing care.

(10) ***Congregate care facilities***. These facilities are independent living complexes that provide transportation and special programs. These facilities do not provide personal or medical services.

As one can see, there are a wide range of programs and facilities to accommodate an older individual with his or her care needs. Elder Law attorneys should be fully aware of all options available to their clients including the scope of services, payment options and limitations of each program.

An excellent publication discussing housing alternatives and the changing demographics is *Housing Alternatives for an Aging Population* by Devinder Brar and Bridget E. Holohan, Government Law Center at Albany Law School. The publication was published in the NYSBA Elder Law Section Fall Meeting materials 1999. In addition, one can contact the Department of Aging for information.

Ellyn S. Kravitz is a member of Abrams, Fensterman, Fensterman & Flowers, LLP. She is the director of the firm's elder law department. She counsels clients on all matters pertaining to life and estate planning. She is an "advocate" concerning issues affecting older persons. Ms. Kravitz received her Juris Doctor degree from the New England School of Law and her LL.M. in Estate Planning from the University of Miami. She received her undergraduate degree from the University of Michigan.

Ms. Kravitz is a member of the New York State and Nassau County Bar Associations. Ms. Kravitz is a member of the Executive Committee of the New York State Bar Association Elder Law Section and chairs the Legal Education Committee. Ms. Kravitz is a member of the Legal Advisory Board of the Long Island Alzheimer's Foundation. She is an adjunct instructor and faculty member of the Paralegal Studies Program at Queens College Continuing Education Program. Ms. Kravitz is a frequent presenter to both consumer and professional groups. She has provided input into state and national programs addressing legal, financial and other related matters involving older persons.

Patrick Formato is a member of Abrams, Fensterman, Fensterman & Flowers, LLP. He is the director of the firm's Health Law Department. Mr. Formato received a B.A. from the State University of New York at Albany and a J.D. degree from Albany Law School. Mr. Formato is a member of the American Health Lawyers Association as well as the Health Care Compliance Association. Presently, Mr. Formato counsels health care facilities with respect to a variety of issues including fraud and abuse and the implementation of corporate compliance programs. Mr. Formato has also represented individual physicians and physician groups in a variety of transactional matters.

Publication News

By Daniel G. Fish

SUCCESSFUL AGING (Pantheon Books, New York, 1998 265 pages), by John W. Rowe, M.D. and Robert L. Kahn, Ph.D.

It is counter-intuitive, but elder law attorneys in the public and private sector are at high risk of holding negative images of their clients. The lawyers most closely identified with the elderly are the most likely to hold ageist views. The reason for this condition is that elder law attorneys see a skewed sample of the elderly. They are most likely to represent those with Alzheimer's disease or Parkinson's disease or post-stroke; those elderly facing the prospect of long-term custodial care. They are likely to represent those who have aged unsuccessfully and not realize that their clients are *not* representative of the elderly in general. The elderly who are healthy and productive are the vast majority; much more representative of the elderly but are less likely to need or seek the assistance of an elder law attorney. This truism is easy to forget in the daily flow of clients, and if it is forgotten, the elder law attorney can easily adopt the negative myths of aging.

An antidote to these stereotypes can be found in *Successful Aging*. It presents scientific data to debunk the most common and pernicious myths about aging. The book is the result of a ten-year study by the MacArthur Foundation. Dr. John W. Rowe has been at the head of that research study and is also the president of Mount Sinai Hospital in New York. Robert L. Kahn is professor emeritus at the University of Michigan.

The book convincingly demonstrates the falsity of the most prevalent myths about aging. The one which is the most pertinent to the practice of elder law is "To be old is to be sick." It is important for elder law attorneys to be reminded that 90% of the population between ages 65 and 100 does not suffer from Alzheimer's disease. As devastating as that illness is, it is found in only 10% of the studied population. Compare that statistic with the percentage of clients in your practice who suffer from Alzheimer's. Additionally, only 5% of the elderly reside in nursing homes. Ninety-five percent of the elderly live in the community. Compare that with the percentage of your clients who reside in nursing homes. The vast majority of the elderly live independently and free of disability. Advances in medicine are ever reducing the percentage of the elderly population who are disabled. The end of life for most elderly is not a long, drawn out custodial illness; but a brief acute medical episode. The Karen Ann Quinlan cases certainly do occur, and when they do occur, they are likely to be presented in an elder law practice, but they are the aberration, not the norm.

Another prevalent myth is "The Secret to Successful Aging is to Choose Your Parents Wisely."

Many of us assume that longevity is a factor of genes and that the outcome is immutable. During an initial interview with a client, most elder law attorneys seek detailed information about the lifespan of close relatives as a predictor of longevity for the client. The authors found that only 30% of physical aging is related to genetics. Environment and lifestyle are shown to be more important factors. As people get older, diet and exercise play a greater role in health. Genetics play a lesser role. The finding leads to the conclusion that our clients' health is not predetermined, but is subject to their own control.

Successful Aging is a particularly provocative book for the elder law community. It forces counselors to the elderly to closely examine their own attitudes.

Daniel G. Fish is a partner in the law firm of Freedman and Fish, whose practice is devoted to the representation of the interests of the elderly. Mr. Fish is a Past President, founding member and Fellow of the National Academy of Elder Law Attorneys. He was a member of the Board of Directors of Friends and Relatives of the Institutionalized Aged and a Fellow of the Brookdale Center on Aging. He was a delegate to the 1995 White House Conference on Aging. Prior to forming the firm, Mr. Fish was the Senior Staff Attorney of the Institute on Law and Rights of Older Adults of the Brookdale Center on Aging of Hunter College. He has taught as an adjunct professor at Cardozo Law School, and Hunter College School of Social Work.

He has authored several articles on the legal issues of Elder Law. He has been quoted in the *New York Times*, *Business Week*, *Fortune Magazine* and *Lawyers Weekly USA*. He has conducted seminars for Time Warner, Paine Webber, Champion International, HBO, Ciba-Geigy, Consolidated Edison, The Alzheimer's Association, TIAA-CREF, William Doyle Galleries, Lenox Hill Hospital, Ogilvy and Mather, Chase Manhattan Bank and Conde Nast.

Technology News

By Stephen J. Silverberg

This is the first in a series of articles regarding web sites of interest to elder law attorneys. In upcoming issues, we hope to highlight many other sites that will help you in your daily practice.

The Western New York Law Center maintains a web site at *www.wnylc.com*. It is a tremendous resource for all elder law attorneys.

The Western Law Center is funded by the IOLA fund of the State of New York. It provides free civil legal services to low income people in western New York, concentrating in areas that legal service corporations are prohibited from handling. Generally, it does not handle individual cases unless the case has a potential for "systems" change. The Center is currently involved in fair housing cases where there has been discrimination because of disability, race or other grounds.

It is also involved in technology, and maintains the STAR Watch web site. This web site is updated daily with news of decisions and information helpful to legal services advocates. It publishes welfare rules and regulations on the site that are not available online elsewhere.

A visit to the web site will show the depth of this resource. The site is well structured and all navigation tools are clearly marked. One area of particular interest to elder law attorneys are fair hearing results. If you click on the box marked "Welfare Law," you will be taken immediately to a second menu where you would be able to access the site "Fair Hearing Data Base" that was put together by the Greater Upstate Law Project in conjunction with the Western New York State Law Center. The New York State Bar Elder Law section cooperates in the program by forwarding fair hearing decisions for posting. This data base will be fully searchable.

Also at this site are all ADMs going back to 1986, as well as Information Letters (INFs) and Local Commissioner's Memoranda (LCM).

The utility of a web site often depends not just on what is contained on the site itself but on other sites to which it is linked. From this site many other public interest groups search for databases for federal and state law, the Federal Register and the status of legislation.

In total, this is an excellent example of how publicly funded organizations can help serve the needs of attorneys in private practice.

Stephen J. Silverberg is the managing partner of Silverberg & Hunter, LLP, a Long Island, New York, firm concentrating in business succession, tax planning and elder law. He is past Chairman of the Tax Special Interest Group of the National Academy of Elder Law Attorneys, and Chairman of the Technology Committee of the New York State Bar Association Elder Law Section.

Bonus News

By James B. Gabler

Rule of Halves Modified—The Gabler Equation

The rule of halves works generally. To know how much should be gifted so that the penalty period expires at the same time that last payment is made to the nursing home with retained assets, use the following equation:

$$\text{Amount to be gifted} = \frac{a \times c}{b + c}$$

Where a = the total assets of client

b = the net monthly cost of nursing home

c = Medicaid monthly nursing home facility rate

A specific example would be as follows:

The total assets of the client = $352,000

The net monthly cost of the nursing home = $6,327

The Medicaid monthly nursing facility rate e.g., New York City = $7,730

$$\text{Amount to be gifted} = \frac{(\$352{,}000)\ (\$7{,}730)}{\$6{,}327 + \$7{,}730} = \$193{,}566.19$$

$$\text{Penalty Period} = \frac{\$193{,}566.19}{\$7{,}730} = 25.04 \text{ months}$$

$$\text{The amount retained} = \$352{,}000 - 193{,}566.19 = \$158{,}433.81$$

Dividing the amount retained $158,433.81 by the monthly cost of the nursing home, $6,327 equals the number of months of payment or 25.04 months.

Editor's Note: This is an excellent formula to give you a quick idea as to the amount to be transferred. Beware, however, that the formula does not take into account the income earned during the penalty period.

James B. Gabler is an Elder Law Attorney practicing in Queens, New York. Mr. Gabler graduated from Harvard College (math major) and Harvard Law School. Mr. Gabler is a member of the New York State Bar Elder Law Section as well as the Queens County Bar, Elder Law Section. Mr. Gabler is also a member of NAELA.

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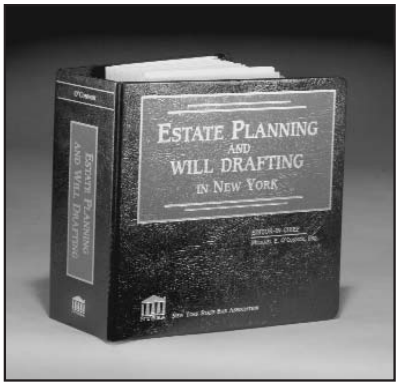
Estate Planning and Will Drafting in New York

NEW RELEASE

Estate planning involves much more than drafting wills. As the introductory chapter of *Estate Planning and Will Drafting in New York* notes, good estate planning requires the technical skills of a tax lawyer; a strong understanding of business, real property and decedent's estate law; and the human touch of a sensitive advisor. This book is designed to provide an overview of the complex rules and considerations involved in the various aspects of estate planning in New York State.

Written by practitioners who specialize in the field, *Estate Planning and Will Drafting in New York* is a comprehensive text that will benefit those who are just entering this growing area. Experienced practitioners may also benefit from the practical guidance offered by their colleagues by using this book as a text of first reference for areas with which they may not be as familiar.

Annual updates to *Estate Planning and Will Drafting* will make this reference a "must buy" for all practitioners.



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