

# Elder Law Attorney

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

## Chair to Chair



**Michael E. O'Connor**  
Outgoing Chair

It seems like only yesterday that I was sharing this page with Kate Madigan and I was the "Incoming Chair." Time flies. We are completing a year without any major legislative changes. There has been case law affecting our clients and appellate courts have had interest in the field. The agenda of future Section activities is crowded.

Penalties are now being imposed on SSI eligibility, where the applicant has made gifts. We anticipate the availability of the principal of Medicaid trusts will still be an issue with Medicaid. We all hope that well-argued hearings will result in decisions finally confirming that the contents of such trusts are non-available. The several pieces of affirmative legislation from the Section will be pursued and hopefully will become law this year.

*(Continued on page 2)*



**Bernard A. Krooks**  
Incoming Chair

It is a great honor for me to serve as Chair of the Elder Law Section of the New York State Bar Association. Having been elected by my peers and colleagues means a great deal to me. Election to such a position is a rare privilege, providing a unique opportunity to serve the Elder Law bar and the clients we represent.

I have not reached this professional milestone on my own. I am blessed to have the support of a loving wife and family. My law partners have been very supportive of my efforts as well, especially my brother, Howard S. Krooks, without whose assistance this day would not have come. I also owe a deep debt of gratitude to my parents for all they have done for me. I can only imagine the smile on my father's face were he here to enjoy this day.

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## Outgoing Chair's Message *(Continued from page 1)*

Bernie Krooks, the incoming Chair, defines the term "high energy leader." He is involved in every aspect of Section activities and goes to whatever lengths necessary to assure that all of our goals are met. Apart from the usual duties of Chair-elect, Bernie has supervised Section programs, spoken at and organized continuing education programs and been actively involved in the work of several committees. The Section is fortunate to have him.

Lastly, I want to thank all those who have done so much for the Section during the past year. Many of

them have been doing yeoman service since the Section started. From the bar staff, Beth Kreuger has been invaluable. She can be depended upon to take care of all of the details which come up in looking after Section activities. Because she has been involved so closely since the creation of the Section, she has an institutional memory which allows us to avoid making the same mistakes over and over. Through all of the work and stress, she finds a way to always have a warm smile on her face.

**Michael E. O'Connor**

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## Incoming Chair's Message *(Continued from page 1)*

As we arrive at the midpoint of the first year of the new millennium, much has changed in the practice of law and the way legal services are delivered. Although the law remains a noble profession, business issues permeate our practices every day. We must be prepared to respond to and address these issues in a meaningful and constructive way. Social needs and values are changing and we face a potential sea change in the way law firms are structured and governed. Many among us point to our traditional ethical guidelines developed in a different era for a different marketplace. They argue that in order to maintain our independence, client confidentiality and the integrity of the profession, we must cling to these outdated concepts. There is no doubt that our ethical rules have served our clients and the profession well. We must be mindful, however, that our ethical guidelines are a means to an end; not the end itself. As attorneys, the end we seek is to provide competent legal representation in a cost-effective manner while maintaining the core values of our profession.

Attempts by lawyers to resist changes demanded by the marketplace will not bode well for our future or the future of our profession. If you have any doubts about this, speak to your friends in the medical profession. Doctors resisted change until it was too late for them to influence the changes themselves in any meaningful way. I believe that attorneys are beginning to realize what many of us elder law attorneys have known for some time: Multi-Disciplinary Practices (MDPs) are engaged in the unregulated practice of law and have been for awhile. More importantly, they are here to stay. Elder law attorneys compete with MDPs on a daily basis. The MDPs, however, are not subject to the same rules that we are regarding conflicts of interest, confidentiality and the prohibition on fee sharing, to name a few. Thus, we operate at a distinct disadvantage in the marketplace. In order to ensure that our ethical guidelines are

applied to MDPs, they must be regulated and we must be actively involved in that process.

In addition to MDPs, computer software threatens to diminish some of our traditional services. At this point, it makes document drafting less labor-intensive, but eventually it might replace work done by attorneys. Over the long term, clients are not going to pay an attorney to run software they can run themselves. Already, document drafting is done by software to a far greater extent than in the past. Competition from non-attorneys has become more intense and promises to grow. If brokerage firms can perform estate planning services for clients, as some do now, they can also turn to some form of automated document drafting to produce estate planning documents.

In order to remain competitive, we must continue to develop new services. Client needs, more than anything else, will determine the value of what we offer. By offering value to clients, we will foster long-term relationships. In furtherance thereof, we must strive to obtain timely feedback from clients to enable us to continually adapt our services to their needs.

Elder law attorneys have always taken a holistic approach to practicing law. Rather than focusing on one particular area of the law, we focus on a particular segment of the population and the specific needs thereof. By doing so, I truly believe that we will always be in the best position to advise our clients. Bob Dylan once said, "the times, they are a changin'." Those words have never been more true than they are today. Rather than resist change, I suggest to you that we should embrace it and be part of the process. As Chair of your Section, I will make every effort to ensure that our collective voice is heard in both the legislative and public policy arenas. I look forward to working with you in that regard.

**Bernard A. Krooks**

# Editor's Message

In June 2000, the Supreme Court of the United States decided the *Troxel v. Granville* case bringing the issue of Grandparent Rights to national attention. The case involved grandparents who, after the death of their son, brought a lawsuit, under a Washington State law, seeking visitation with their son's out-of-wedlock children who lived with their remarried mother. I recently read an article which stated that this grandparent rights case is not an isolated incident, but rather the tip of the iceberg, an emerging national crisis.



I was immediately startled by this article because it involved *grandparents* in crisis and I did not know anything about the laws of this country, or New York State for that matter, which I would use to help them. But how could that be? I am the managing partner of one of the biggest Elder Law firms in the country, yet not one lawyer in my firm would have a clue as to how to help these grandparents. After all, we are supposed to be the experts on all areas of law affecting seniors. Furthermore, I could not think of any other Elder Law firm in which to refer such clients.

We all know that Elder Law is not a discrete set of laws, but rather a response to the growing legal needs of seniors, involving a broad spectrum of laws. The needs of seniors dictates what we do and this will continue to evolve as time goes by. Certainly, since the field of "Elder Law" began in the mid to late 1980s, we have been preoccupied with issues surrounding long-term care, both advocating access to continued quality care and seeking all avenues to finance such care. In fact, some have wrongly branded us "Medicaid Lawyers." The truth is, however, that the demand for long-term care advice, while great, is just one issue on the plates of seniors today. As Elder Law attorneys we have responded to many other issues our clients have faced

and we must continue to listen to our clients and respond to their ever-evolving needs. Whether or not we begin to advise our senior clients on their rights as grandparents, which has traditionally been the province of family law practitioners, is not the whole point; rather we must be aware of the issues and, at least, learn who in our legal communities we can turn to for advice or to whom we can feel comfortable referring the case. Keep in mind also that not all grandparents are seniors; in fact the average age to become a grandparent in this country is about 46 years of age.

With my interest piqued, I decided to dedicate this issue of the *Elder Law Attorney* to Grandparent Rights. The first call I made was to Gerard Wallace, who the article I read identified as the Director of the Grandparent Caregiver Law Center at the Brookdale Center on Aging of Hunter College in New York City. That one phone call to Mr. Wallace tapped me into the entire New York network of people who are passionate about the issue of grandparent rights, from the grandparents themselves, to support group leaders, to lawyers in the trenches. This issue provides you with seven articles which, from many different points of view, collectively attempt to paint the whole complicated, emotional, stressful, yet many times joyful picture of the concept of grandparents concerned for the welfare of their grandchildren.

I would also like to point out that this edition of the *Elder Law Attorney* features three new regular news columns. In addition to the nine regular news columns which appeared in the last issue, please welcome (a) Public Elder Law Attorney News, written by Valerie Bogart; (b) Advance Directive News, written by Ellen Makofsky; and (c) Snowbird News (Florida), written by Julie Osterhout.

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

All my best! Keep smiling!

**Lawrence Eric Davidow, CELA**

# The View from a Grandmother and Leader: Voices and Visions

By Mildred H. Horn

## Not All Monsters Are Make Believe. . .

Nevertheless monsters lurk everywhere—imbedded within the nooks and crannies of one’s outlandish haunts, surfacing only to provoke havoc and upheaval whenever they appear.

Case in point—from the deliberate and systematic annihilation of six million Jewish men, women and children perpetrated by the maniacal Adolf Hitler more than 65 years ago to the fictitious *Wicked Witch of the West* who mesmerized her unsuspecting victims in the realm of *The Wizard of Oz*.



What distresses me most, however, since the dawn of civilization is the never-ending pattern of man’s inhumanity to man. Particularly, towards the children—our grandchildren.

In the context of *Grandparent Rights*, too many children are deemed castaways and nonexistent in the current court system. For the most part they are exploited and become pawns during custody and/or visitation hearings between their natural parents and grandparents. Unfortunately, these innocent bystanders are caught and literally trapped in an appalling scenario that views and treats children as property.

According to the Brookdale Center of Aging in New York City, an estimated 3.9 million youngsters are now living with their grandparents, a 50% increase in the last decade. More and more attention is being focused on this national phenomenon.

This increasing social problem reaches people from all socioeconomic parameters, white and black, burdening a large segment of our senior citizens who can no longer look forward to a carefree life. With the deterioration of the nuclear family and the struggles that face grandparents who strive to provide stability and security to replace that which is being lost; more attention needs to be given to their unique problems.

And they are many—lack of legal rights, adequate financial aid, health and daycare, biased laws, among others.

As we grow in numbers we will set our sights on the formidable task of reversing unfair laws and creating legislation to ensure grandparent rights. The welfare of children is in jeopardy because of the social ills plaguing the nation. Grandparents Reaching Out is an organization concerned with these children. They are, after all, the future.

The following headlines were extracted from some of the nation’s recent high profile cases:

- Mother charged with prostituting children for drug money . . .
- Children left alone to perish in fire; parents charged . . .

A number of pertinent questions arise:

1. What happens to these children when their natural parents refuse or are unable to give responsible care to their offspring? (Due to alcohol/drug abuse, divorce, abandonment, neglect, death, emotional/physical/sexual abuse, children having children, etc.)
2. How do we determine what is in the best interest of the child?
3. Who makes these determinations?
4. What supports do grandparents have in raising grandchildren?
5. What do social workers, judges, attorneys, law guardians, CPS caseworkers, legislators, healthcare providers, daycare professionals, etc. need to know about these issues?

Foster care is NOT the answer. Especially when there are loving and nurturing grandparents or other nonparent caregivers who are willing to assume the responsibility of raising their grandchildren. Higher courts have ruled that it is the fundamental right of a natural parent to raise the children and current laws are less than kind to grandparents seeking custody of grandchildren even in the most serious conditions.

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Without legal custody, grandparents must give up their grandchildren to their children at any time without assurance that the child will be happy or well cared for. It doesn't matter if the natural parents are working or not, if they live in squalor, have little or no morals. A grandparent must literally fight their own children in court.

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*"No one will push Grandparent Rights unless grandparents unite nationwide and evolve as staunch advocates who lobby tenaciously for an agenda that resonates cross-country, impacting on the congressional leaders in Washington, D.C. Lip service is no longer acceptable."*

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Yet as necessary as it is, the attempt to get custody can devastate relationships within the family and even result in the grandparents losing the grandchildren. It is not a step most grandparents take lightly. Going into court to publicly declare your child *unfit* is not a pleasant undertaking. Frankly, most parents have no desire to further antagonize or alienate their own sons and daughters. But grandparents do it because they have to, and for the most part it is the hardest thing they will ever do. However, "doing what's in the best interest of the child" remains paramount.

No one will push Grandparent Rights unless grandparents unite nationwide and evolve as staunch advocates who lobby tenaciously for an agenda that resonates cross-country, impacting on the congressional leaders in Washington, D.C. Lip service is no longer acceptable.

Adhering to the orthodox doctrines of the Jewish faith, I will light the traditional memorial lamp before sunset on May 11th, observing the fifteenth anniversary of my daughter Hetty's untimely demise. In 1985 Hetty was a recently divorced young mom with two preschool children—a graduate student completing her doctoral dissertation in clinical psychology at Yeshiva University.

Shortly after the agonizing loss of my cherished daughter, Hetty and I began talking via a daily journal. It rescued me from utter despair and near insanity. It became my salvation.

From the outset, it was Hetty—her guiding hand, her imperceptible presence, gently chiding and encouraging me to get involved. Do something constructive, meaningful, significant. Somehow she managed to transmit—probably through osmosis—the strength, stamina and grit I needed to pursue a unique and ultimately fulfilling dream.

I can hear her, as plain as day—"Go for it, Mommy! We'll make it work. Let's try to develop a program that will benefit grandparents raising grandchildren (like yourself) and help them cope with the difficulties and horrendous problems they confront in a parenting role the second time around."

Suddenly, and without warning—an unexpected thunderstorm descended from the darkening skies above and unleashed a surge of ferocious winds and torrential rain outside the house. It invaded the secluded domain of sweet dreams and quiet solitude that Hetty and I shared daily. As I emerged from that reverie and slowly regained my composure, the realization that I could no longer afford the luxury of a stoic living in a perpetual state of denial startled me to my senses.

Without question—my two beautiful grandchildren were totally dependent upon me now—emotionally, financially and physically.

- How does a parent reconcile herself to such a catastrophic tragedy?
- What are your rights as a grandparent?
- Where do you go to obtain legal custody of your grandchildren?
- Are they eligible for Social Security benefits?
- What about health care? Day care?
- Where is grief counseling available for us as a family unit?
- Will you find a qualified and trained individual to talk to, someone who can relate to the overwhelming dilemmas confronting you?

Weathering six years of one bureaucratic obstacle after another, I eventually concluded that the needs and concerns of grandparent caregivers are completely different from those of young parents. Motivated by these concerns and a deep-rooted desire to help other grandparents raising grandchildren (and those denied visitation) overcome life's inequities

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gave birth to Grandparents Reaching Out Inc. (a.k.a. GRO).

GRO is a nonprofit, nonsectarian support group I founded in September, 1991 for the growing number of grandparents and other nonparent relatives who wish to give shelter, guidance and unconditional love to their grandchildren rather than forsake them to the system. It also includes grandparents denied visitation and those seeking custody of their grandchildren.

Dedicated to the memory of my daughter, GRO's acronym reads **HETTY: Holding Everything Together That's Yours**. Its executive officers, board of directors and members contribute their time voluntarily and without compensation. Funding for the organization is obtained from individual donations, corporate grants, fundraising activities and the minimal annual dues of its members.

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*"It has been a humbling and learning experience in more ways than one, a challenging and gratifying journey into the land of the unknown—Grandparent Rights."*

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Through emotional support, educating policymakers, conducting workshops, sponsoring annual town meetings/seminars, and designing service and referral programs to meet specific social needs; GRO helps grandparents with the challenges they encounter in a parenting or non-parenting role advocating "the best interests of the child."

Volunteer organizations such as GRO exist and flourish because lives and hopes and families are saved—new, creative solutions are found; and the entire quality of our lives is enriched; all because people choose to become involved in organizations which matter greatly to them.

It has been a humbling and learning experience in more ways than one, a challenging and gratifying journey into the land of the unknown—*Grandparent Rights*.

Wherever we go, whatever we do—Hetty has always been and will always be the inspiration and driving force behind any specific event or accomplishment. I am merely the instrument that helped orchestrate Hetty's music.

Join me on a whirlwind tour of a few selected landmark occasions that GRO was privileged to be a part of.

On June 8, 1992, Grandparents Reaching Out played an integral role in a Congressional Hearing entitled, "*Grandparents: New Roles and Responsibilities*." It was conducted by former Congressman Thomas J. Downey, Chairman: Subcommittee of Human Services, Suffolk County Community College, Brentwood, N.Y.

As part of the agenda, the witness list consisted of four grandparents and I who testified on Panel One at this prodigious hearing. The testimony was extremely gripping, emotional and heartwrenching. Impassioned pleas were repeated over and over again, imploring New York State Senators, Assemblymen and County Legislators to listen with their hearts as well as their heads.

We recounted our individual grievances with a system that offered little or no help regarding finances, social services, legal assistance, health care providers, daycare, etc. Congress published an account of the hearing in book form during the latter part of 1992.

November 1, 1993 highlighted the first of GRO's six consecutive Annual Town Hall Meetings, this one held at Border's Book Shop, Sayville, N.Y. It featured rookie Congressman Rick Lazio as keynote speaker. The topic, "*Life in the 90's: The Grandparents' Struggle*" generated an unusual amount of interest and excitement in the community and aroused emotional responses, pro and con, to a fever pitch from the assembled group. It boasted a standing room audience and the feedback was phenomenal.

Once every decade the U.S. Department for the Aging sponsors a White House Conference to introduce legislative and policy recommendations. The Reagan administration held one in 1981. Unfortunately, the Bush administration did not feel it warranted a conference in 1991. However, the Clinton administration scheduled one during the week of May 2nd through May 5th, 1995.

They came from all walks in life—2,600 delegates traveled cross-country representing the "graying" of America. Grandparental issues involving custody and visitation rights were not merely introduced but proposals were voted on and unanimously passed. Among them was greater assistance for grandparents who served as primary caregivers of their grandchild-

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dren—a first in White House Conference on Aging history. What a momentous event to witness!

For almost three years GRO lobbied tirelessly in the Albany Legislature to get the Grandparent Rights Education Law Bill passed (A.3490). After successive bus trips to the state capital, which carried a crew of GRO executive officers, board of directors and grandparent members in early 1996 and followed that with an avalanche of letter writing and phone calls to every N.Y. State Senator and State Assemblyman in April 1996, and again in June 1996—Governor Pataki signed the Bill into law on July 2, 1996.

A.3490 requires that the State Department of Education consult with the State Office for the Aging and the State Department of Social Services in the development and publication of an informational brochure and conduct two annual statewide workshops to inform grandparent caregivers of help available. It will also provide information concerning the issues of kinship care and legal duties and rights as they relate to dependency, custody and entitlement programs.

Valuable information (i.e., immunization requirements, standardized tests, special health care, etc.) will be distributed throughout hundreds of school districts in N.Y. State as well as going to hospitals, medical professionals, public health nurses, C.P.S., D.S.S., senior citizen centers, entitlement programs, public libraries, and other appropriate venues.

Thus, instead of a grandparent needlessly running in contrary directions seeking help and information, she or he will be able to find whatever is needed at one specific location.

### That's One Touchdown and One More to Go. . .

Initiated by GRO—State Assemblyman Paul E. Harenberg, former Chair, Aging Committee and State Senator Owen L. Johnson cosponsored and proposed legislation (A.8608) in both houses during 1995–1996.

*Twice* it passed unanimously in the State Senate but was *defeated twice* (1995–1996) by the Judiciary Committee in the State Assembly. It was reintroduced on February 12, 1997 as A.4268 modifying specific changes. *Again* it passed *unanimously* in the State Senate and *again* it was *defeated* by the Judiciary Committee in the State Assembly.

A.4268 is currently pending before the State Assembly of 2000. It is an act to amend § 72 of the

Domestic Relations Law, to afford the right to seek visitation with a child to any person related by at least the third degree of affinity or consanguinity. Presently DRL § 72 permits only a child's biological grandparent(s) to seek visitation in the event of a divorce or the demise of a parent. The proposed legislation would allow more family members (step-grandparents, aunts/uncles) to qualify for possible visitation rights while continuing the authority of judges to allow visitation based upon the "best interests of the children."

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*"In the event of a divorce or the death of a parent, what justifies shattering the emotional and psychological well-being of a minor child by denying him continuity in his relationships with extended family members?"*

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Severely limiting the family members that could possibly have visitation with a child is NOT in the child's best interests, particularly where the breakdown of the nuclear family, single parent household, or both parents working, have caused children to develop significant relationships with other relatives.

In the event of a divorce or the death of a parent, what justifies shattering the emotional and psychological well-being of a minor child by denying him continuity in his relationships with extended family members? The proposed legislation addresses these and other societal changes, which render the amendment imperative to meeting the needs of minor children.

In retrospect, five years is a drop in Albany's legislative bucket and to coin a phrase, "*we have just begun to fight.*"

The last whistle stop on this eye-opening excursion is full steam ahead. In conjunction with SUNY Stony Brook School of Social Welfare and the National Association of Social Workers—NYS, we are in the preliminary stages of planning GRO's Seventh Annual Town Hall Meeting on June 16, 2000 at Touro College, Law Center Auditorium, Huntington, N.Y.

A renowned keynote speaker, moderator and distinguished panelists will participate and include national, state and county representatives: social workers, judicial, educational, health care providers, legal, legislative, etc. The program is entitled,

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“Grandparents and Grandchildren: In the Best Interest of the Child” and promises to be a most penetrating and insightful seminar.

Since its inception in 1991, GRO has implemented a number of noteworthy programs that embody counseling, a Law Clinic providing quality representation from participating family law practitioners at a reduced rate to grandparents who cannot otherwise afford to retain such counsel, a much needed five-day respite each summer for 24 grandparents, annual sleepaway camp for 20 grandchildren and family outings are scheduled every three months.

Our goals, however, are wide and varied and much remains to be realized on a grassroots level.

- a) Educate and sensitize human service providers in Suffolk and Nassau Counties about the rights of grandparent caregiver households and grandparents seeking visitation.
- b) Champion policies that provide financial, social services, health care, legal and educational supports as needed to grandparent caregivers raising grandchildren.
- c) Most important—expand current GRO programs to fulfill the demands of the endless influx of grandparent members.

## Establish New Programs

- a) Tutoring: Remedial reading/math/science/history, etc.

To benefit elementary, middle school and high school youngsters. Many grandparents are unfamiliar with subject matter and teaching methods. Supervised by retired educators, college students and honor society high school seniors volunteering their expertise to a much-needed community service.

- b) Rap Groups: For adolescents, ages 12-18 years on a weekly basis.

Supervised by an experienced and qualified adult. Discussing topics of interest and concern: sports, music, personal problems, etc.

- c) Babysitting Exchange:

This will be a blessing in disguise for grandparents who cannot afford to pay babysitting services, it enables them to run errands unen-

cumbered by young children underfoot, and gives grandparents time and space to unwind.

Though we are extremely proud and happy with the progress and success of the organization, perhaps articulating a brief *wish list* is long overdue.

Dare I verbalize a prayer so close to my heart that I always felt was doomed to failure before it reared its head? The thought of somehow acquiring an official site (pro bono), a permanent address establishing GRO as an indispensable and vital agency takes my breath away.

To quote Hetty, “That would be neat, Mom. Really mind-boggling. Besides—celebrating life and unconditional love is what GRO is all about.”

The space presently available for us to conduct GRO programs is cramped, inadequate and inconvenient simply because they are in different locations and scattered throughout Suffolk County.

First and foremost, GRO is in dire need of office space and supplies.

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|------------------------|---|
| Location               | — Suffolk County (pro bono)                               |
| Size                   | — Minimum 700—800 square feet                             |
| Equipment/<br>Supplies | — All types office machines,<br>furniture, paper supplies |

This will afford us adequate space to conduct counseling sessions, the Law Clinic program and leave ample room for board meetings and a small office area. We have a 501-(C)(3) status, are state and federal tax exempt and carry Directors & Officers/General Liability insurance.

On behalf of GRO Inc., our grandparents and their precious grandchildren, this is my one fervent desire — my *only* heartfelt wish. Is my vision that far-fetched?

One way or another—be it accident, murder, suicide, or victims of drug and alcohol abuse—too many of us have lost our children.

In memoriam, we’d like to express our respects and deeply felt tribute:

In memory of Nicole, beloved daughter of Brigitte and Anthony Castellano.

In memory of Karen, beloved daughter of Marilyn and Frank Choma.

In memory of Scott, beloved son of Stella Rosenberg.

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In memory of Dawn, beloved daughter of Barbara Sanford.

In memory of Coleen, beloved daughter of Madeline and Bruce Sheehy.

In memory of Helene, beloved daughter of Dorothy and David Zitosky.

When I return home from chanting Yursteit the evening of May 11th, I will look forward to that special sense of well-being and joy because after attending temple services I always feel Hetty's presence in the house.

It soothes and comforts me and I will indulge myself by clinging to her essence for awhile. This unique source of strength and vitality permeates everywhere and the inner peace and contentment I seek will envelop me. With it comes understanding, insight and humility.

"For God's sake, Mom—how many times must I reiterate that WE are a TEAM? No doubt about it, we've come a long way since September, 1991. That's cool!"

"Nicole, Thom and Dawn are gallivanting around town enjoying their new status as Angels, F.C. (First Class). They're busy as bees buzzing in a honeycomb implementing programs that will enrich the lives of our children, your grandchildren."

"Pursuing a miracle or two, and they have been known to happen here now and then—the rest of us (Colleen, Helen, Scott and yours truly) are working up a storm. We're caucusing a group of delegates and lobbying a number of heavenly bodies in an effort to accelerate policymaking on pertinent *grandparent rights*."

*"If we can do it—you can do it too. . . . In unity there's strength!"*

Mildred H. Horn is a remarkable woman who has turned personal tragedy into a challenge. Dedicated to the memory of her daughter, Hetty (Holding Everything Together That's Yours), Mrs. Horn is Founder and Director of Grandparents Reaching Out Inc. (GRO). Under her leadership since 1991, GRO has expanded from a dozen families in Suffolk County to over 500 families, encompassing three chapters in the metropolitan area.

Mrs. Horn is a former Vice President of the National Coalition of Grandparents, a proficient member of several Advisory Councils throughout the state of New York, and an advocate for grandparental issues and children's rights. She has been honored with numerous county, state and national awards for public service.

The Horns were a close-knit family who emphasized the importance of family values. Mildred and Abraham Horn gave their two children, Henrietta (Hetty) and Saul, a solid foundation on which to grow. Until his demise in 1981, her husband, Abby, was a unique and dedicated educator in the New York City school system. Saul, barely 9 1/2 years older than his niece and nephew, is a caring and concerned "big brother" and an excellent role model. He is happily married, the father of three beautiful children, and an executive with a major corporation.

At present, Mrs. Horn resides in Patchogue, New York, which also serves as a home-base for GRO. She is extremely proud of the two grandchildren she raised from toddlers to young adulthood, primarily as a single grandparent.

Miriam graduated from Kent State University in 1996, is happily married and anticipating the birth of her first child in early May. Her grandson, Menachem, graduated from SUNY Cortland in 1998 and is a market research analyst with a firm in Manhattan.

As Hetty would say, "That's cool, Mom."

# The Big Legal Picture: Grandparents Parenting Grandchildren: A New Family Paradigm

By Gerard Wallace

## Introduction

The dramatic decrease in two-parent families, combined with the equally dramatic increase in the numbers of older persons, many of whom are living healthier and longer lives and the accompanying changes in family composition, will affect the future practice of elder law in many ways. The reconfiguration of family life will place an increasing number of grandparents and other aging relatives in the role of primary and secondary caregivers for children, and issues related to their care and control of children will emphasize the interplay of family and elder law. With many grandparents, great grandparents and other older relatives already their clients, elder law practitioners must become familiar with the legal issues that many of their clients are facing in their newly configured intergenerational families. Practitioners should also know about the resources available for such clients. This Article will present the legal issues faced by grandparent and other non-parent primary caregivers of children, an overview of the visitation case currently before the U.S. Supreme Court, a summary of bills recently introduced in the New York State Legislature, and a listing of resources.



## I. Legal Issues for Non-Parent Primary Caregivers of Children

Older Americans are assuming primary responsibility for raising children whose parents are unavailable to care for them because of divorce, death, incarceration, substance abuse, disability, AIDS, or other circumstances. Although some non-parent caregivers provide full-time care to children for short periods, many provide this care for children over extended periods of time. Legal issues for these elder caregivers for children include their legal relationship with the children (custody, foster care, guardianship, adoption), maintenance of that relationship over time, authority to make educational, medical and other kinds of deci-

sions for the children, financial and other assistance, and planning for care of the children after their own incapacity or death.

Many non-parent primary caregivers of children are grandparents.<sup>1</sup> Nationally, these grandparents have sole responsibility for more than four million children. The average age of such grandparents is 55, with many being in their sixties and seventies. Virtually all caregiving grandparents provide care to their grandchildren against great odds. Often they must cope with decreased physical endurance, increased isolation from their peers and loss of expected leisure time in their retirement years while experiencing the loss and support of their own children (the grandchildren's parents). Additional stress is caused by uncertainty about the future of their grandchildren either because the grandchildren's parents may return to claim them or because their own aging may mean they will be unable to continue caring for the children over the long term. Finally, the lack of financial resources to care for an expanded household often weighs heavily on the shoulders of grandparent caregivers who often live on fixed incomes.

Although grandparents raising grandchildren are acting as parents, state and federal law provide greater deference to parents based on their fundamental right to raise their children as they see fit. Natural or adoptive parents are secure in the knowledge that they cannot be deprived of their children without clear and convincing evidence of their unfitness as parents,<sup>2</sup> but grandparents have no such protection when serving as parents. Parents have the necessary legal authority for the successful rearing of children but grandparents do not. Parents are provided with financial and other forms of assistance such as social security benefits for surviving children, intestacy laws to ensure passage of their wealth to their children, foster care payments to persons who take care of needy children, adoption subsidies for foster parents who choose to adopt, and income tax credits to adoptive parents for the cost of private placement adoptions. Few forms of legal and financial assistance are provided to grandparents who are primary caregivers for children.

Whether caregivers are raising children informally or under court-ordered arrangements, they need legal recognition of their standing, authority to act as substitute parents, and security concerning their relationship with the children. In addition, access to public benefits where appropriate, financial assistance, housing, and other resources is critical. Many of these concerns can be addressed only through legislation and urgently require the attention of lawmakers to change laws and social policies that do not serve the needs of grandparent caregivers. States have yet to adapt their laws and social policies to the realities of the modern family.

## I. A. Uncertainties about the Legal Status of Grandparent Caregivers

Generally, three kinds of legal status are available for grandparent caregivers: (1) informal caregiving without a court-ordered legal arrangement (sometimes called informal or physical custody); (2) court-ordered legal custody or guardianship of the person and/or property; and (3) foster care (kinship or non-relative) under the supervision of the state which retains legal custody of the child. Grandparents who adopt the children for whom they are caring assume the rights and responsibilities of natural parents.

### I. A. 1. Informal Caregiver Authority

Without adequately understanding the advantages and disadvantages of each option, caregivers often choose to keep the caregiving arrangement informal because custody, guardianship, kinship foster care, and adoption require unwanted court (or state) intervention that is considered to be antagonistic to fragile family relationships.<sup>3</sup> Grandparents with legal custody and guardianship usually do not have much difficulty in making educational and medical decisions for the children in their care.<sup>4</sup> On the other hand, most informal grandparent caregivers who have only vague legal recognition are raising children without the educational and medical decision-making authority necessary for the successful and stable rearing of children.

Diverse statutory descriptive phrases make it difficult to paint a clear picture of the authority of informal caregivers in New York. For example, the informal relationship is variously described as:

- “Person in parental relation to a child”<sup>5</sup>
- “Person who has assumed the charge and care of the child”<sup>6</sup>
- “Person or persons having the actual custody of such minor or minors”<sup>7</sup>
- “Person having custody of the infant”<sup>8</sup>

- “Person with whom he [an infant] resides”<sup>9</sup>
- Anyone who has a child “chiefly dependent upon him for support and maintenance.”<sup>10</sup>

Both the Education and Public Health laws provide limited statutory authority for “persons in parental relationship” who are defined as parents, guardians, step-parents and “custodians” (who are any person caring for children because the parents are deceased, mentally ill, incarcerated, have been committed to an institution, or have abandoned or deserted the children). Since frequently one or both parents still live in the community but are incapable of providing care, many informal caregivers do not fall within the definition of “custodian” and are limited in their abilities to make ordinary school and medical decisions for the children. In addition, the Education Law provides that persons in parental relationship have authority and responsibility for most educational needs,<sup>11</sup> but the Public Health Law states that they can consent only to immunizations.<sup>12</sup>

One possible solution to this problem would be to provide a simple mechanism by which the parents of the child could delegate their educational and medical decision-making authority to caregivers. Such a mechanism does not exist in New York State at this time.<sup>13</sup> Although the New York statutory general power of attorney permits, among other things, the delegation of powers related to “personal relationships and affairs,”<sup>14</sup> granting this power to an agent provides only sufficient authority for financial decisionmaking, but not for educational and health care decisionmaking. In many other states, such delegations are already possible. Washington, D.C., California, Minnesota, Delaware and a number of other states have specific legislation covering parental authorizations to informal caregivers.<sup>15</sup> Close to 20 states have adopted the Uniform Probate Code parental power of attorney.<sup>16</sup> Almost all delegations under these statutes are for limited periods of time, ranging from six months to two years, and tend to be renewable by the substitute caregivers. In New York, unfortunately, the lack of statutory authorization of parental delegations remains a limitation on the ability of parents to delegate or transfer their authority.

Additionally, even if children are living with persons in parental relationship, they need to fulfill other criteria in order to qualify for free tuition.<sup>17</sup> School districts often demand proof of legal custody or guardianship as a requirement for school admission or as documentation of residency. Court orders, however, are not required under the Education Law. Instead, students must prove by an examination of the totality

of the circumstances that they are permanent residents of the school district, intending to remain permanently in that district.<sup>18</sup> Under most circumstances, grandparent caregivers should not have to go to court to get children accepted (tuition free) for public school in the districts where they reside.

## I. A. 2. Legal Custody versus Guardianship

The choice between legal custody and guardianship also lacks certainty. Some county family courts prefer to award legal custody, while others award guardianship of the person to all non-parents (or only to non-blood relatives). When there is a choice, the decision is invariably based on wrong information. In terms of their practicality, legal custody and guardianship at first appear to be interchangeable.<sup>19</sup> Both are capable of providing sufficient health, educational, and financial authority. However, practical distinctions exist. For instance, numerous laws referring to “parent or guardian”<sup>20</sup> do not include legal custodian, and without guardianship, private health insurance providers often refuse to cover dependent children. Unlike guardianship, where the guardian may or may not have actual physical control of the child, legal custody invariably means the actual care, maintenance, supervision and control of the minor. In contrast, other statutes place legal custodians alongside parents and guardians,<sup>21</sup> and some statutes also add informal custodians to these three.<sup>22</sup>

One advantage of guardianship for a grandparent is nevertheless worth mentioning. The Surrogate’s Court Procedure Act provides that parents *and guardians* can petition either family court or surrogate’s court for the appointment of a standby guardian.<sup>23</sup> They can also designate a standby in a writing similar to a will that states that the designation is effective upon the parent’s or guardian’s debilitation, incapacity, or death. For aging grandparents who are guardians, not legal custodians, the ability to appoint or designate a standby guardian can provide added security for their grandchildren’s futures. Unfortunately, the statute is not always readily available to grandparents because many family courts prefer legal custody to guardianship proceedings.

## I. A. 3. Kinship Foster Care

For kinship foster parents, the state retains custody of all children living with foster parents. Kinship foster parents are subject to regulation by the local child welfare agency and federal and state guidelines. They also are vulnerable to removal of children from their homes because they are not the parents of the children. And while until recently, the regulations regarding certifica-

tion of kinship foster parents have been more lenient than those for non-kin foster parents, implementation of the Adoption and Safe Families Act (ASFA)<sup>24</sup> may necessitate one set of rules for both kin and non-kin foster parents.

ASFA has placed added pressure on child welfare systems to quicken the pace of adoption. To meet this goal, states are increasingly providing permanency alternatives for kinship foster parents. These alternatives, commonly called subsidized guardianship, usually continue a stipend, based solely on the needs of the children, to replace the foster care support previously available to the family.<sup>25</sup> Missouri now offers a stipend to all grandparent caregivers including non-foster parents.<sup>26</sup> Subsidized guardianship is not available in New York.<sup>27</sup>

## I. B. 1. Maintaining Custodial Relationships

Unlike parents, third-party custodians (both formal and informal) do not have a fundamental constitutional interest in the permanency of their relationship with the children. Regardless of the nature of the legal relationship between the grandparents and the children, the grandparents’ interests are subordinate to the interests of the parents. If the caregivers do not have court orders, parents can simply demand the return of the children and, if necessary, obtain assistance from law enforcement. In such instances, the grandparents’ only recourse is to seek an *ex parte* custody order to delay the return of the children to their parents. If the caregivers have court orders, then the parent’s demand must start with a court petition. Either situation results in a “third party custody dispute.”

In third party custody disputes, New York State courts require an initial finding of “extraordinary circumstances” before the court can consider the usurpation of parents’ rights. Once extraordinary circumstances have been found, the court evaluates the “best interest of the child” to determine custody. New York State courts require an initial finding of “extraordinary circumstances” in order to insure that the state does not usurp parents’ rights. Once extraordinary circumstances have been found the court will evaluate the “best interests of the child.” “Extraordinary circumstances” include parental unfitness, persistent neglect or abandonment. In *Bennett v. Jeffreys*,<sup>28</sup> the N.Y. Court of Appeals added “an unfortunate or involuntary extended disruption of custody” to the list of extraordinary circumstances.<sup>29</sup> In *Bennett*, a teenage mother had relinquished her newborn to a family friend under pressure from her mother. After seven years, she sought custody of the child. The Court decided

that the length of time in the care of the third party constituted an extraordinary circumstance and that it was in the child's best interest to remain in the only home she had ever known. This additional "extraordinary circumstance" requires a finding of both an uninterested parent and a prolonged stay with a non-parent.<sup>30</sup> The questions that haunt custodial grandparent caregivers are what will courts consider an "uninterested" parent and what length of stay with the grandparent will be required to warrant a finding of extraordinary circumstances.<sup>31</sup>

A number of states other than New York consider that after a certain length of time in the care of someone other than the parent, only the best interest of the child should be considered when deciding a custody dispute. Two states, Indiana and Kentucky, protect the security of grandparent caregivers and their grandchildren by deeming the grandparents to be "de facto custodians." When a child has been in the care of a grandparent for a certain amount of time, that caregiver has equal status with a parent in a custody dispute.<sup>32</sup> Guardians are also subject to custody challenges by parents.<sup>33</sup>

## I. B. 2. Notification of Non-custodial Grandparents

A source of insecurity for non-custodial grandparents is that they have almost no rights to notification of custody, guardianship or adoption proceedings involving their grandchildren and may find, after the fact, that the children are in the legal control of others. A few states, like Florida,<sup>34</sup> provide for notification of adoption proceedings to grandparents if they have been primary caregivers for a certain period of time in the past. Once grandparents do find out about the legal custody, guardianship, or adoption of grandchildren, they can still petition for visitation under the grandparent visitation statute.<sup>35</sup>

## II. Limitations on Public Benefits

Public benefit programs use broad definitions of caregivers, but these definitions are not uniform, and sometimes can leave out certain relatives, as well as grandparent caregivers.

### II. A. Financial and Other Assistance

Temporary Assistance to Needy Families (TANF) provides that

an allowance may be granted to the aid of such child who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or

mental incapacity of a parent, and who is living with a person related to him by blood, marriage, or adoption eligible to receive aid to dependent children on his behalf pursuant to the federal social security act, the provisions of this chapter and regulations of the department.<sup>36</sup>

TANF grants may be based on the resources of both indigent caregivers and children, or of indigent children alone. Because both parents have a duty to support their children and their income is deemed available to their children, grandparents who adopt the children (and who are ineligible for public assistance because they have excessive income) will lose TANF grants based only on the income of the child.<sup>37</sup>

Regulations for the Food Stamp Program use the "household concept" for eligibility and benefit determinations.<sup>38</sup> Unlike TANF, children's applications cannot be separated from the application of their caregivers. Together they are considered as one household unit because children necessarily eat with the persons with whom they are residing.

The Child Health Plus Program, which provides health insurance to low-income families for children that do not qualify for Medicaid, uses a broader definition of caregiver, permitting any person upon whom a child is dependent to apply for the program, but the caregiver's income is counted in determining whether any premium must be paid.<sup>39</sup>

Other types of assistance use other definitions. Some categories are under-inclusive, not including full-time caregivers who are great-grandparents, step-grandparents, and aunts and uncles. The Internal Revenue Service grants an Earned Income Credit for a dependent child to an adult who has a "qualifying child," that is, a child who is: (1) a son, daughter, adopted child, grandchild, or stepchild; (2) under age 19, or under age 24 and a student, of any age and disabled; and (3) lived with the caregiver for more than one-half of the year. The Earned Income Credit is also available for any "foster" child, defined as any "child you cared for as your own child" for the entire year.<sup>40</sup>

Under the Social Security Program, children are ineligible for benefits based on earnings of their grandparent caregivers unless they are living full-time with their grandparents when the application for retirement benefits is made *and* the natural parents are dead or disabled, or the children are adopted, or considered to be adopted under the doctrine of equitable adoption. These limited circumstances omit many of

the common grandparent or relative caregiver situations.<sup>41</sup>

## II. B. Housing for Multi-generational Families

Housing for aging caregivers of young children also poses many legal problems. Multi-generational housing has yet to become a policy priority. In New York City, senior housing units subsidized by the federal Housing and Urban Development Corporation are generally too small for families, and although the New York City Housing Authority has 42 buildings with senior housing, children are excluded. Grandparents in subsidized senior housing lose eligibility when children move in or the increase in their family size creates ineligibility.<sup>42</sup>

Efforts to provide special housing for grandparent caregivers are at the startup phase. In Manhattan, Presbyterian Senior Services is developing a 65-unit apartment building at 163rd Street and Prospect Avenue specifically for grandparents raising grandchildren. This project is modeled on the successful Grandfamilies House in Boston,<sup>43</sup> where extensive in-house services are offered along with apartment units tailored for elderly caregivers. The Buffalo municipal housing authority also is developing a plan to build housing for grandparent-headed families. For grandparents who live in "Naturally Occurring Retirement Communities" (NORCs), defined as housing in which seniors have aged in place and where over 50% of the seniors have below median income, services are now being developed which could include targeted services for seniors raising children.<sup>44</sup>

## III. *Troxel v. Granville*: A Case For Grandparent Visitation Rights

On June 6th, the Supreme Court of the United States ruled in *Troxel v. Granville*<sup>45</sup> that the State of Washington's visitation statute was unconstitutional. Many media accounts portrayed this decision as a denial of visitation rights to all grandparents. Contrary to the claim of victory by parents' rights organizations, the American Association of Retired Persons (AARP) and the Brookdale Center on Aging's Grandparent Caregiver Law Center among others, noted that the decision did not substantially diminish grandparents' rights. Clearly, the decision in *Troxel v. Granville* does not amount to a clear cut victory for either side. Parents retained their protected liberty interests (although arguably not as strongly protected as before *Troxel*), and grandparents did not gain a right to visitation but retained their privilege to seek visitation (although subject to some judicial deference to parental denial of visitation).

Under review was the decision of the Washington State Supreme Court<sup>46</sup> which found its visitation statute unconstitutional because of its broad scope and failure to mandate a finding of harm to a child that would justify state interference. The Washington State visitation statute permitted "any person" to petition a superior court for visitation at "any time."<sup>47</sup> It contained no limiting conditions or threshold tests, and permitted judges to base their decision solely on the best interests of the child without consideration of the parent's wishes. At stake was a petition for visitation by the paternal grandparents for increased visitation with their deceased son's two daughters, who live with their mother Tommie Granville and their adoptive father.

## III. A. Conflicting Interests in Third Party Visitation

In the arguments leading up to the Supreme Court's decision, numerous conflicting interests and standards were put forth. Differences in the definition of family and the rights of parents, children, and relatives were argued alongside differing views of what constituted state interference, what justified state interference, and whether the best interest test sufficiently protected the parties', the child's, and the state's interests.

The controversy evoked strong opinions from the public. *Troxel v. Granville* drew a great deal of media attention to the role that grandparents play in the lives of their grandchildren. The legal issues often involve visitation rights when the child's family changes through death, divorce or remarriage.<sup>48</sup> Needless to say, when grandparents must seek visitation through the courts, discord and acrimony are rampant in family relations, and parents already feel under attack.

But unlike other states, Washington State's visitation statute was not just about grandparents, parents, and grandchildren. The U.S. Supreme Court noted that Washington State's grant of permission to "any person" to petition for visitation with children was "breathtakingly broad" and that visitation could be ordered if found to be in the child's best interest without deference to the parents' authority.<sup>49</sup> Other states limit the privilege of seeking visitation to grandparents under certain circumstances, such as visitation sought by the grandparent after the death of the child's parent. These visitation rights are sometimes considered to derive from the right of the deceased parent. In addition, many state statutes permit grandparents to seek visitation when one of the living parents of the child opposes visitation. Only a few states permit a visitation proceeding when both parents oppose visitation.

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In many states, grandparents must also show that they had a relationship with their grandchildren, or were prevented by the child's parents from having a relationship with their grandchildren, in order to seek visitation.<sup>50</sup> Other states limit the right to seek visitation to grandparents who were full-time (primary) caregivers. Once the requirements for standing to seek visitation are satisfied, however, all states use the best interest of the child standard to decide visitation rights. Some statutes explicitly require deference to parental decisions, and judges commonly apply a rebuttable presumption that parents act in their child's best interest.<sup>51</sup>

In this case, the Troxels, parents of the deceased father, had sought increased visitation with their son's out-of-wedlock children who live with their remarried mother. The mother, Tommie Granville, had agreed to the grandparents visiting their grandchildren once a month, but the Troxels wanted more. Unfortunately, not only was the statute unrepresentative of other state statutes, but the issues were further complicated by the grandparents' request for additional visitation.

The potential stakes were so high that over twenty *amici curiae* filed briefs by the end of November 1999. If the Court's decision had found the Washington State statutes unconstitutional on broader grounds, visitation between tens of thousands of grandparents and grandchildren could have ended.

### III. B. Which Standard of Review?

In reaching its decision, the U.S. Supreme Court rejected at least two standards of review. Until this decision, the due process clause of the Fourteenth Amendment had generally been considered to include protection of parental autonomy as a fundamental liberty interest. In order to justify state intrusion, states must have a compelling reason, such as the prevention of substantial harm to children. The Washington Supreme Court had followed this standard and declared that the U.S. Supreme Court's earlier decisions clearly indicated that to comply with the U.S. Constitution's guarantee of privacy, non-parent visitation statutes must require proof that the absence of visitation will harm the child.<sup>52</sup> The Washington Supreme Court decided that the loss of contact between grandparents and grandchildren did not rise to the level of harm contemplated by the past rulings of the United States Supreme Court. The Washington Court also found the statutes at issue overly broad, both in the class of persons who could petition and in the lack of any threshold conditions.

The Washington Supreme Court's dissent asserted that parents' rights are not absolute and that the level of interference with those rights concerning visitation did not rise to the level of a compelling state interest. According to the Washington dissent, the U.S. Supreme Court cases cited by the majority combined family autonomy with another fundamental interest.<sup>53</sup> Since no other fundamental interest of the parents needed protection, harm was the wrong standard, and in its absence, the best interest test was a sufficient safeguard of the children's and parents' interests.

In addition, the Washington Supreme Court decided that because the statute failed to contain a requirement that the court must find harm to the child before ordering visitation, the statutes *on their faces* violated the U.S. Constitution. During oral arguments on January 12th, both Chief Justice Rehnquist and Justice Scalia referred to the facial challenge, but the remarks of the Justices left unclear whether they would base their decision on the facial challenge. Neither the harm standard nor the facial challenge eventually provided the basis for the Supreme Court's decision.

Faced with uncertainty regarding the standard and scope of review, the briefs of the parties and the *amici* covered a wide range of arguments, some focusing on what constitutes harm, interference, and even family, and others addressing whether the best interest test adequately protects the interests of all of the parties. Briefs also considered the nature of the interests of parents, grandparents, children, and states. Both parties in oral argument spent considerable energies debating whether the best interest standard sufficiently protected the parents' interests.

### III. C. For the Parent, Tommie Granville

*The Coalition for the Restoration of Parental Rights* argued that neither precedent nor justification exists for granting grandparents the right to impose their will on parents, and that the coerced removal of children from the parent's custody is a greater interference than those interferences which the Court previously found unjustifiable. Furthermore, they argued that the visitation proceeding itself is a cause of substantial harm to children.

*The Domestic Violence Project et al.* also asserted that the threshold of parental unfitness had not been crossed and that, absent such a finding, "intrusions" into parental authority are not "acceptable." To permit state legislatures to define fundamental constitutional rights would create different fundamental rights in different states.

*The National Association of Counsel for Children* focused on the Washington State statutes' failure to provide threshold tests that would inhibit standing by any person under any circumstances. The Association saw this as placing an impermissible burden on parents. However, the Association asked that the Court defer judgment on children's rights, because this case is the wrong vehicle for a sweeping decision.

*The Christian Legal Society and the National Association of Evangelicals* conceded that narrowly drawn grandparent visitation statutes could serve a compelling state interest. They argued, however, that the Fourteenth Amendment's Due Process Clause protects the autonomy of the family, providing "fundamental rights" that warrant strict scrutiny, not a "sliding scale." This right is doubly protected in this instance because it is combined with another fundamental right, free speech, inasmuch as parents must be free to communicate their values, a form of "expressive communication" protected by the First Amendment.

### III. D. For the Grandparents, the Troxels

*The National Conference of State Legislatures, Council of State Governments, National Association of Counties, U.S. Conference of Mayors, et al.* argued that the Washington Supreme Court applied the wrong standard and that the Supreme Court's precedents actually did not require strict scrutiny. "Absent infringement of some other constitutional right, State action which implicates the parental liberty interest in bringing up children must be sustained if it has a reasonable relation to some purpose within the competency of the State." (citing *Wisconsin v. Yoder*).

*Grandparents United for Children's Rights, Inc.* proposed that children had the right to "liberty and protection in maintaining relationships with their grandparents" and that the best interest standard protected this right.

*The AARP* pointed to the far-reaching consequences of the Court's decision and argued that the fragmentation of family life necessitated extraordinary efforts to provide children with stability. Furthermore, the AARP argued that states had not awarded grandparents any rights, but the opportunity to provide a benefit to children. The AARP also found the intrusion not a "substantial infringement of parents' rights."

Finally, *the Grandparent Caregiver Law Center of the Brookdale Center on Aging at Hunter College* argued that visitation statutes were inherently concerned with the harm caused to children by the forcible cessation of contact with persons who had established loving rela-

tionships with them and that the state interest in preventing this harm justified an inquiry into the best interest of the child.

### III. E. Oral Arguments

In January's oral arguments, the Justices, six of whom are grandparents, focused their questions on the need for finding a harm to be prevented and whether the best interest test adequately protects parental interests. Justice O'Connor opened with an inquiry about harm to the child. But the attorneys for both parties continued to center their arguments on the best interest test. The grandparents' attorney argued that harm was not the touchstone of the case because intrusion on the family was minor, that the liberty interest had adequate protection, and that the best interest standard provided the best outcome. The Justices appeared skeptical of these assertions. The parent's attorney argued that deference to parental child-rearing should make the subjective intention of the parent (to act in the child's best interests) the measure of what is in the child's best interests. Justice Scalia expressed incredulity at the use of a subjective standard.

When the U.S. Supreme Court finally rendered its decision, the Court attempted to incorporate much of the arguments put forth by both sides, and the ruling appears more important for what is implied than asserted.

### III. F. The Supreme Court's Decision

Justice Sandra Day O'Connor authored the plurality opinion which was joined by Chief Justice Rehnquist and Justices Ginsburg, and Breyer. Justices Souter and Thomas wrote separate concurrences; and Justices Scalia, Stevens, and Kennedy authored separate dissents.

Commentators originally thought the U.S. Supreme Court had accepted review because a conflict regarding the constitutionality of visitation statutes had arisen. The Supreme Court of Washington State had agreed with Florida, Kentucky and Tennessee in finding their visitation statutes unconstitutional.<sup>54</sup> Other states had reached the opposite conclusion.<sup>55</sup> In states that declared their visitation statute unconstitutional, reasoning was centered on the need for states to find harm to the child.

Instead of resolving the issue, the plurality declared that the constitutionality of visitation cases should be decided on a case by case basis—not by examining the statute *per se*, but by examining the particular application of the statute to a particular case.

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This declaration amounts to a victory for grandparents because no state statute automatically becomes unconstitutional.

Nevertheless, the language of the opinion contained statements extremely favorable to parental rights. Justice O'Connor wrote: "[S]o long as a parent adequately cares for his or her children (*i.e.* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." This would appear to settle the question in favor of the parent, Tommie Granville whose fitness was not in question, except that in her next sentence, Justice O'Connor declared that in this case intervention is permissible. Justice O'Connor found the application of the statute unconstitutional because the trial judge "gave no special weight at all to Granville's determination of her daughters' best interests." This strongly suggests that so long as courts apply a presumption that a parent's denial of visitation is in the child's best interest, fit parents receive adequate protection from unwarranted state interference. Thus, judicial decisions that contain explicit explanations of why the presumption has been rebutted should be constitutional.<sup>56</sup>

The Court apparently chose not to limit all state interference with families to instances where parents were unfit. The plurality opinion circumvented the necessity for proof of parental unfitness, and two dissenters clearly did not limit state interference to unfit parents. Justice Kennedy's dissent recognized that there could arise cases "in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto." Justice Stevens considered that the trial judge had given sufficient deference to the parent's denial of visitation. He also asserted that there may be instances where a child's interest deserves protection even if it is not directly related to a potential harm to the child.

Six justices wrote *dicta* that conceivably could permit state statutes to increase the class of persons who may seek visitation to include persons who assume parental duties. The plurality mentioned favorably the possibility that grandparents and other relatives who have undertaken "duties of a parental nature" might seek visitation. Justices Kennedy and Stevens suggested that grandparents and persons who acted as caregivers may seek visitation.

The Court appeared to search for a way to balance the interests of parents and those who had substantial

relationships with children. The plurality noted that the "cost" of permission to seek visitation was the burden placed on parent-child relationships. Other opinions admitted that under a number of circumstances state intervention is permissible so long as the causes for interference sufficiently outweigh the reasons for the parent's denial of visitation. In effect, the Court left open a wide avenue for grandparents and other relatives to pursue visitation.

While the plurality opinion noted that the "breathtakingly broad" statute permitted "any person"—"at any time" to seek visitation, the four Justices did not base their ruling on the statute's broadness, although their comments make it likely that statutes this broad would be found unconstitutional.

Interpretation of the Court's decision is assisted by recognizing what the Court chose not to do. The plurality chose not to address the need for a finding of harm, but rather validated the use of a rebuttable presumption as a sufficient safeguard of parental interest. Justice Souter affirmed the facial unconstitutionality because he saw the class of persons who could seek visitation as too broad. He too chose not to address the harm issue. While Justices Kennedy and Stevens addressed this issue, they rejected the harm standard as too confining and not an accurate reflection of the Supreme Court's previous rulings. Justice Scalia not only did not address the harm standard, but he did not comment on any test, because he would leave visitation statutes squarely in the hands of state legislatures. He declared that parental interests were not mentioned in the Constitution and thus are not a proper subject for the Supreme Court's review. Although Justice Thomas did not expressly refer to the harm standard, he alone opined that strict scrutiny was the proper standard of review, and therefore implicitly limited state interference to situations where there is a potential for harm to the child. The reasoning of the case appears to quiet the debate over the harm standard while tacitly avoiding a direct renunciation of it.

While the Supreme Court's ruling leaves much that can be implied and little that is easily confirmed, it clearly safeguards state grandparent visitation statutes from constitutional challenges. Grandparents are not in danger of losing their visitation privileges.

In New York, to have standing to seek visitation, courts have interpreted the grandparent visitation statute to demand a showing by grandparents that they have a relationship with their grandchild or have been prevented by the parents from establishing such

a relationship.<sup>57</sup> This threshold test provides initial protection to fit parents from unreasonable petitions for visitation. Because New York's courts have coupled this threshold test with a strong reluctance to order visitation that is destructive to the parent-child relationship, the statute, as usually applied, offers little opportunity for a constitutional challenge. New York's grandparents will continue to be able to seek visitation, and they will continue to have an uphill battle to convince courts that their petition should be granted.

#### IV. Legislative Initiatives in New York State

Prior to the 1990s, New York was active in its pursuit of assistance for non-parent caregivers. In 1966, the State enacted the first grandparent visitation statute. In 1975, the State Legislature enlarged the conditions for seeking visitation and permitted grandparents to petition in the face of the united resistance of intact nuclear families; i.e., both natural parents. A year later, the N.Y. Court of Appeals recognized that under certain extraordinary circumstances non-parents could be awarded custody. In the late 1980s, the state enacted one of the first standby guardian statutes and was one of the first states to offer foster care payments to relatives.

For the past few years, a number of bills pertaining to non-parent caregivers have languished before the State Legislature. Some of these bills contain elements of a complete continuum—recognition, authority, security, financial and resource assistance—but until late March this year, comprehensive packaging had yet to emerge. The following is a summary of recent legislative initiatives in New York State related to grandparents and other non-parent caregivers.

**A07052/S6000 (Parental Authorization of Caregivers)** would provide for a written instrument similar to a power of attorney that would permit parents to sign over responsibility for school enrollment, attendance and activities, and medical decisionmaking, to any persons of their choice who are primary caregivers of their children. The parents would choose what authority to transfer and could revoke their authorizations at will. Any authorized caregiver possessing such a properly notarized instrument would have the authority to make most of the necessary day-to-day decisions for children in their care. Both educational and medical providers would be released from liability for their reliance on this authorization. This Bill could lessen the number of unnecessary family court petitions for custody or guardianship, because school districts and medical providers could no longer ask for

court orders before accepting a primary caregiver's authority.

**S2976 (Concurrent Kinship Adoption) and A4829 (Kinship Guardianship)** create new legal relationships for kinship foster parents and their charges. Both Bills predate the federal 1997 Adoption and Safe Families Act (ASFA) which placed increased emphasis on permanency planning for children in foster care, but which exempted kinship foster parents from that mandate. ASFA left kinship foster parents in a legal limbo, in need of alternative permanency plans.

"**Concurrent Kinship Adoption**" hybridizes adoption law and legal custody, enabling kin to adopt without terminating parental rights. Instead, concurrent custodial rights would be shared by both sets of parents with primary custody awarded to the new kinship adoptive parents. Kinship adoption may enable caregivers to qualify for the federal adoption subsidy.

"**Kinship Guardians**" would be ineligible for the federal adoption subsidy. In order for kinship guardians to qualify for federally subsidized guardianship, New York must seek a waiver from the federal government.<sup>58</sup> This Bill, like concurrent kinship adoption, permits parents to maintain visitation with children. Kinship guardians would be ineligible for the federal adoption subsidy, but if New York made application for permission to use federal money to pay for subsidized guardianship; the permanency outcome would be the same. This bill, like concurrent kinship adoption, permits parents to maintain visitation with children.

**S1970/A3328 (Grandparent Resource Centers)** would establish centers in each of the 59 local Area Agencies on Aging (AAAs). These centers would help link grandparents with relevant service delivery systems in the local community. They would be modeled on New York City's successful Grandparent Resource Center, part of the Department for the Aging. These resource centers could offer a hotline for information and referral, technical assistance and training for support groups, publications, educational seminars, and conferences.

**S1621/A2795 (great-grandparents) and S1531/A603 (step-grandparents)** would add great-grandparents and step-grandparents (in addition to grandparents) as persons authorized by Domestic Relations Law § 72 to petition either the supreme courts or family courts for visitation with children. Both Bills deal with the reality of our fragmented families. In the past, these Bills have passed one of the

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houses. However, no movement on these two Bills may be possible until the Supreme Court of the United States renders its decision on grandparent visitation sometime this June.

**A2542** would extend the list of persons who can seek visitation to include any relative within the third degree of consanguinity. Like grandparent visitation, the constitutionality of this measure will be affected by the pending U.S. Supreme Court case.

**S4058/A1888** would allow grandparents who have the written permission of their grandchildren's parents or persons having legal custody to participate in school parent associations or parent-teacher associations in New York City.

**S4887/A5038** would require that authorized adoption agencies provide to the court a signed statement from the adoptive parents, acknowledging that the natural grandparents could retain visitation rights after the adoption of their grandchildren.

**S3394** would create a commission to study the need for an increase in compensation for law guardians and assigned counsels. Increased compensation is backed by Chief Judge Judith Kaye who made it part of her recommendations to the Committee to Promote Public Trust and Confidence in the Legal System. Oftentimes, grandparents feel that their role as caregivers is not understood. For law guardians and assigned counsels in family courts, the compensation increase would strengthen their ability to adequately represent families.

**A120/S255** would raise the maximum age of male persons in need of supervision to 18. Family courts would have jurisdiction to supervise both males and females until they reached this age. Boys, between 16 and 18, who were runaways or difficult to control, would now come under the jurisdiction of family courts, and caregivers would have court assistance in controlling them.

**A10429**, the "Grandparents Guardianship Act," would solve numerous problems that grandparent caregivers confront in family courts, the foster care system and public assistance. The Bill would create a specific legal status, called grandparent guardianship, apart from legal custody or guardianship, with safeguards against unwarranted reunification and loss of visitation (by defining the period of time in a grandparents' care that warrants a presumption that it is in a child's best interest to remain in their care). Also provided are a stipend, equal to 75% of the foster care rate, for grandparent guardians, and assigned counsel to

grandparent guardians in legal custody, guardianship, adoption, and visitation proceedings. When child welfare personnel approach grandparents to take over the care and custody of children, this Bill requires written acknowledgment from grandparents that they do not want to seek to become kinship foster parents. This acknowledgement would insure that caregivers had the chance to become kinship foster parents.<sup>59</sup> The Bill also adds provisions for the creation of grandparent resource centers in each county office for the aging.

This bill combines provisions from the most recent legislation around the country with other comprehensive solutions to many of the legal problems grandparent caregivers are facing. Based on the principle that just as parents are the natural guardians of their children, so too are grandparents their natural substitute guardians, the Bill affirms that grandparents are doing the job that the state would have to do, but for their sacrifice. While there are still other issues, like respite<sup>60</sup> and child care, the proposed Grandparent Guardianship Act would offer great relief to overburdened elderly caregivers and reflects many of the solutions recommended by the Grandparent Caregiver Law Center.

### V. Resources for Caregiving Grandparents

Assistance for grandparent caregivers includes support groups, referral services, and newsletters. The following is a short review of some of the programs now available in New York State.

- *The State Office for the Aging (SOFA)* offers technical assistance to county area offices on aging in setting up grandparent support groups and also publishes a statewide newsletter, called "Kincare Connection."
- *Cornell Cooperative Extensions, Catholic Charities, the Jewish Board of Family and Children's Services, and the Federation of Protestant Welfare Agencies* all offer assistance.
- Grandparent organizations, like *Grandparents Reaching Out* on Long Island and *Miracle Makers* in Brooklyn, provide both support groups, some respite services, and legal referrals.
- *The New York City Department for the Aging (DFTA)* has a very successful Grandparent Resource Center. The Center helps to set up support groups, publishes reference materials, including a resource guide, and provides a helpline.

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- The *Brooklyn Grandparents Coalition* publishes its own newsletter (many organizations are doing this) and has an extensive array of activities and services for grandparents.
- *Family Services of Westchester* created a county reference guide that other counties now use as a template for their own guides.
- *The Brookdale Foundation* offers limited financial support for agencies interested in developing programs for caregiving grandparents.

### VI. About the Grandparent Caregiver Law Center

The Grandparent Caregiver Law Center (GCLC) of the Brookdale Center on Aging of Hunter College, CUNY, is a not-for-profit program, funded with support from the Interest on Lawyer Account (IOLA) Fund of New York State and private foundations. The program is unique in the United States because it combines research and policy analysis with hands-on assistance to grandparent caregivers and to professionals who help address the grandparents' real-world problems. Although there are growing numbers of support groups for grandparents, often initiated by social service agencies, which focus on grandparent caregivers, no other existing organization has this particular combination of legal and practical problem-solving expertise.

The GCLC, a member of the multi-agency Kincare Taskforce of New York City, is the major source for legal information on issues related to grandparents in New York State. The Center offers assistance to non-attorney advocates, public schools, religious institutions, the aging services network, the child welfare system, legislators and other government officials, legal professionals, and individual grandparents concerning their rights and authority in the absence of the children's parents. The Center has contributed to successful outcomes of family disputes for countless numbers of grandparents, improving the well-being and future prospects for the children involved.

The Center publishes a series of booklets for grandparents in English and Spanish, and has written professional articles and county reference guides for grandparents in New York State. The materials are subject to ongoing legal and editorial review to insure that they remain up to date. In addition, a monograph written by the current director, Gerard Wallace, "*The Dilemma of Kinship Care: Grandparents as Guardians, Custodians and Caregivers—Options for Reform*," has been

published by the Government Law Center at Albany Law School. Most recently the Center's Director submitted an *amicus curiae* brief to the Supreme Court of the United States in support of the rights of grandparents to request visitation with their grandchildren. The brief was featured in the monthly "Supreme Court Debates," published by the Congressional Digest.

### Endnotes

1. While grandparents naturally have a special relationship with their grandchildren, many others, both relatives and non-relatives, are providing care. In this Article, reference is usually made to grandparent caregivers; however, the legal issues, other than visitation, are fairly similar for grandparents and other non-parental caregivers.
2. *Santosky v. Kramer*, 455 U.S. 745 (1982), *on remand*, 89 A.D.2d 738, 453 N.Y.S.2d 942 (3d Dep't 1982).
3. Renee S. Woodworth, *You Are Not Alone . . . You Are One in a Million*, 75 Child Welfare League of America Journal of Policy, Practice, and Program 619, 631 (Sept./Oct. 1996).
4. While guardianship and legal custody offer legal recognition, they too present uncertainties about decision-making authority. For example, legal custody implies the ability to make medical decisions, but there is no statutory basis for this authority. See N.Y. Public Health Law § 2504. Also, both legal custody and guardianship are temporary and could be barriers to school admission and relocation of residence. See *In re Linton*, 12/18/98 NYLJ 38 (col. 3). In foster care, legal custody remains with the state which must authorize educational and medical decisions.
5. This phrase is used in both the Education Law and the Public Health Law. The Public Health Law omits step-parents. Both definitions omit legal custodians and full-time informal caregivers of children whose parents are present in the community. N. Y. Educ. Law § 3212 and N.Y. Public Health Law § 2164.
6. N.Y. Pub. Health Law § 442.
7. N.Y. Ben. Ord. Law § 2.
8. N.Y. Art & Cult. Aff. Law §§ 35.03(2)(c), 35.05.
9. N.Y. Civ. Prac. L. & R. § 309(a).
10. N.Y. Ins. Law § 4305(c)(1); See also §§ 3216 (a)(3), 4235(f)(1), 4304(d)(1).
11. N.Y. Educ. Law § 3212(2). See also N.Y. Educ. Law § 4111 (Indian child truant returned to person in parental relation; schooling record, issuance, person in parental relation); N.Y. Educ. Law § 3222 (school records); N.Y. Educ. Law § 4402 (Committee on Special Education can deal with person in parental relationship); N.Y. Educ. Law § 4107 (person in parental relation to an Indian child can be held criminally responsible for attendance), N.Y. Educ. Law § 4106 (duties of person in parental relation to Indian children). See also, Individual Education Plans (IEPs), 34 U.S.C. § 300.20(a). *But*, parents and guardians retain exclusive powers for some school situations. Only parents and guardians can consent to school drug testing, N.Y. Educ. Law § 912-a; receive tuition reimbursement, N.Y. Educ. Law § 562; consent for employment certificate, N.Y. Educ. Law § 3217, N.Y. Educ. Law § 2119 and farm work permits, N.Y. Educ. Law § 3226; and in attendance conflicts with religion of parent or guardian, can be absent from education, N.Y. Educ. Law § 3204.

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12. N.Y. Public Health Law § 2164.
13. The arrangements that parents and grandparents have created without state involvement exist apart from lawful custody as it is defined in the Domestic Relations Law. However, they are a form of “custody” and in practice family courts recognize the person who has informal custody and provide notice to “a party having care, custody, and control,” N.Y. Dom. Law § 71 and “any person who has physical custody,” N.Y. Dom. Rel. Law § 75-e. *But see* N.Y. Civ. Prac. L. & R. § 1201. Regarding the authority of informal caregivers, statutes offer only limited powers. Statutes permit the delegation of parental authority for transfers of “care and custody” to the local social service department, N.Y. Soc. Serv. Law § 384-a(1), and for certain recreational activities, N.Y. Env’tl. Conser. Law §§ 1-0920, 1-0715.
14. N.Y. Gen. Oblig. Law § 5-1502I, “Personal Relationships and Affairs” provides that the agent may be appointed: “to do any other act or acts, which the principal can do through an agency, for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.” While it can be argued that this authority includes education and medical, in practice it has been used exclusively for financial needs. This subdivision specifically refers to real and personal property. N.Y. Gen. Oblig. Law § 5-1502I(14).
15. *See, e.g.*, D.C. Code Ann. § 16-4901.
16. UPC § 5-102.
17. Free tuition requires residence in the school district. N.Y. Educ. Law § 3202.
18. 34 Educ. Dept. Rep. 551, 603; 35 Educ. Dept. Rep. 61; *In re Moncrieffe*, 121 Misc. 2d 395 (Surr. Ct., Nassau Co. 1983).
19. In 1996, the Government Law Center (GLC) at Albany Law School mailed surveys to family courts, surrogate’s courts, and law guardians asking what were the practical distinctions between legal custody and guardianship of the person. The answers were often contradictory. Some respondents considered the two interchangeable or stated that the differences were obscure. *See* responses to the GLC questionnaire concerning the practical distinction between legal custody and guardianship, published in Appendix A of the report by Gerard Wallace and Megan Miner, “The Dilemma of Kinship Care: Grandparents as Guardians, Custodians, and Caregivers—Options for Reform,” Albany Law School Government Law Center, April 1998). *See also*, Sandra B. Edlitz, “Guardianship and Custody: Is There a Distinction?,” New York Law Journal (March 21, 2000).
20. *See, e.g.*, N.Y. Al. Bev. Law § 65-c (2)(b) (Only a parent or guardian can give alcoholic beverages to a person under the age of 21); N.Y. Al. Bev. Law § 99-f (Only a parent(s) or lawful guardian(s) can petition the liquor authority to obtain a special permit allowing any person under the age of 18 to perform as an entertainer in an establishment licensed to sell alcoholic beverages); N.Y. Civ. R. Law § 509 (Only a parent or guardian can provide written consent for the use of a minor’s portrait or picture for advertising purposes); N.Y. Dom. Rel. Law § 15 ( Only a parent or guardian may consent to the marriage of a minor, unless to the minor’s knowledge neither parent nor guardian is living, then the written consent of the “person under whose care or government the minor or minors may be before a license shall be issued”); N.Y. Ment. Hyg. Law § 9.90 (Only a parent or guardian or the mental hygiene legal service may consent to the transfer of a mentally ill minor); N.Y. Pub. Health Law § 1399-ff (only a parent or guardian can make a complaint regarding sale of tobacco products to their child); N.Y. Soc. Serv. Law § 384 (1)(d) (Adoption); N.Y. Veh. & Tr. Law § 2410 (Only a parent or guardian can allow an unattended child under 16 to operate an ATV upon their property); N.Y. Ins. Law § 321(c) (Only a parent or guardian can consent to release of medical information.); N.Y. Pub. Health Law § 2442 (Only a parent or guardian or a “person legally empowered to act on behalf of the human subject” may consent in writing to human research upon a minor); N.Y. Pub. Health Law § 2961 (18) and § 2967 (Only a parent [who has custody of the minor] or a legal guardian can consent to orders not to resuscitate). N.Y. Gen. Oblig. Law § 3-112 (Only a parent, guardian, local social services department, or foster parent is liable for property damages caused by a minor). In addition, the authority of non-parent legal custodians to make medical decisions is not routinely included in custody orders and no statutory authority permits them to do so.
21. *See, e.g.*, N.Y. Civ. Prac. L. & R. § 1201 (an infant can appear by representation in court only by his parent(s) guardian, or legal custodian).
22. *See, e.g.*, N. Y. Dom. Rel. Law § 15(2) (Parents or guardians can consent to marriage); N.Y. Dom. Rel. Law § 15 (“[I]f there is no parent or guardian of the minor or minors living to their knowledge, then the town or city clerk shall require the written consent to the marriage of the person under whose care or government the minor or minors may be before a license shall be issued.”); N.Y. Art & Cult. Affr. Law § 35.05 (Only a “parent or parents having custody, or other person having custody of the infant” may acquiesce to court approval of a contractual obligation binding an infant, or to obtain or consent to the employment or exhibition of such minor as a model); N.Y. Civ. Prac. L. & R. § 309(a) (A parent or guardian or “any other person with whom he reside” may be the recipient of personal service upon an infant); N.Y. Educ. Law § 3212 (Only a person in parental relation to a child can take charge of a child’s education). *See also* N.Y. Pub Health Law § 2164 (a similar definition of a person in parental relation to a child provides that such a person can consent to immunization).
23. N.Y. Surr. Ct. Proc. Act § 1726.
24. U.S. Pub. Law 105-89, enacted in November of 1997, lessened efforts to reunify children with parents convicted of certain felonies, mandated criminal record checks of all foster and adoptive parents and any one else who is residing in their homes, and compelled states to initiate termination of parental rights proceedings whenever a child was in the care and custody of the state for at least 15 of the past 22 months.
25. *See, e.g.*, Cal. Welf. & Inst. Code §§ 11360-11370.
26. Mo. Rev. Stat. § 208.029.
27. There are two bills that could provide for subsidies before the New York Legislature. *See* this article, Part V. Legislative Initiatives in New York State. The only mechanism in New York for softening the family disunity caused by relative adoption is N.Y. Soc. Serv. Law 383-c, which permits surrendering parents to condition their surrender on the agreement of the adoptive (foster) parents for continued contact between the natural parent(s) and the child(ren). Such agreements, unlike private placement adoption agreements, are legally enforceable.
28. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
29. *Id.* at 550.
30. Carol A. Creaky, Continuity of Residence as Factor in Contest Between Parent and Nonparent for Custody of Child Who Has Been with Nonparent—Modern Status, 15 A.L.R. 5th 692, citing *Bannister v. Bannister*, 81 App. Div. 2d 91 (1981 2d Dep’t). Courts will often couple the time period with the fact that the

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- child has a psychological bond with the third party or would be harmed by removal, but the extended disruption is the foundation for a finding of extraordinary circumstances.
31. Indigent grandparent caregivers with informal custody also are not assured of assigned counsel. Family courts usually do not provide counsel unless indigent grandparents have court orders. *See*, Family Ct. Act § 262. Courts usually will not find a prolonged disruption of custody when the parent remains in the grandparent's home, despite the assumption of parental duties by the grandparent.
  32. *See*, Indiana H.B. 1445 (1999) and Ky. Rev. Stat. Ann. § 403.270.
  33. *In re Linton*, 12/18/98, NYLJ, 38, (col.3).
  34. Fla. Stat. § 63.0425.
  35. N.Y. Dom. Rel. Law § 72.
  36. N.Y. Soc. Serv. Law § 349(B)(1).
  37. N.Y. Soc. Serv. Law § 349(C).
  38. Code of Rules and Regulations of the State of New York. Ch. II, Regulations of the Dept. of Social Services, Part 387, Food Stamps Program, § 387.1(w).
  39. For information, contact the Children's Defense League, 212-697-2323.
  40. I.R.S. Schedule EIC (Form 1040A) instruction booklet, at 2, 42. Note the expansive definition of "foster child."
  41. In deciding who has been equitably adopted, the Social Security Administration will include a child who is adopted by a surviving spouse after the death of a worker, and will accept any child deemed to be equitably adopted under state law. U.S.C. § 216. In New York, equitable adoption is possible in limited situations where the natural and adoptive parent(s) had reached an agreement before the death of the adoptive parents. *Rodriguez v. Morris*, 136 Misc. 2d 103 (Surr. Ct., Suffolk Co. 1987).
  42. Naomi Karp, *Legal Problems of Grandparents and Other Kinship Caregivers*, GENERATIONS, Journal of the American Society on Aging, Vol. XX, No. 1 (Spring, 1996).
  43. Boston Aging Concerns Young & Old United, Inc. (BAC-YOU) and the Women's Institute for Housing and Economic Development developed the project using an old YMCA building.
  44. For more information, contact the Department for the Aging, Senior Housing, at 212-442-0917.
  45. *Troxel v. Granville*, 530 U.S. \_\_\_ (2000). Supreme Court Docket # 99-138.
  46. *In re Smith*, 137 Wash. 2d 1 (1998).
  47. Former Revised Code of Washington § 26.10.160(3).
  48. Approximately one in ten grandparents have been primary caregivers for children. After the children are returned to their parents, those parents sometimes cease contact with the grandparents. Grandparents may then be forced to seek visitation in the courts to maintain contact with the grandchildren for whom they previously cared.
  49. Statutes in Hawaii, Massachusetts, Virginia, and Connecticut have laws permitting judges to grant visitation or custody to persons unrelated to children. For example, see Conn. Gen. Stat. Ann. § 46b-59. Courts in Wisconsin, Pennsylvania, and Massachusetts have granted some visitation to non-natural parents.
  50. N.Y. Dom. Rel. Law § 72 permits grandparents to seek visitation whenever "equity" would see fit. Courts have interpreted "equity" to give standing to grandparents who have had a relationship with their grandchildren or been thwarted by the parents from having such a relationship, despite the opposition of both natural parents.
  51. Stephen Elmo Averett, *Grandparent Visitation Right Statutes*, BYU J. Pub. L. (1999).
  52. *Citing Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Prince v. Massachusetts*, 321 U.S. 158 (1944).
  53. For example, parental autonomy and religious freedom, *Wisconsin v. Yoder*, 406 U.S. 204 (1972).
  54. Violated U.S. Constitution, *Brooks v. Parkerson*, 265 Ga. 189 (1995); violated state constitutions, *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn.1993) and *Beagle v. Beagle*, 678 So.2d 1271 (Fla.1996).
  55. Over a dozen states have found statutes constitutional. *See, e.g., King v. King*, 828 S.W.2d 630(Ky. 1992) (cert. denied). *See also*, Kathryn Katz, *Mandated Visitation with Grandparents in Intact Families: The Need for Reform*, Aging Matters, Government Law Center at Albany Law School (Winter, 1998).
  56. The Supreme Court cited the grandparents' attempt to increase visitation as an aggravating circumstance which combined with the trial judge's failure to apply the traditional rebuttable presumption favoring parental decisions resulted in the visitation order being unconstitutional.
  57. *Emmanuel S. v. Joseph E.*, 78 N.Y.2d 178 (1991). *See also*, Practice Commentaries by Alan D. Scheinkman, N.Y. Dom. Rel. Law § 72 (McKinney, 1999).
  58. The U.S. Department of Health and Human Services (HHS) has a five-year waiver program for funds available through Title IV-E of the Social Security Act. Eight states and the District of Columbia have received waivers.
  59. Many county child welfare agencies, despite the preference for kinship foster care in N.Y. Fam. Ct. Act § 1017(1) and N.Y. Soc. Serv. Law § 384-a(1-a), attempt to avoid offering kinship foster to grandparents. *See also*, State of New York Office of the State Comptroller, Division of Management Audit, Department of Social Services Kinship Foster Care Report, 95-106 (Nov. 22, 1996) and AFSA.
  60. The National Family Caregiver Support Program, part of the current proposed renewal of the Older Americans Act, provides funds for caregivers' respite. A percentage of this is earmarked for elderly relatives who are raising children. U.S. Sen. 707; H.R. 1341.

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# The View from a New York Private Practitioner in the Trenches: Rights of Grandparents to Visitation and Custody of Their Grandchildren

By Jerome A. Wisselman

Prior to the enactment in 1966 of Domestic Relations Law § 72, which for the first time permitted grandparents to seek visitation rights with their grandchildren, grandparental rights was a relatively obscure issue. Grandparents lacked standing to seek visitation at common law and, because there was no statutory basis upon which they could rely, they were deprived of the right to make an application for visitation.<sup>1</sup> Slowly given strength and relevance due to evolving social changes, grandparental rights has emerged over the last few decades as an important and visible area of law. The current matter before the U.S. Supreme Court, *Troxel v. Granville*,<sup>2</sup> is reflective of this emergence.



Today, grandparents are commonly involved with caring for their grandchildren. The death of a parent, divorce, drug or alcohol addiction of a parent, and the emergence of the two-income family are the most common underlying reasons for expanded grandparental involvement. Often, at the initial stages of this involvement, where there may be reasonable normalcy in the family structure, the grandparents are welcome relief-givers, who selflessly take on responsibilities they never dreamed of having at their stage of life. As time goes on, however, conflicts between grandparents and parents often develop. The subsequent breakdown in communication then leaves the grandchildren in the midst of the battlefield between their warring parents and grandparents, an unintended but often very real consequence of these disputes. Grandparents and their own children may become embroiled in litigation, ostensibly with a view towards insuring the best interests of the grandchildren, though the legal proceedings may exacerbate the already difficult situation between the family members. Depending upon the situation, grandparents may wish to petition the Court for visitation and, where warranted, custody of their grandchildren.

## Visitation

In 1966, the legislature enacted § 72 of the Domestic Relations Law<sup>3</sup> which for the first time granted grandparents the derivative right to seek visitation rights, but only where their child had died. The grandparents were, in effect, given the right to assume the role of their deceased child, whose death triggered their rights to petition for visitation.

In 1975, Domestic Relations Law § 72 was amended in two ways. First, grandparents on either side were now given standing to bring a visitation proceeding where *either* one of the child's parents had died. Second, grandparents were given standing "where circumstances show that conditions exist which equity would see fit to intervene." The amended statute rested on the principle that "visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild \*\*\* which he cannot derive from any other relationship."<sup>4</sup>

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*"Grandparents and their own children may become embroiled in litigation, ostensibly with a view towards insuring the best interests of the grandchildren, though the legal proceedings may exacerbate the already difficult situation between the family members."*

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Subsequent to the 1975 amendment, it was commonly accepted that "equity would see fit to intervene" when there had been an abdication of parental responsibility, or where there had been a breakdown of the nuclear family.

The Court of Appeals, however, in *Emanuel S. v. Joseph E.*,<sup>5</sup> concluded that the grandparents' right to seek visitation was independent of the status of the parents, even when the nuclear family was intact. However, standing in such a situation is not automat-

ic (as it would be where one of the parents had died), but, rather, to be conferred by the Court in its discretion, after, and only after, examining all relevant circumstances. The Court provided the following considerations to be reviewed by the lower court: the nature and basis of the parent's objection to the visitation and the nature and extent of the grandparent-grandchild relationship, specifically whether there is a sufficient existing relationship with the grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one.<sup>6</sup> Then, only after the Court has determined that standing exists, will the next step, determining whether visitation is in the best interests of the child, be reached.

Thus, in all grandparental visitation matters, a two-step test is involved. One, to determine if there is standing, whether automatic or discretionary. Two, if standing exists, whether it is in the best interests of the child to have visitation with the grandparents.

While antagonism between the parties in and of itself will not be a bar to visitation,<sup>7</sup> where the antagonism is *extreme* and caused largely by the grandparent, it has been held that standing had not been achieved, and even if it were, visitation would not be in the children's best interests.<sup>8</sup>

Likewise, antagonism coupled with family dysfunction may also serve to deny visitation rights.<sup>9</sup> Where grandparents have been critical and demeaning and refused to accept responsibility for deterioration of the parties' relationship, the Court has denied standing.<sup>10</sup> Mere fights between a parent and the grandparents, however, without any untoward conduct on the part of the grandparents, was not found to interfere with the grandparents' standing to pursue visitation.<sup>11</sup>

When grandparents must resort to the Court to see the grandchildren, a family's complicated emotional entanglement is at the root of the struggle. But where parents cut off a longstanding relationship between the children and the grandparents, that is a bitter pill to swallow for the children, who most often love their grandparents and have had no part in the conflict. In fact, cessation of that relationship may be psychologically damaging to the children.

### **An Order of Custody May Be the Answer**

In many situations, visitation is not a sufficient or appropriate remedy for the grandparent or the grandchild. This may particularly be so where the grandparent has been raising the grandchild or where the parents are unable to take care of their own children.

Commonly in these matters the parents are addicted to drugs or alcohol, or unable to cope with everyday life struggles and drift in and out of their children's lives, while the grandparents provide the stability vital to the grandchildren's emotional and physical health. Then, when years have passed, after the grandchildren have become rooted in their daily lives in the grandparents' home and community, the parents suddenly appear at the doorstep to "reclaim" the children, regardless of how this would affect the children.

To remedy this, a grandparent may apply for an Order of Custody of the grandchildren. However, this is not an easy matter to achieve. Courts do not like to intrude into the natural custodial relationships between the parents and their children. When confronted with an application for custody by a grandparent or non-parent, the Courts apply rigorous requirements before issuing such an order.

As with visitation, the Court of Appeals has provided a two-step procedure concerning custody disputes between the grandparent and a parent.<sup>12</sup> The grandparent must show:

- (1) Extraordinary circumstances exist to warrant proceeding to step (2).
- (2) If such extraordinary circumstances exist, a hearing will be held to determine whether it is in the best interests of the children to be in the custody of the grandparents, or the parents.

If extraordinary circumstances are *not* shown to exist, the grandparents will not get to step two. If, however, such circumstances *are* shown to exist, then a hearing will be ordered, with a determination to be made "in the best interests of the children." It is important to remember that this test is not reached unless the threshold determination is first made, that extraordinary circumstances exist. The fact that a grandparent can do a "better job" of parenting is not relevant to step one, and it will not, alone, serve as a basis for a custody award to the grandparent.

"Extraordinary circumstances" include situations where it can be shown that the parent is unfit, and has been held by the Courts to include, but is not limited to:

- (1) Persistent neglect and abuse of child;
- (2) Abandonment or surrender of the child;
- (3) Psychological disturbances requiring frequent hospitalizations;

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- (4) Persistent drug problems and admissions to drug or alcohol rehabilitation clinics;
- (5) Incarceration;
- (6) Other conduct showing substantial disengagement with the child.

Where it is shown extraordinary circumstances exist, and that is in the best interests of the child to be with the grandparent, then the custody should be given to the grandparent.

A history of domestic violence and drug use by a biological father has served as a basis for the Court finding extraordinary circumstances.<sup>13</sup> Likewise, a voluntary surrender of a child by the father, and subsequent relinquishment of the child, has served to constitute extraordinary circumstances.<sup>14</sup> A period of prolonged custody of a child in the child's grandmother's acquaintance, together with the psychological bonding which had taken place and the potential for emotional harm if custody were transferred to the mother, served as a basis for awarding custody to the acquaintance.<sup>15</sup> The existence of the mother's chronic schizoid personality coupled with a protracted separation of the mother from the child and the attachment of the child to the father's fiancée warranted finding of exceptional circumstances and granting of custody to the nonparent fiancée.<sup>16</sup> However, it was also found that the protracted separation of a child from his father, without being coupled with any evidence of psychological trauma to the child by being removed from an aunt's custody, was not an extraordinary circumstance where father sought custody immediately after the mother's death.<sup>17</sup>

It is often difficult to determine exactly what circumstances will qualify as "extraordinary." Each judge may have a different interpretation of this. And even if you have an idea of what a particular judge may use as a benchmark, slight differences in the facts of a particular situation may lead to different results.

As a general rule, if the grandparents feel resolved in their hearts that it will be in the best interests of the grandchildren to be raised by them, it is time to move forward and assess whether extraordinary circumstances exist. Often the intangibles, such as motivation and commitment to achieve a result, can help the grandparent over the threshold in establishing the elements required to gain custody. It is not uncommon for the parents to end up consenting to the grandparents having custody where the parent does not wish to, or cannot afford to, engage in litigation, or where other life concerns are a priority to the

parent. In other words, if the grandparents set the process for custody in motion, they may succeed because they meet the required tests, or because of the energy of the process itself. Determination, tempered by discretion, and coupled with a reasonably sound basis in fact, may lead to successful results. Grandparents are cautioned, however, to take such a position *only* when they earnestly believe the grandchildren will suffer detriment if left in the hands of the parents.

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*"[I]f the grandparents feel resolved in their hearts that it will be in the best interests of the grandchildren to be raised by them, it is time to move forward and assess whether extraordinary circumstances exist."*

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### Public Involvement in Grandparental Issues Is Increasing

Great strides are being made to understand the nuances of, difficulties of, and needs of, grandparents involved with caring in one way or another for their grandchildren. Organized seminars and conferences in which these matters are being addressed are becoming regular occurrences. Legislators and other public officials are becoming more actively involved in learning how to help families deal with the legal, financial, and social issues which confront grandparents raising their grandchildren. However, further education is still necessary for those professionals involved with making decisions or having influence on these matters.

### U.S. Supreme Court Decision in *Troxel v. Granville*

The U.S. Supreme Court has determined that the manner in which a broad-based Washington State statute, RCW 26.10.160(3) was appealed was unconstitutional. The statute provides as follows:

Any person may petition the Court for visitation rights at any time including, but not limited to, custody proceedings. The Court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

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Grandparents around the country were waiting with baited breath for the Court's ruling in *Troxel v. Granville*,<sup>18</sup> the facts of which follow:

Natalie Troxel, 10 years old, and Isabel Troxel, 8 years old, are the children of Brad Troxel and Tommie Granville, and the grandchildren of Jennifer and Gary Troxel. Brad and Tommie were never married. Their relationship ended and they separated in June, 1991, when Natalie was one and one-half years old and six months prior to Isabel's birth. After the separation, Brad lived with his parents and regularly brought Natalie and Isabel to the paternal grandparents' home for weekend visitation.

In May 1993, Brad committed suicide. Thereafter, the grandparents saw Natalie and Isabel regularly, though not overnight. In October 1993, the mother informed the grandparents that she did not want them to see the children more than one short visit per month. The grandparents didn't agree with this, and as a result were not permitted to see the grandchildren at all between October and December 1993.

In December 1993, the grandparents commenced an action pursuant to the Washington statute seeking Court-ordered visitation with their granddaughters. They were granted visitation by the lower court, as follows: one weekend per month from Saturday, 4:30 p.m. until Sunday, 6:00 p.m., one week during the summer, and visits on each of the grandparent's birthdays.

The mother appealed, objecting to overnight and summer visitation. During the appeal, the mother married Mr. Wynn, who later adopted Natalie and Isabel. The Court of Appeals of Washington, based on a standing argument made by the mother, revised and modified the visitation order in accordance with her request. The Washington Supreme Court then granted a review of the matter and, in December 1998, held that the underlying statute, RLW 26.10.160(3) was unconstitutional, thereby vacating the original visitation order in its entirety. The U.S. Supreme Court affirmed the decision of the Washington Supreme Court but only as to how statute was applied to the particular case before it. The Court did not rule on due process arguments of parents and grandparents and did not rule that grandparental visitation statutes were unconstitutional. This clearly supports the position of grandparents. However, the Court's language also recognized the presumptive right of birth parents to decide with whom their children should visit, subject, of course, to rebuttal in appropriate cases. The bottom line is that the New York grandparental visitation statute which is far

more limited than the Washington statute, has been left intact. As long as it is applied judiciously by the courts, it should withstand any attacks upon its constitutionality.

### A View from the Trenches

The following anecdotes are based upon actual cases handled by the writer.

#### *In re B*

Thomas was only three weeks old when his parents decided to give him to the paternal grandparents to raise. One year later, Thomas' father died. Thereafter, the mother visited with Thomas at his grandparent's home sporadically. For a period of over one year she did not see him at all. Then, when Thomas was six years old, the mother filed a writ of habeas corpus against the grandparents, requesting immediate custody of Thomas, in spite of the fact that Thomas had lived his entire life, except for 3 weeks, with his grandparents. On the first return date of the writ, the New York Family Court Judge immediately returned Thomas to the mother. Can you imagine what effects this had upon Thomas?

Our firm was thereafter retained by the grandparents. We learned that the grandparents had never sought an order of legal custody, and that the judge indicated that unless the mother could be proven to be unfit, the grandparents would not be successful in establishing extraordinary circumstances required to get to step two, the best interests issue. Shortly after being retained, we commenced trial, and we were able to show that the mother was virtually an absentee parent, that the grandparents were quite capable and cared for Thomas as well as anyone could. We also provided the Court with case law indicating that prolonged periods of non-custody of a child by a parent and acquiescence of custody in another during this same period can rise to the level of extraordinary circumstances, allowing the case to move to a best interests hearing. While, generally speaking, the fact that a grandparent or any non-parent can do a better job than the parent of raising a child is not in and of itself sufficient to deprive a parent of custody, once the extraordinary circumstances threshold is met, the grandparents (or other third party) are then on equal footing with the parent and a showing that it would be best for the child to be with the grandparents will be enough.

In *In re B*; the court ultimately found that extraordinary circumstances did exist and returned Thomas to the grandparents after trial. Unfortunately,

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Thomas had suffered post traumatic stress disorder as a result of his removal to the mother on return of the writ, and after the trial, an order was issued denying her any contact with Thomas.

### *In re F*

During the early years of the parents' marriage, the paternal grandparents subsidized the mother and father's educational and living expenses. The father became a doctor and the mother obtained a masters degree. Two children were born of the marriage. After their births, the paternal grandparents cared for the children on weekends, during summer vacations, and whenever else they were needed. When the children were ages six and four respectively, their father died. Shortly thereafter, the mother refused to allow visitation to the grandparents. Petitions for visitation were filed. The mother continued her strenuous objections to visitation throughout the proceedings which she vociferously defended. At trial, the mother failed to appear, claiming emotional distress, though her counsel did appear to conduct cross-examination. After trial, the Court ordered weekend visitation from Friday through Sunday, one weekend per month. The mother then remarried and moved to another state, and has yet to comply with the order, requiring ongoing enforcement proceedings.

This case reveals a common pattern when the grandparents' child dies and the surviving spouse wants to go on to a new life without reminders of the connections to the old life. Grandparents are often successful in these types of matters, but an assessment must be made as to the emotional cost to all involved, being mindful of the right of the children to have their grandparents in their lives and to have a connection to the father's side of the family.

### *In re T*

Mrs. T had two children, a boy and a girl, currently ages 40 and 35 respectively. Mr. T, the stepfather of the children, and Mrs. T married 25 years ago, the second marriage for each of them. Mr. T treated the children in every way as his own, and trained the stepson to become an employee of his business. Later the son married, and he and his wife lived with Mr. and Mrs. T in an extension of their home built especially for them. The grandparents and the children spent time together regularly, even enjoying vacations together. After birth of a grandson, they saw each other daily and the grandparents watched their grandson on weekends and during other periods when requested to do so. Relations thereafter broke down, leading the paternal grandmother and her own

son to have several verbal altercations, as a result of which the son and his wife moved away. The son also left the stepfather's business. Thereafter, the grandparents were refused all requests for visitation with their grandson.

At trial, both of Mrs. T's children testified that when they were younger, Mrs. T constantly provoked both of them verbally and physically, and that she continued up until the current time to be intrusive and controlling.

The Court carefully considered the testimony over a two-week trial, and found that the grandmother had in fact been overbearing and intrusive for most of her children's lives, and denied her standing to proceed to a best interests hearing.

This matter evidenced that while animosity between the parents and grandparents may not alone be sufficient to deny visitation, where the animosity is based upon extreme conduct by the grandparent, standing will be denied.

While the statute provides a procedural vehicle for obtaining visitation,<sup>19</sup> (*LoPresti v. LoPresti*) there is no guarantee the visitation will be ordered, even if standing is shown.

## Benefits Available to Grandparents

Benefits may be available to grandparents who have physical or legal custody of their grandchildren. Grandparents may become kinship foster parents where a grandchild has been removed from the home by a court order due to a finding that the child was neglected or abused, or by a voluntary placement agreement, signed by the parent or guardian (or other person with the care of the child) which gives the care and custody of the child over to an authorized social services agency acting on behalf of the State. Upon qualification, a grandparent may receive kinship foster payments to help provide for the grandchild's needs. Application may also be made to Medicaid to cover health care costs. The downside to kinship foster care is that you are subject to scrutiny by Department of Social Services while legal custody remains with the Department. The grandparents can also apply for financial assistance for themselves through Temporary Assistance to Needy Families (TANF), if they are in need.

Grandparents who are neither kinship foster parents nor in need may still apply for TANF benefits if the grandchild is not being supported by a parent who is away from home. If the parent is at home, the

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parent must apply for benefits unless mentally or physically unable to do so, in which case the grandparents may then apply.

## Endnotes

1. *LoPresti v. LoPresti*, 40 N.Y.2d 522, 526, 355 N.E.2d 372, 374, 387 N.Y.S.2d 412, 414 (July 1976).
2. 137 Wn.2d 1, 969 P.2d 21 (1998). Cert. granted, October 1999.
3. § 72. Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant grandchildren. Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of § 651 of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other party or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.
4. *Emanuel S. v. Joseph E.*, 78 N.Y.2d 181, 577 N.E.2d 27, 573 N.Y.S.2d 36 (July 1991), citing *In re Ehrlich v. Ressler*, 55 A.D.2d 953, 391 N.Y.S.2d 152, quoting *Mimkon v. Ford*, 66 N.J. 426, 437, 332 A.2d 199, 204.
5. *Supra*.
6. See *In re Seymour S. v. Glen S.*, 189 A.D.2d 765, 592 N.Y.S.2d 410 (2d Dep't, January 1993) denying standing; *In re Augusta v. Carouso*, 208 A.D.2d 620, 617 N.Y.S.2d 189 (2d Dep't, October 1994) *lv. app. dismiss.*, 85 N.Y.2d 857, 624 N.Y.S.2d 375 (February 1995).
7. See *LoPresti v. LoPresti*, *supra*.; *In re DiBerrardino v. DiBerrardino*, *infra*.
8. *In re Gloria R.*, New York Law Journal, January 11, 1994, p. 22, col. 4 (New York Co., Saxe, J.)
9. *DiBerrardino v. DiBerrardino*, 229 A.D.2d 539, 645 N.Y.S.2d 848 (2d Dep't, July 1996).
10. *Coulter v. Barber*, 214 A.D.2d 195, 632 N.Y.S.2d 270 (3d Dep't, October 1995).
11. *In re Kenyon v. Kenyon*, 251 A.D.2d 763, 674 N.Y.S.2d 455 (3d Dep't, June 1998).
12. See *Bennet v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (September 1976).
13. *In re Benzon v. Sosa*, 244 A.D.2d 659, 663 N.Y.S.2d 938 (3d Dep't, November 1997).
14. See *In re Antoinette M. v. Paul Seth G.*, 202 A.D.2d 429, 608 N.Y.S.2d 703 (2d Dep't, March 1994), *lv. app. den.*, 83 N.Y.2d 758, 615 N.Y.S.2d 875, 639 N.E.2d 416 (June 1994).
15. *In re Pauline G. v. Carolyn F.*, 187 A.D.2d 589, 590 N.Y.S.2d 124 (2d Dep't, November 1992).
16. *In re Benjamin B. v. Cathy B.*, 234 A.D.2d 457, 651 N.Y.S.2d 571 (2d Dep't, December 1996), *lv. app. den.*, 89 N.Y.2d 812, 657 N.Y.S.2d 405 (March 1997).
17. *In re Eger v. Garafalo*, 251 A.D.2d 770, 674 N.Y.S.2d 176 (3d Dep't, June 1998).
18. 137 Wn.2d 1, 967 P.2d 21 (1998).
19. *LoPresti v. LoPresti*, *supra*.

**Jerome A. Wisselman is an attorney who has actively practiced in the family law area for over 20 years. He has litigated cases in every aspect of family law, including numerous grandparental custody and visitation matters. He has written articles on family law issues for various publications, and has conducted workshops on these matters.**

**Mr. Wisselman graduated with a B.A. in Accounting from Queens College of the City University of New York in 1969, and obtained his Juris Doctor from Brooklyn Law School in 1972. He also attended the Masters of Law program in Taxation at New York University School of Law.**

**In 1976, Mr. Wisselman opened his own practice, concentrating in family and matrimonial law. From 1976 to the present, his firm has represented grandparents in many phases of family law litigation.**

**Mr. Wisselman has also been actively involved with lobbying for changes in legislation concerning grandparental issues, and has attended numerous conferences, including those sponsored by Mayor Giuliani and Governor Pataki concerning grandparental issues, and the White House Mini-Conference on the Aging held at Albany Law School. He also has served on the Advisory Boards of the New York State Assembly Committee on the Aging, and Brookdale Foundation.**

**As an advocate for grandparental rights, Mr. Wisselman is committed to helping effectuate the changes necessary to meet the needs of grandparents in a rapidly changing society which is making greater demands upon them to care for and support their families, even as they approach, or are in, retirement.**

# The View from the New York State Office of the Aging: In Support of Grandparents

By William T. Graham

I have been the Legal Service Developer for the New York State Office for the Aging for the past 12 years. What, you ask, is a Legal Services Developer?

The Older Americans Act was enacted by Congress in 1965.<sup>1</sup> The Act, which has been amended several times, is the federal government's primary vehicle for providing funding and services to meet the needs of our aging population. As part of the 1984 Amendments to the Act, each State Agency on Aging was required to assign personnel to provide state leadership in developing legal assistance programs for the elderly throughout the state. The requirement for a Legal Services Developer is now found in the Act in Titles III and VII.<sup>2</sup>

Among the specified duties of a Legal Services Developer<sup>3</sup> is the provision of technical assistance and other support to local offices for the aging, legal assistance providers,<sup>4</sup> ombudsmen, and others on legal issues facing older Americans. In order to provide this technical assistance and support, a Legal Services Developer has to be knowledgeable about many different substantive areas of law.

New York, like most other states, operates an information and referral Senior Citizen's Hotline. By dialing 1-800-342-9871, older New Yorkers and their families can get information on a variety of subjects that affect them. Generally, a request for assistance is referred to the appropriate local office for the aging. However, staff at the New York State Office for the Aging (NYSOFA) are often called upon to provide general information and assistance to callers. As Legal Services Developer, I am often called upon to answer questions on legal issues affecting grandparents.

Twelve years ago, the questions most commonly asked by grandparents centered on issues of visita-



tion. They wanted to know what their rights were in regard to visiting and maintaining a relationship with a grandchild. Apprising grandparents of their rights under NYS Domestic Relations Law, § 72 was often all that was needed.

Over the years, however, more and more grandparents and other older relatives began asking a variety of different questions. They wanted to know about custody and guardianship. They were asking questions about enrolling their grandchildren in school. They wanted to know if they had the right to get medical treatment for a grandchild. Many callers were living on a fixed income and wanted to know if any financial assistance was available for raising a grandchild.

Not of all of the callers were seeking legal or financial assistance, either. Many were seeking assistance with raising a grandchild and were in need of some form of support and counseling.

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*"Over the years . . . more and more grandparents and other older relatives . . . wanted to know about custody and guardianship."*

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### Support Groups

The Targeted Caregivers Initiative (TCI) was started in 1992 to address the needs of isolated caregivers in New York State. By 1995 the presence of caregivers taking care of frail family members and also raising young grandchildren was becoming more apparent to local offices for the aging. NYSOFA responded to this increasing number of grandparent caregivers by partnering with the New York City Department for the Aging Grandparent Resource Center to develop a curriculum for grandparent support groups. In 1996 the State Office was awarded a two-year "Relatives as Parents Program (RAPP)" grant from the Brookdale Foundation to enhance our Targeted Caregivers Initiative.

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Both programs respond to the needs of the rapidly growing number of relatives, primarily grandparents, who are the caregivers of children. This trend of increasing numbers of grandparent caregivers results from substance abuse, child abuse, abandonment, teenage pregnancy, death, divorce, AIDS, joblessness and incarceration, as well as mental or physical incapacity of the parents.

The objectives of the TCI and RAPP programs are to:

- Provide seed grants to local offices for the aging to work with community organizations to establish support groups.
- Provide information to grandparents/relatives on legislation of interest to them.
- Provide training and curriculum on how to set up grandparent/relative support groups.
- Provide technical assistance to national and state agencies.
- Work with the Task Force on School Community Collaboration to educate state/local agencies and public on issues.
- Seek public/private partnerships to continue and expand TCI/RAPP activities.
- Advocate on behalf of grandparents/relatives.

Responding to the number of children with developmental disabilities being raised by grandparents and relatives, a new Grandparents and Relatives Raising Children with Developmental Disabilities program has been initiated under a three-year grant from the New York State Developmental Disabilities Planning Council. The objectives of this new program are similar to the TCI and RAPP programs, with special attention given to the needs of those raising children with developmental disabilities.

### Videos

Grandparents raising grandchildren often express frustration at being unable to obtain even the most basic information about the legal issues confronting them. With funding from the New York State Developmental Disabilities Planning Council, NYSOFA has produced a two-video set which, in effect, is a primer on the legal aspects of custody and guardianship, the best interests of the child, access to medical care, school enrollment and other matters.

The videos feature a grandparent support group from the Albany area discussing legal issues with Melinda Perez-Porter, Esq., formerly with the Brookdale Center on Aging. I act as narrator to emphasize various points of the discussion and to provide a link between segments.

The New York State Office for Aging makes the videos available for loan to support groups, individuals and others interested in legal issues facing grandparents raising grandchildren.

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*"Grandparents raising grandchildren often express frustration at being unable to obtain even the most basic information about the legal issues confronting them."*

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### New York State Kinship Connection

The *New York State Kinship Connection* is a newsletter for grandparent support group leaders. Past issues have addressed such matters as being involved in a grandchild's education, obtaining a Home and Community Based Medicaid Waiver for a disabled child, shattering the myths surrounding grandparents as parents, and a review of legislation affecting grandparents raising grandchildren.

### Other Resources

Other resources available from NYSOFA include:

- A series of Workshops to Help You COPE, a free six-workshop curriculum developed for grandparents raising grandchildren;
- *Aging & You #1*, a 30-minute program with Walter G. Hoefer, Director, New York State Office for the Aging, discussing issues affecting grandparents raising grandchildren;
- *Aging & You #2*, another 30-minute program with Director Hoefer discussing issues affecting grandparents raising grandchildren with developmental disabilities;
- *Relatives As Parents*, a 13-minute video which can be used to help educate the older relative who is now acting place of a parent; and

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- A 30-second Public Service Announcement (video) to promote local support groups.

## Web Site & Contacting NYSOFA

Those who are interested in more information about grandparents raising grandchildren can visit NYSOFA's grandparents web page at: [www.aging.state.ny.us/caring/grandparents](http://www.aging.state.ny.us/caring/grandparents).

The web page also contains a county by county directory of all grandparent support groups in New York.<sup>5</sup> For more information on support groups and products you may contact our Targeted Caregiver Coordinator, Wanda I. Troché, at (518) 474-5041.

I still receive calls on legal issues pertaining to grandparents raising grandchildren and may be reached at (518) 474-0388.

## Endnotes

1. 42 U.S.C §§ 3001 *et seq.*
2. *See, specifically*, 42 U.S.C. §§ 3027(a)(18), 3058j(b)(2).
3. The Older Americans Act uses the term "Legal Assistance Developer." When the Act was amended in 1984, however, the position was described as that of a Legal Services Developer. This remains the more commonly used term.
4. Local offices for the aging contract with legal assistance providers to provide legal services to senior citizens. Legal assistance providers are often Legal Services Corporation grantees, but many in New York are attorneys who devote a portion of their private practice to accepting Older American Act clients.
5. A list of support groups accompanies this article as the Appendix on p. 32.

William Graham is an Assistant Counsel with the New York State Office for the Aging. For the past twelve years, he has been the Legal Assistance Developer responsible for working with Legal Assistance Programs for the Elderly under the Federal Older Americans Act. Bill represents the Office on the Board of the New York State Partnership for Long Term Care Insurance. He has been invited to and participated in planning conferences addressing: The Court Related Needs of the Elderly and Persons with Disabilities; Alternatives to Long Term Care; Coordinating Elder Rights Activities for the Vulnerable Elderly; and Symposium '97 - Reinvigorating Legal Assistance for the Elderly.

Mr. Graham has presented workshops at the Joint Conference on Law and Aging in Washington, D.C., as well as at the Annual Senior Citizens Law Day sponsored by the Government Law Center of Albany Law School. He recently narrated the two-volume video, *Legal Issues Facing Grandparents Raising Grandchildren*, produced by the State Office for the Aging through funding provided by the NYS Developmental Disabilities Planning Council.

Bill is a member of the New York State Bar Association's Elder Law Section and the National Association of Legal Services Developers.

## APPENDIX

### New York State Grandparent Caregiver Support Groups

Graciously submitted by William Graham, Esq., Legal Services/Assistant Counsel, New York State Office for the Aging

#### ALBANY COUNTY

Grandparents Support Group of Albany  
Neighborhood Community Center  
340 First St.  
Albany, NY 12206  
(518) 449-2001

Lois Siegel  
Town of Colonie Senior Resources Department  
RAPP  
91 Fiddlers Lane  
Latham, NY 12110  
4th Tuesday—7-8:30 pm  
(518) 783-2824

Caregivers Program of Catholic Charities  
100 Slingerlands Street  
Albany, NY 12202  
Attn: Judy Gallagher  
(518) 449-2001

#### BROOME COUNTY

Sister Kathleen Joy Steck or Mrs. Maria White  
Grandparent Support Group  
7 Livingston Street  
Binghamton, NY 13903  
607-722-9075 or 607-724-8694

Jan Cohen  
Grandparents as Parents  
Cornell Cooperative Extension of Broome County  
840 Upper Front Street  
Binghamton, NY 13905  
607-772-8953 x122

Sharon Quackenbush  
1944 Colesville Road  
Harpursville, NY 13787  
607-693-1373

#### BRONX COUNTY

Kinship Care Program  
Family Support Systems Unlimited Inc.  
2530 Grand Concourse, 3rd Floor  
Bronx, NY 10458  
Attn: Alice Wheatley

Neighborhood S.H.O.P.P., Inc.  
953 Southern Boulevard, 4th Floor  
Bronx, NY 10459  
Attn: Raquel Colon  
Elder Abuse Support Group

Catholic Charities Counseling Services  
Bronx Center  
2380 Belmont Avenue  
Bronx, NY 10456  
Attn: Dr. Marjorie Stuckle  
Parenting Group

Co-op City Senior Citizens Council  
2049 Barton Avenue  
Bronx, NY 10475  
Attn: Candice Harris  
(718) 320-2066

Comprehensive Care Management Program/  
Beth Abraham Health Services  
2401 White Plains Road  
Bronx, NY 10467  
Attn: Martin Mandal  
Family Caregivers Support Group

Davidson Senior Center  
950 Union Avenue  
Bronx, NY 10459  
Attn: Althea Lord  
Grandparent Support Group  
(718) 328-2810

Family Resource Center  
1384 Metropolitan Avenue  
Bronx, NY 10462  
Attn: Linda Resto  
Parents Support Group

Edenwald Senior Center  
1135 East 229th Street Drive South  
Bronx, NY 10466  
Attn: Marcia Schwartz  
(718) 882-3815 or 882-3824

Intergenerational Program of Family Support  
1749 Grand Concourse, Suite 1A  
Bronx, NY 10452  
Attn: Augustina Melekwe

Jean Springer  
Interfaith Volunteer Caregivers—NORC  
135 Einstein Loop Room 36  
Bronx, NY 10475  
(718) 671-2090

## GRANDPARENT RIGHTS

Kathy Gibson  
Grandparents Advocacy Project  
1595 Metropolitan Avenue  
Bronx, NY 10462  
(718) 863-4776

**CAYUGA COUNTY**  
Cayuga County Office for the Aging  
160 Genesee Street  
Auburn, NY 13021  
(315) 253-1226

**CHAUTAUQUA COUNTY**  
Chautauqua County Office for the Aging  
7 N Erie Street  
Mayville, NY 14757-1027  
(716) 753-4471

**CHEMUNG COUNTY**  
YWCA of Elmira and the Twin Tiers  
211 Lake Street  
Elmira, NY 14901-3193  
(607) 733-5575

**COLUMBIA COUNTY**  
A Child's Voice, Inc.  
NYS Grandparents Rights Organization  
P.O. Box 121  
Kinderhook, NY 12106  
Attn: Sally Degnan  
(518) 758-1229

**CORTLAND COUNTY**  
Family Support Services  
Cortland County Mental Health Department  
7 Clayton Avenue  
Cortland, NY 13045  
Attn: Jamee A. Sobko

**DUTCHESS COUNTY**  
Mary K. Dolan, Aging Service Coordinator  
Dutchess County Office for the Aging  
27 High Street  
Poughkeepsie, NY 12601  
(914) 486-2555

Vivian Bucey  
615 Violet Avenue  
Hyde Park, NY 12538

**ERIE COUNTY**  
Amherst Senior Services  
30 N Union Road  
Williamsville, NY 14221

Susette Mines  
Mental Health Association  
999 Delaware Avenue  
Buffalo, NY 14209

Cherry Hewitt  
Mid Erie Counseling  
608 William St.  
Buffalo, NY 14206  
(716) 855-1384

Ann Marie Howard/Phyllis Holmes  
Grandparent Support Group  
Town of Amherst Senior Center  
301 N Union Road  
Amherst, NY 14221

EPIC—Every Person Influences Children  
Parenting Workshops  
SUCB—1300 Elmwood  
Buffalo, NY 14222  
Attn: Danette Turner

Grandparent Enrichment Program  
The Salvation Army  
960 Main Street  
Buffalo, NY 14202  
Attn: Pam Krawczk  
(716) 883-0800 Ext. 272 / FAX: (716) 888-6299

J. O'Connell & Associates  
10646 Main Street  
Clarence, NY 14031  
(716) 759-0676  
joconnel@frontiernet.net

Saturday Support Group  
999 Delaware Avenue  
Buffalo, NY 14209-1892  
Attn: Mary Skorupa  
Mental Health Association of Erie County

Diana Kachura  
Mid Erie Counseling and Treatment Services  
1520 Walden Avenue  
Cheektowaga, NY 14225  
(716) 855-3574

Dorothy Levitt  
Erie County Department of Senior Services  
95 Franklin Street, 13th Floor  
Buffalo, NY 14202-3963

Maria Pratts/Linda Archie  
Parent Network Center  
250 Delaware Avenue, Suite 3  
Buffalo, NY 14202  
716) 853-1570 / FAX: 716-853-1574

**FULTON COUNTY**  
Fulton County Office for the Aging  
19 North William Street  
Johnstown, NY 12095  
Attn: Meredith Lord  
(518) 736-5650

## GRANDPARENT RIGHTS

EEC School #31  
212 Stanton St.  
Buffalo, NY 14212

CAO—Jesse Nash Ctr.  
608 William St.  
Buffalo, NY 14206

### KINGS COUNTY

Dr. Georgianna Glose, Director  
Fort Greene SNAP  
375 Myrtle Avenue  
Brooklyn, NY 11216  
(718) 694-6957

Catholic Charities Brooklyn East Family Center  
1987 Flatbush Avenue  
Brooklyn, NY 11234  
(718) 677-9848 / FAX: (718) 677-1869

Catholic Charities Family Center  
West Brooklyn  
191 Joralemon Street  
Brooklyn, NY 11201  
Attn: Ruth Francis & Dietrich Barber  
Grandmothers As Mothers Again (G.A.M.A.)  
(718) 722-6003 and 6006

Grandparents Right to Implement Parenthood  
1669 Dean Street  
Brooklyn, NY 11213  
Attn: Pegye Johnson  
(718) 744-5100

Jewish Community House of Bensonhurst  
7802 Bay Parkway  
Brooklyn, NY 11214  
Attn: Faye Levine  
Bereavement/Alzheimer's Caregiver Support Group

Lakeside Family & Children Services  
185 Montague Street  
Brooklyn, NY 11217  
Attn: Jan Goldberg

New Hope Guild / S.B.I.  
P.S. 13K  
557 Pennsylvania Avenue  
Brooklyn, NY 11207  
Attn: Sarah Brewster, CSW

Park Slope for Mental Health  
464 Ninth Street  
Brooklyn, NY 11215  
Attn: Pam Tolk

St. Joseph Services for Children & Family  
540 Atlantic Avenue  
Brooklyn, NY 11217  
Attn: Luz Garcia  
Foster & Grandparent Support Group

Bensonhurst Guidance Center  
Grandparents As Parent Substitutes Program  
8620 18th Avenue  
Brooklyn, NY 11214  
Attn: Deborah Langosch, ACSW  
Program Coordinator  
(718) 256-8600

Berean Community & Family Life Center  
1635-49 Bergen Street  
Brooklyn, NY 11213  
Attn: Ms. Selma Tatum  
Grandparent Parents Again  
(718) 744-0466

Bethlehem Baptist Church  
741 Sheffield Avenue  
Brooklyn, NY 11207  
Attn: Catherine Sanders  
Bethlehem Grandparent Support Group  
(718) 257-8479

Brookdale Hospital & Medical Center  
1335 Linden Blvd.  
Brooklyn, NY 11212  
Attn: Tobi Abramson,  
Geriatric Mental Health Coordinator  
Parent's—Take Two  
(718) 240-5450

Partnership with Children, Inc.  
57 Front Street, 7th Floor West  
Brooklyn, NY 11201  
Attn: Brenda Taylor  
Support Group For Parents  
(718) 875-9030

Brooklyn Parent Resource Center  
New Hope Guild  
80 East 93rd Street  
Brooklyn, NY 11212  
(718) 604-8800

Brooklyn Union  
1 Metrotech Center, 15th Floor CCA  
Brooklyn, NY 11201  
Attn: Kristen Yontz  
Grandparents Support Group  
(718) 403-1141

Spanish Speaking Council (RAICES)  
30 Third Avenue, Room 617  
Brooklyn, NY 11217  
Attn: Jose R. Ortiz  
Grandparents as Primary Caregivers Support Groups

## GRANDPARENT RIGHTS

### MONROE COUNTY

Ellen Lersch  
Monroe County Office for the Aging  
City Place  
50 West Main Street Suite 4100  
Rochester, New York 14614-1236  
(716) 274-7825

Linda James  
Southwest Family Resource Center  
Skip Generation  
537 Post Avenue  
Rochester, NY 14619

Loretta Marshall, Program Coordinator  
Caregiver Resource Center and  
Parents Again Program  
Catholic Family Center  
Elderly Services  
25 Franklin Street  
Rochester, NY 14604-1007  
(716) 262-7048

### NASSAU COUNTY

Grandparent Advocates Supporting Autistic Kids  
6 North Ravine Road  
Great Neck, NY 11023  
Attn: Robert Krinsky  
(516) 466-0675

ABD Home Health Care  
24506 Jericho Turnpike #Lower  
Floral Park, NY 11001-3923  
Attn: Audrey Dorsey  
Early Intervention Support Group  
(516) 352-7138

Episcopal Diocese of Long Island  
Office of Ministry / Aging  
36 Cathedral Avenue  
Garden City, NY 11530  
Attn: June S. Gerbracht  
(516) 248-4800 Ext. 23

Schnieder Children's Hospital  
269-01 76th Avenue Rm 235  
New Hyde Park, NY 11040  
Attn: Roz Rosenthal,  
Grandparent's Connections

### NEW YORK COUNTY

Children's Aid Society  
Brookdale Foundation PS 5  
3703 Tenth Avenue  
New York, NY 10034

Mahalia Jackson School (P.S.123M)  
301 West 140th Street  
New York, NY 10030  
Attn: Ethnie Braithwaite  
Grandparents Group

New Alternative for Children  
37 West 26th Street, 7th Floor  
New York, NY 10010  
Attn: Kay Herrell  
Adoptive & Kinship Parent Group  
(212) 696-5483

New York City Board of Education (P.S. 146)  
421 East 106th Street  
New York, NY 10029  
Attn: Helaine Eisenberg  
PS 146 Grandparents Support Group  
(212) 348-5483

Presbyterian Senior Services  
2095 Broadway—4th Floor  
New York, NY 10023-2893  
Attn: Angela Archer/David Taylor  
Parenting Grandparent Group  
(212) 874-6633

Association to Benefit Children (ABC)/Variety House  
316 East 88th Street  
New York, NY 10128  
Attn: Eve Snitiker

Little Sisters Family Health Service  
426 East 119th Street  
New York, NY 10035  
Attn: Sr. Charlotte Raftery  
Grandparent Caregiver Group

The Children's Aid Society / P.S. 5 WHS  
3703 Tenth Avenue  
New York, NY 10034  
Brookdale Kinship Program

The Educational Alliance  
197 East Broadway  
New York, NY 10002  
East Broadway Grandparent Support Group  
(212) 780-2300 Ext. 424

The Family Center  
66 Reade Street  
New York, NY 10007  
Attn: Jerome Brown  
Caregivers Educational Seminar

The Jewish Guild for the Blind  
15 West 65th Street  
New York, NY 10023  
Attn: Dr. Goldie Dersh  
Caregivers for Visually Impaired Child

## GRANDPARENT RIGHTS

United Cerebral Palsy of New York City, Inc.  
Office of Consumer & Family Advocacy  
120 East 23rd Street  
New York, NY 10010  
Family Training Support Group  
(212) 979-9700 Ext. 237

Visions/Vacation Camp for the Blind  
500 Greenwich Street 3rd Fl.  
New York, NY 10013-1354  
Attn: Betsy Fabricant, Camp Director  
Toll Free: 1-888-245-8333  
www.visionsvcb.camp

Gouverneur Diagnostic or Treatment Center  
227 Madison Street, Room 329  
New York, NY 10002  
Attn: Griselda Kelin  
Grandparents Support Group  
(212) 238-7399

Gouverneur Diagnostic or Treatment Center  
227 Madison Street  
New York, NY 10002  
Attn: Rita Gazarik

Grandparents Raising Grandchildren  
Harlem Interfaith Counseling Service  
247-249 West 135th Street  
New York, NY 10030  
Attn: Gwendolyn Florant  
Grandparent Empowerment Movement (GEM)

Rolanda Pyle  
Grandparent Resource Center  
NYC Dept. for the Aging  
2 Lafayette Street, 15th Fl.  
New York, NY 10007  
212-442-1094

New York City Self-Help Center  
120 W 57th Street  
New York, NY 10019  
212-586-5770

Jessica Gorham  
Friends of Family Academy  
220 W 121st St.  
New York, NY 10027  
(212) 749-3558

**NIAGARA COUNTY**  
Mary Jane Emborsky, Director  
Mental Health Association in Niagara County, Inc.  
151 East Avenue  
Lockport, NY 14094  
(716) 433-3780 / FAX (716) 433-3487

Paula Smith  
Grandparents As Parents  
6773 Rapids Road  
#157  
Lockport, NY 14094

**ONTARIO COUNTY**  
C. Kenneth Perri  
Legal Assistance of the Finger Lakes  
1 Franklin Square  
P.O. Box 487  
Geneva, NY 14456  
(315) 781-1465 / FAX: (315) 781-2565

Cornell Cooperative Extension of  
Ontario County  
Second Time Around Parents  
480 N. Main Street  
Canandaigua, NY 14424  
Attn: Isabelle Doran Jensen  
(716) 394-3977

**ONONDAGA COUNTY**  
Syracuse Jewish Family Service  
4101 E. Genesee Street  
Syracuse, NY 13214

**ORANGE COUNTY**  
Denyse Variano  
Cornell Cooperative Extension  
of Orange County  
Education Department  
1 Ashley Avenue  
Community Campus  
Middletown, NY 10940  
(914)-344-1234

**QUEENS COUNTY**  
Steinway Child & Family, Inc.  
41-36 27th Street  
Long Island City, NY 11101  
Attn: Betty Turner Ross  
Family Caregivers Support Group

Community Resources &  
Services for Children, Inc.  
90-04 161st Street, Suite 801  
Jamaica, NY 11432  
(718) 206-3400 / FAX: (718) 558-5349

Grandparent Extended  
199-05 112th Avenue  
Hollis, NY 11412  
Attn: Harold Dunkerson

## GRANDPARENT RIGHTS

Catholic Charities/Queens South Family Center  
90-39 189th Street  
Hollis, NY 11423-2543  
Attn: Maria Passadino  
Grandparents Who are Raising their Grandchildren  
(718) 271-1238 / FAX: (718) 464-1317

Family Consultation Services  
216-10 Jamaica Avenue  
Queens Village, NY 11428-2121  
Attn: Frank Kehoe  
Grandparents as Parents  
(718) 465-8585 or (718) 345-4800

Jamaica Service Program for Older Adults  
123-10 143 St.  
Jamaica, NY 11436  
Attn: Jean Chauncey  
(718) 657-6500

St. Christopher Otille  
89-30 161st Street  
Jamaica, NY 11432  
Kinship Foster Parents Program  
Attn: Nora Scharr

### RENSSELAER COUNTY

Family and Children's Services of N.Y.  
2331 5th Avenue  
Troy, NY 12180  
Attn: Laurie Reynolds  
(518) 274-3880 Ext. 40

### RICHMOND COUNTY

Community Agency for Senior Citizens  
56 Bay Street  
Staten Island, NY 10301  
Attn: Michelle Bogue, CSW  
Grandparent Support Group  
(718) 981-6226

### ROCKLAND COUNTY

Norman Silverman  
YAI/RCALD  
2 Crosfield Avenue  
Suite 411  
West Nyack, NY 10994  
(914) 358-5700 X17

### SUFFOLK COUNTY

Bellport Hagerman East Patchogue Alliance, Inc.  
P.O. Box 121, 1492 Montauk Highway  
Bellport, NY 11713  
(516) 286-9236 / FAX: (516) 286-3948

Grandparents Reaching Out, Inc.  
40-203 W. 4th Street  
Patchogue, NY 11772  
Attn: Mildred Horn, President & Founder  
(516) 447-0062

Hna Cathy Kugler  
Apostolado Hispano, Ministerio del South Fork  
Diocese of Rockville Centre  
168 Hill Street  
Southampton, NY 19968  
(516) 283-4379

### TOMPKINS COUNTY

Susan Perkins  
T.S.T. BOCES  
301 Geneva Street, Suite G10  
Ithaca, NY 14850  
(607) 277-8602

### ULSTER COUNTY

Ann Beardinelli  
Middletown Cornell Cooperative  
Extension—RAPP Program  
268 Mountainview Avenue  
Wallkill, New York 12589  
(914) 566-0810

### WESTCHESTER COUNTY

Family Service of Westchester  
One Gateway Plaza  
Port Chester, NY 10573  
Attn: Lori Connolly  
(914) 937-2320

Mount Vernon Community Action  
Group of WestCOP  
42 East Third Street  
Mount Vernon, NY 10550  
(914) 664-8680

Sybil Lampart-Dyke  
Westchester County Office for the Aging  
9 South First Avenue 10th Floor  
Mount Vernon, NY 10550  
(914) 665-5928

Lenore Rosenbaum  
WJCS Self Help Clearing House  
141 North Central Avenue  
Hartsdale, NY 10530  
(914) 949-7699 Ext. 319

### WASHINGTON, D.C.

Ange Anglade, MSW  
Community Development Coordinator  
Catholic Charities  
1438 Rhode Island Avenue, NE  
Washington, DC 20018  
202-526-4100 Ext. 226  
FAX: 202-526-1829

# The View from a Grandparent Resource Center: Grandparent Resource Center and Its Legislative Goal

By Katherine Mendez

The subject of grandparents raising grandchildren is gaining more interest among practitioners and lawmakers as the number of grandparent-headed households has grown over the last two decades. These nontraditional families have unique needs which often go unmet because of a lack of available services. They are also faced with the challenges of parenting for a second time, at a considerably later age, and of coping with their own child's absence as a parent. Unfortunately, existing law often does not offer a remedy for the issues grandparent caregivers face daily.



This article will describe a program that was established to help this emerging population, and how the formation of that program led to efforts to create new legislative remedies for some of their common issues and concerns.

## The Grandparent Resource Center

The New York City Department for the Aging (DFTA) is a mayoral agency, as well as the nation's largest federally funded Area Agency on Aging, providing services to the city's 1.3 million older residents. In 1994, the Department established the Grandparent Resource Center, the first of its kind in the nation. The Resource Center was created to assist the growing numbers of grandparents raising grandchildren in New York City by providing them with information, training and support. The Resource Center offers an Information Hotline, which grandparents may call with their questions about public benefit eligibility, social services options, legal issues, and more. The program also sponsors a Grandparent Support Group Facilitator Network, which helps to start up, and provide technical assistance to, grandparent caregiver support groups. Training sessions are held for support group leaders on issues ranging from the kinship foster care process to how to cope with adolescence. Borough-wide grandparent information forums are also held periodically, and cover a range of issues that are of interest to grandparent caregivers.

The Grandparent Resource Center is linked with a network of organizations that assist grandparent care-

givers, and work to find ways to provide them with the services they need. Through feedback from grandparents and a collaboration with network participants, the Grandparent Resource Center identified several recurring issues that we felt could be redressed through state legislative measures. One of these issues is how to help grandparents who are confronted with obstacles when seeking to make basic decisions regarding their grandchildren's schooling and health care. Encouraged by the recent enactment of similar legislation in several other states, a decision was made to seek the support of the New York State Legislature for a proposal to expand grandparents' rights to make certain school-related and medical decisions on behalf of the grandchildren in their care.

## Survey of Grandparent Caregivers

The increase in the number of grandparent-headed households is attributable to a number of causes. A survey of 308 grandparents conducted by the Grandparent Resource Center in 1998 found that the top four reasons grandparents were raising their grandchildren were substance abuse by the parent, death of a parent, the parent's abandonment of the child, and incarceration of the parent.

When parents are unable or unwilling to care for their children, the grandparents, and in most cases the grandmother, often step in to take over the job. While some grandparents obtain permanent legal custody or guardianship of their grandchild, many do not. Reasons include hope that their new care giving role is a temporary one, a fear of alienating their own child, or feelings of mistrust of or intimidation by the court system.

When asked about the kind of care giving arrangement they had, our survey found that 40% of grandparents raising their grandchildren were doing so through informal arrangements made with the parents. This was by far the highest number of any of the categories listed. Another 23% of respondents had legal custody of their grandchildren, and 15% were their legal guardians. Eight percent had a kinship foster care arrangement, while the remaining 14% of respondents did not indicate their arrangements.

## Proposed Legislation Introduced

Despite their non-court-sanctioned role, the reality is that grandparents in an informal care giving arrange-

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ment must still face the small daily challenges of raising a child, whether that be reviewing the child's school records, approving their attendance at school outings, or arranging for medical testing or treatment if the child becomes ill. The proposed legislation, which was adopted as part of the New York City Mayor's Legislative Agenda, was developed to serve the needs of this 40% of grandparents who have so-called "informal" arrangements to care for their grandchildren.

Through efforts of the Department for the Aging and members of the grandparent caregiver network, the bill was originally introduced in 1996. It has evolved over the years, becoming narrower in scope from the original proposal to accommodate concerns raised by different interested parties.

A.7052 (DiNapoli) and S.4000 (LaValle), a two-house bill currently before the New York State Legislature, is the latest outcome of these discussions. The bill would amend the General Obligations Law by adding a new Title 17 to Article 5, entitled "Powers of Caregivers to Authorize Treatment, School Enrollment and School Participation." The goal of the bill is to permit parents to grant a grandparent or other adult non-parent providing "informal" care for their children the authority to approve school-related activities, school enrollment and non-emergency medical care.

Currently, there is no mechanism which permits this kind of authorization by a parent to another adult who is raising their child. Grandparents raising their grandchildren would hold such authority if they obtained legal custody or guardianship of their grandchildren. However, as our study reveals, many do not seek this option. The reasons are complicated, and include a fear of alienating their own child, a belief that the situation is a temporary one, or feeling intimidated by or afraid of the court system. A power of attorney is also not usually a viable option for this population, who don't have ready access to lawyers and legal information, and, again, may be intimidated by the legal system and its processes. This bill attempts to create a reasonable and balanced alternative for parents and the adults entrusted with raising their children.

The bill would permit parents to prepare an affidavit in which they could designate a grandparent or other non-parent over 18 years of age to make certain decisions on behalf of their minor child or children. The

range of decision-making authority would be designated by the parent, and could include reviewing school records, providing consent for medical or dental examinations or treatment, including immunization, enrollment in school, absence from school, and participation in school-related activities. The affidavit would have to be notarized, and would be valid for a period of time to be specified by the parent up to a maximum of one year. The conveyance of authority through the affidavit would be revocable at will by the parent. Such affidavit would be valid provided there was no prior court order prohibiting such delegation of authority and provided further that, in a case of joint custody, both parents have consented to such delegation of authority. Schools and health care providers who permitted activities or provided treatment in good faith reliance upon the authority conveyed by the affidavit would not be deemed to have acted negligently, unreasonably or improperly, and would not be held liable, unless they knew the authorization had not been given for the care or treatment in issue, or had been revoked, or unless medical care was unwarranted or was provided in a negligent or unacceptable manner.

The bill came very close to becoming law in 1998, when both houses of the State Legislature passed it. However, Governor Pataki vetoed it, noting his support for the bill's goals but directing its sponsors to address his concerns about potential impact on school enrollment of non-resident children, and the rights of non-custodial parents. These concerns were addressed in a 1999 re-drafting of the bill. Now in its fourth year, the bill continues to generate interest, and has received the support of numerous organizations. They include the Federation of Protestant Welfare Agencies, the New York City/New York State Chapter of the National Association of Social Workers, the KinCare Task Force, the New York State Intergenerational Network, the Council of Senior Centers and Services, and others.

Similar efforts to help grandparents through legislative channels have been undertaken in other states. California, Washington, D.C., North Carolina, and Delaware, among others, have enacted laws providing for the kinds of measures that this proposal seeks to have approved. It is our hope that A.7052/S.4000 will be successful this year, and will help to pave the way for greater improvements in the delivery of services and supports to grandparents raising their grandchildren.

Katherine Mendez is currently the Director of Legislative Affairs for the New York City Department for the Aging. Prior to coming to the Department, she worked as the Coordinator of the Pro Bono Support Unit for the Community Outreach Law Program of the Association of the Bar of the City of New York. She holds a law degree from the City University of New York (C.U.N.Y.) Law School.

## The View from the Aging Network: Grandparents Raising Grandchildren

By Kevin Brabazon

Though *grandparents* raising *grandchildren* is not a new phenomenon, it is a rapidly growing trend. The number of children being raised in a grandparent-headed household increased by 76% between 1970 and 1997, but the greatest increase has been in households where no parent is present. Between 1990 and 1998 alone, the number of these households increased by 53%.<sup>1</sup>




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*“The number of children being raised in a grandparent-headed household increased by 76% between 1970 and 1997, but the greatest increase has been in households where no parent is present.”*

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This *surrogate parenting* situation usually results from substance abuse, abandonment, child abuse and neglect, teenage pregnancy, death, divorce, AIDS, and incarceration, as well as mental or physical incapacity of the parent. Research data reveals that 10.9% of all grandparents in the United States will be primary caregivers for one or more grandchildren for a period of at least six months during their lives. Nearly half of these will be caregivers for 5 years or more.<sup>2</sup> The scope of the problem was nationally acknowledged when the 1995 White House Conference on Aging made grandparents raising grandchildren one of its top priorities.

This is not just a caregiver’s issue, however. 2.9 million children (4.2% of all American children) currently live **in homes with no parent present**. Of these, only 500,000 (17.3%) are in the formal *foster care* system and they and their foster parents receive significant financial support and services.

*The remaining 2.4 million children (82.7%) and the caregivers who are responsible for them receive little assis-*

*tance and may encounter systems that make it difficult to access even basic services, such as health care and education.* Since grandparents are disproportionately represented amongst the caregivers (two thirds are grandparents), surrogate parenting has now become an aging and intergenerational as well as a family issue, affecting every socio-economic and ethnic group, and rural as well as urban communities.

Children being cared for by someone other than the biological parent have traditionally been dealt with through the *child welfare* and foster care systems, because they have often been removed from abusive and neglected situations. However, what is most significant is that for those caregiver families, which are not in the formal system, it has been the aging network that has increasingly responded. Since 1995 all of the major national conferences in the aging field have offered workshops and symposia approaching the issues of grandparents as parents from a variety of perspectives. There is a growing recognition of the importance of family roles, and publications in the aging field have been giving more attention to *inter-generational* issues such as grandparents and relatives as surrogate parents. The Gerontological Society of America has established a Grandparent Caregiver Interest Group, which in turn has encouraged much more extensive research on *kin*care issues.

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*“For grandparents returning to child care responsibilities after many years, the challenges can be daunting.”*

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For grandparents returning to child care responsibilities after many years, the challenges can be daunting. Grandparents are often isolated by their own feelings of failure and guilt in raising their own adult children and do not know where to go to receive help in dealing with the unexpected new roles they face. In addition, they may find it hard to secure some of the basic services the children need if they are not the legal guardians or custodians.

19% of children living in households headed by their parents were in poverty in 1997 compared to 27% of children living in grandparent-headed house-

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holds. This expands to a staggering 65% in families headed by a grandmother only, with no parents present.<sup>3</sup> In addition, grandparent caregivers experience other stressors disproportionately.

Generations United indicates that “the stress of caring for young children, accompanied by their own health difficulties, can be overwhelming for many older grandparents, resulting in a variety of stress-related illnesses.” Children may suffer from the health impacts of prenatal drug or alcohol exposure, resulting in special education needs and developmental problems. Studies indicate that grandparent caregivers are inclined to put the children’s needs before their own, often compounding the difficulties of their situations. Legal and financial assistance, entitlement information, child care, housing, mental health and respite services are often cited as unmet needs of caregivers.

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*“Studies indicate that grandparent caregivers are inclined to put the children’s needs before their own, often compounding the difficulties of their situations.”*

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A number of state child welfare systems have responded by developing more flexible approaches to financial assistance primarily for those in the formal system. By the end of 1999, 12 states offered some type of “stipended *guardianship*,” i.e., financial assistance based upon a long-term kinship placement that did not require adoption of a child. However, the aging field continues its response to the majority of grandparent caregivers who are unwilling to exacerbate difficult family relationships by taking their adult children to court, and who therefore remain outside the formal system.

A few important national initiatives have been developed over the past few years, which local communities and states can utilize. One of these is the **AARP Grandparent Information Center** in Washington, D.C., which offers information and referral services to caregivers and those agencies helping them, and has developed relevant studies and publications on kincare issues. **Generations United**, a national organization focused on promoting intergenerational public policies and programs, has included “Grandparents and Other Relatives Raising Children” as a priority area of their intergenerational agenda. It also

provides valuable informational material on innovative programs, and the status of state and federal policies affecting relatives as surrogate parents.

The **Brookdale Foundation Group**, as part of its national grant-making activities in the aging field, has enabled the expansion of needed services to relative caregivers through its Relatives as Parents Program (RAPP), which was initiated in 1996. In the following four years, it provided seed grants to over 70 community-based agencies and 24 public state agencies (14 of which are State Offices on Aging) across the country. Through the Foundation’s local initiative, community agencies have developed models of direct, accessible services to caregivers and their families. Through its statewide initiative, state agencies address the broad issues impacting relative caregivers and children, with special emphasis on those outside the system.

The **New York State Intergenerational Network** (NYSIgN)—a coalition of over 100 organizations in New York State—has identified grandparents raising grandchildren as one of its highest priorities and has worked to promote public policies that are responsive to the needs of these “skipped generation” families. There are two particular pieces of legislation that NYSIgN has drawn advocates’ attention to. One is a bill that would allow parental delegation of authority to a grandparent or other relative caring for a child, thereby permitting the caregiver to register a child in school or access medical services (bill number A07052 in the Assembly and S04000 in the Senate). The second is a bill that would authorize the Director of the New York State Office for the Aging (SOFA) to establish grandparent caregiver resource centers in every county of the state (A03328 and S01970). This resource centers would be modeled after a demonstration project developed in New York City by the Department for the Aging, that has profoundly affected informal caregivers in the city.

**SOFA** has worked to develop basic services to grandparents and other relatives raising grandchildren in almost 30 counties in the state, and has developed a network of community-based organizations that are providing direct services. One of these agencies—Legal Assistance of the Finger Lakes—has taken on the challenge of providing free legal services to grandparents who have few rights in the legal system, are often impoverished (especially after taking on the financial responsibility of a child or children), and are seldom entitled to a court-appointed advocate. Through an innovative partnership with

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Cornell Cooperative Extension of Ontario County and some funding that has been “creatively stretched,” this agency has done an excellent job of providing a cost-effective mix of legal representation (in court and on behalf of clients denied public benefits) and education regarding rights, benefits and entitlements.

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*“Well-designed public policies would go a long way towards ameliorating many of the more difficult issues faced by ‘second time around’ parents and providing a suitable framework for raising children in the healthiest and most productive ways possible.”*

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SOFA has also begun to have an impact on some of the special problems encountered by surrogate parents by developing creative intergovernmental partnerships. For example, a partnership with the Office of Mental Retardation and Developmental Disabilities has initiated a growing focus on the high incidence of special needs children in grandparent-headed households. These needs often result from pre-natal drug or alcohol exposure or other forms of abuse which result in grandparents becoming the primary caregivers of the children.

The needs of grandparents raising grandchildren are multifaceted. There has been a response from the aging network and a growing response from the child welfare service delivery system. There is still a great need, however, to review the progress that has been made in the area of direct services, especially when viewed through the lens of rights and entitlements. Grandparent caregivers have many challenges to overcome in these areas. Well-designed public policies would go a long way towards ameliorating many of the more difficult issues faced by “second time around” parents and providing a suitable framework for raising children in the healthiest and most productive ways possible.

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1. Casper and Bryson, 1998.
2. Fuller-Thompson, Minkler, and Driver, 1997.
3. Casper and Bryson, 1998.

Kevin Brabazon has been President of the New York State Intergenerational Network since 1991; Relatives as Parents Program (RAPP) Consultant for the Brookdale Foundation; developing services to grandparent/relative caregivers through community-based organizations; Adjunct Professor at New York University—Rober Wagner Graduate School of Public Administration and Stern Business School; Consultant for intergenerational programs and not-for-profit organizations. Author of articles on intergenerational issues and co-editor of “Intergenerational Approaches in Aging: Implications for Education, Policy and Practice,” published by Haworth Press.

# The View from a Social Worker: Sociological and Psychological Issues Faced by Grandparent Caregivers and Those Seeking Visitation Rights

By Joanne M. Danner

Grandparent caregivers and those seeking visitation rights are faced with difficult sociological and psychological issues, which are exacerbated because of the lack in existing support mechanisms geared to meeting the diverse, complicated needs of this population. The grandparents face emotional, psychological, financial and legal challenges. Social and legal systems often do not provide adequate support because of a lack in recognition of the issues faced by this population.

Although the phenomenon of grandparents assuming the role of primary caregivers for their grandchildren and those seeking visitation rights transcends diverse socioeconomic, socioeducational, and cultural backgrounds, society has not recognized the growing number of grandparents in this position today and their need for support.

Current sociological issues have produced a change in the American family and in the universal definition of the family. The traditional, nuclear family no longer accounts for the principal family model. Problems related to crime, accidental death, domestic violence, neglect, homicide, suicide, abandonment, substance abuse, alcohol abuse, sexual abuse, infectious disease, mental illness, teen pregnancy, divorce, and incarceration have created a void in the family. Due to these issues, many individuals can no longer perform their parenting roles. The result has created an escalating number of children in need of primary caregivers.

In response to this sociological phenomenon, there is an increased number of grandparents who are filling the parental gap. They are assuming the role of custodial, primary caregivers for their grandchildren. These individuals have unique social needs in regard to adjusting concurrently to the dual processes of aging and parenting the second time around in midlife or elderly years. They are challenged by the financial, emotional, and physical difficulties of rais-



ing children during a period in their lives when stress factors are increased through their new parenting role and the responsibilities associated with this role. Grandparents will often make the difficult decision to parent again in midlife or elderly years when the only alternative is to place their grandchildren with strangers through accessing the foster care system. Grandparents assuming a parental role for their grandchildren often experience role confusion. Parental responsibilities require grandparents to learn how to communicate and relate to their grandchildren in a different manner.

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The social problems that produce grandparent caregivers affect people from all backgrounds. The role of unplanned parenthood in retirement years transcends the components of race, gender, class, ethnicity, culture, religion, socioeducational, and socioeconomic factors as related only to minority kinship networks. Although these factors continue to influence the escalating number of grandparents who are raising their grandchildren, society has not recognized the growing number of grandparents in this position today. The problems that create the role of parental grandparents are not framed within the confines of one culture or group of people. People from lower socioeducational and socioeconomic backgrounds may have a higher incidence of grandparent caregivers due to poverty and increased stress factors, but the number of grandparent caregivers in other groups is increasing. These individuals are in need of emotional, financial, and legal support. The current social and legal systems are not adequately meeting the diverse, complicated needs of this population.

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Many grandparents are also seeking visitation rights. Some of the circumstances that precipitate the need to seek visitation rights include being blocked from visiting grandchildren because of the death or divorce of a spouse who is the adult child of the grandparents. Grandparents are challenged by facing negotiation procedures with complex legal and social systems to acquire visitation rights. Interfacing with the legal system can be costly and create a financial burden on individuals living on constricted retirement incomes. Seeking visitation rights takes time, and grandparents may be denied visiting with their grandchildren in the interim. Grandparents experience psychological stress during the waiting period. They may be blocked from providing emotional support and stability to their grandchildren. For some grandparents, seeking visitation rights may be a preliminary step to seeking custody of grandchildren that are neglected or abused.

Because the sociological problems incurred by children prior to grandparent caregiving are so complex and extensive, they require a great degree of care, commitment, love, understanding, and self-sacrifice on the part of their grandparent caregivers. In many cases, the custodial role is assumed out of necessity rather than choice. Custodial grandparents are not often raising normal, well-adjusted and problem-free children. The emotional, physical, and developmental problems in this population of children often require long-term care. Many of these children are scarred for life. Although children are resilient, problems related to trauma and neglect may never improve completely even with the best of care. Grandparent caregivers who face this challenge need to understand the etiology and effects of the unique problems related to the children in their care. They may need special training and education concerning issues such as mental health, emotional needs, physical disabilities, developmental disabilities, behavioral problems, medical needs, trauma from physical or sexual abuse, infection control for care of children with infectious disease, and help to cope with terminal illness. They need to have information on resources, which may help them meet their unique challenges. Unfortunately, resources and support mechanisms have been limited.

Grandparent caregiver households may represent families with two grandparents present who share caregiving responsibilities or families with a single grandparent present who shoulders the burden alone. Grandparent caregiver households are comprised of divorced, widowed, and married grandparents. Gender differences in caregiver burden are present in

some families. Inequality in caregiving responsibilities may place a strain on the marriage of grandparents. There have been reports of long-term marriages resulting in divorce because the grandparents were not in agreement concerning the care or visitation of their grandchildren.

Caregiving and nurturing are terms viewed as relating to the role of women in society. Assuming a grandparental caregiver role does not change this perception. In most cases, the principal burden of caregiving is delegated to women even if they are married and the spouse is present in the household. It is not proper to generalize this practice to encompass the entire population of grandparent caregivers. There are some households in which both spouses will contribute to the care of the children.

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Gender inequality in grandparental caregiving goes farther than unequal distribution of responsibilities. Many grandparent caregiver households are run entirely by single female grandmothers on extremely limited incomes, which may be below the poverty line. The female-headed households are subject to stigmatization by society, which can be a factor that prevents them from seeking help. Caregiving responsibilities contribute to depletion of physical energy and finances. This should be an issue of concern for society, but women and children have always been ignored because they are devalued, oppressed groups.

The number of single grandmothers serving alone in a parental role for their grandchildren is worthy of special attention. The burdens associated with the primary caregiver role are increased to a greater extent for this segment of the grandparent caregiver population. They tend to be poorer than other grandparent caregivers. They must face extraordinary physical and emotional challenges as well as problems related to finances, housing, and lack of respite care. Resources are extremely limited when one individual is responsible for total care. In many

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cases, courage is the glue that holds these families together. They are stigmatized to a greater degree than male/female couples who fill the parental role together.

Grandparents who take responsibility for the caring of grandchildren with pediatric AIDS and other infectious diseases face roles associated with a tremendous sense of loss, especially when both the mother and child expire. Caregiving for children with infectious diseases brings numerous crises. It is a role that leaves caregivers feeling depressed, hopeless, powerless, and empty. It is a role that challenges the very core of religious values and other belief systems. It presents an overwhelming, exhausting challenge. On a pragmatic level, grandparent caregivers of children with AIDS are in need of financial assistance, health care, respite care, support groups and AIDS education. The frailty of the caregiver's condition due to chronological age exacerbates the many stress factors involved with this type of caregiving. As we have discussed, there is often no choice but to assume this role, and the grandparents assume it with unconditional love with a great cost to self.

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*"A peaceful existence may be difficult to achieve for grandparent caregivers of children with alcohol-related problems."*

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Families with the responsibility of caring for children with infectious disease experience extreme isolation. Families are consumed by the caregiver role because the severity of the care demands it. In performing their role, personal needs are ignored. Life is refocused on the needs of the infected individual. These caregivers are overburdened and weary. The demands of this role are emotionally and physically draining. Services are not adequate to meet the needs/demands faced by grandparent caregivers of children infected with HIV, AIDS, and other infectious diseases.

The familial problems related to alcoholism often become the prerequisite to grandparents assuming the role of primary caregivers for their grandchildren because parents can no longer fulfill their parental roles. Because these children come from chaotic families, they have numerous problems and are difficult to care for. These children have been raised in dysfunctional families without positive role models. They are

victims of inconsistent, unpredictable parental behavior. The dysfunction produced by alcoholic parents can lead to developmental and behavioral problems. Children of alcoholic parents may be born with fetal alcohol syndrome. Many of the symptoms experienced by fetal alcohol syndrome infants are similar to those of drug-addicted infants.

The degree of problems experienced by children who are from alcoholic homes may escalate with age. Grandparents who assume the role of primary caregivers for their grandchildren with a familial background of alcoholism may have a monumental task when the grandchildren reach teenage years because alcohol-related behavioral and genetic problems are well developed and ingrained. Worries associated with genetic predisposition to alcoholism are always present. Even if children do not develop into alcoholics, the risk factor is high. These children may also have unhealthy, alcoholic behavioral patterns in their psychological makeup from living with their alcoholic parents. The cycle is difficult to break. The caregiving role is laden with stress factors. In light of the intensity of these problems, home life may often be likened to a battlefield. A peaceful existence may be difficult to achieve for grandparent caregivers of children with alcohol-related problems.

Grandparents who raise grandchildren from alcoholic backgrounds may also have to deal with the problem of teenage alcohol consumption due to cultural influences, peer pressure, or a genetic predisposition to alcohol. Because risk factors for alcohol-related problems are present in this population of children, grandparents must educate themselves and their grandchildren concerning the effects of alcohol consumption. Grandparents who have grandchildren from alcoholic backgrounds must monitor them closely and scrutinize their peer relationships to help reduce risk factors.

For the grandparents or single grandmothers who take care of grandchildren from drug-addicted parents, the road is difficult and laden with suffering. The infants suffer from withdrawal and numerous adverse symptoms related to their mother's drug consumption, which may result in medical conditions or developmental problems. The grandparents suffer while watching the infants go through such a difficult beginning in life. The early days in the life of an infant born with drug addiction may have an adverse effect on emotional and developmental factors. When infants who are addicted to drugs at birth begin to develop, they are at high risk for medical and developmental problems.

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When children are removed from their homes because of sexual abuse, it is not uncommon for grandparents to assume a primary custodial role. The grandparents must learn how to deal with the scars produced in the children from sexual abuse. They must understand the symptoms of post-traumatic stress disorder. They are placed in a position of great concern if the sexual offender has visitation rights. It is a very stressful role to fulfill, which will produce frustration if the children do not receive adequate protection from the legal system.

In order to facilitate the healing process for sexually abused children, grandparent caregivers will need education concerning the symptoms the children will experience related to the trauma of sexual abuse. Sexually abused children experience shame and guilt. They blame themselves for the abuse and have difficulty expressing feelings associated with their trauma. Grandparents in the caregiver role must also be cognizant of the effects caused by the psychological and emotional trauma related to sexual abuse.

Domestic violence contributes to children in need of parents and housing. The existence of violence in a household produces children with problems requiring extensive services. The children are traumatized and may be damaged physically. Some of the difficult problems that these children may face include experiencing nightmares, sleep disorders, depression, low self-esteem, eating disorders, inability to trust, inability to form attachments, and emotional withdrawal. Like victims of sexual abuse, victims of domestic violence also suffer from post-traumatic stress disorder.

Grandparents who survive on limited retirement incomes have often scaled down their lifestyles and have been living in quarters with limited space prior to becoming primary caregivers for their grandchildren. Housing space is often too inadequate to accommodate additional members in the family, and the inclusion of grandchildren produces a crowded living environment. Unfortunately, funds for larger living quarters are not readily available. This produces significant stress. An even worse scenario exists when grandparents or a single grandmother live in subsidized senior citizen housing. When they take their grandchildren, even if it is for temporary custody, they risk losing senior housing. There is no provision for these special circumstances. The inclusion of grandchildren is not defined as family members who are entitled to live in senior citizen housing complexes.

In spite of the stress factors related to grandparent caregiving, grandparents assume the caregiver

role because they believe that it is better for their grandchildren to be raised by family members than to enter the foster care system and be raised by strangers. They believe that their grandchildren would not be loved and cared for by strangers in the same manner that they would be by blood relatives. Grandparent caregivers believed that traumatized children require their unconditional love and support. Although many people who serve in the foster care system are good people, unconditional love and support is a requirement that is difficult or impossible for strangers to provide. Foster care can provide excellent homes with loving families, but the system also has people who serve as foster parents for financial purposes. Some foster parents provide for the physical needs of foster children, but they ignore their pain and emotional needs. It is not uncommon for children to be placed in several homes, which does not give them a sense of security.

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Raising children is a difficult task at any age, but when the caregiver is elderly, challenges and stress factors are increased. Grandparent caregivers have decreased energy levels and physical problems/limitations associated with chronological age. It is difficult to maintain the energy level to keep up with children, especially if they are very young. It is difficult emotionally to keep up with the problems and adjustments of older children. It is difficult psychologically to deal with the problems related to the effects of trauma experienced by children. When grandparents assume the primary caregiver role for their grandchildren, their entire lifestyle changes. Their social life is limited, and they experience isolation. Their finances are overburdened or depleted. They must learn how to negotiate the systems involved in their grandchildren's lives such as the welfare, education, medical, and legal systems. This aspect alone creates tremendous stress because it requires endurance in dealing with these systems and education in order to negotiate them.

Elderly grandparents who become caregivers out of necessity must also deal with conflicting emotions

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relating to their new role, which may include fear, guilt, anger, frustration, and grief. In spite of the fact that they love their grandchildren and want to do the best thing for them, their personal lives have been turned upside down. Change is difficult to experience at any age, but in elderly years, it is an uncomfortable and devastating challenge to face. The geographic disbursement of families in modern society has left many grandparent caregivers reluctant to ask for help or avail themselves of resources. Many caregivers face stressful, difficult, and challenging odds alone without the help of friends, family, or supportive resources.

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*“Grandparent caregiver households are redefining the family, but public and social policies have not adequately recognized this in relation to redesigning policies to produce resources for these families.”*

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Two mechanisms available for support of needy children are Aid to Families with Dependent Children (AFDC) and stipends from foster care. There is quite a variance between these two funding sources. Provision of foster care stipends have more stringent requirements. Many of the grandparents are unable to go through the involved eligibility process.

Grandparents who have custody of their grandchildren often encounter difficulty interfacing with the social welfare system in order to obtain financial benefits to help them raise their grandchildren. Laws vary from state to state and policies will become more decentralized through the new trend in welfare reform. Caseworkers are not always knowledgeable in grandparental issues and rights. This has resulted in misinformation and blocking of access to resources.

Grandparent caregiver households are redefining the family, but public and social policies have not adequately recognized this in relation to redesigning policies to produce resources for these families. There is a tremendous need in this area because grandparent caregiver households have limited resources derived principally from retirement incomes. The majority of older grandparents did not receive the formal education necessary to command high salaries and ensure adequate savings. Many of these families live below the poverty level and are solely responsible for providing financial resources. These families

are in dire need of financial resources to help raise their grandchildren.

Grandparent caregivers and those seeking custody are in need of more assistance from the social service, legal, education, religious, and medical systems in order to address their sociological, psychological, financial, and legal concerns. Grandparents may be in need of counseling, respite care, support groups, case management, advocacy, housing, education, medical support, legal support, and financial support. They may be in need of assistance in locating and assessing resources and guidance in strategies to help them navigate complex, bureaucratic systems.

Social service agencies, which provide for the needs of children and families, should offer resources to serve the needs of grandparents. Social workers need more education concerning the issues faced by grandparents. Social work counseling and assessment skills require an expanded knowledge base concerning grandparental issues, which should include crisis intervention, grief, loss, marriage counseling, medical education, financial resources, modern parenting skills, and referrals for legal matters. Social service agencies, which serve the needs of the elderly, should provide expanded resources and referrals for grandparents.

Domestic violence groups should expand services to include support groups and counseling for grandparents raising grandchildren who have been physically, sexually, or emotionally abused. Grandparents need to be educated concerning domestic violence issues and how to protect themselves and their grandchildren. They need education concerning how to provide emotional support for their grandchildren.

Medical services should provide more support and education for grandparent caregivers, especially those caring for children with infectious disease and chronic medical needs. Respite and nursing services, as well as education, could be provided. Agencies serving the developmentally disabled should provide support and education for grandparent caregivers because many of the grandchildren in their care have developmental disabilities. The educational system should provide more resources and support.

In the long-term analysis, policymakers should view grandparent caregiver households as saving money for the government because they provide the service of supporting and raising their grandchildren. The foster care system is already overburdened,

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and grandparent caregiver households should be viewed as a viable alternative worthy of support if the family is stable. Grandparents have the love and desire to help their grandchildren battle difficult problems, which may be unresolved when strangers care for the children. In this respect, grandparent caregiver households can also be viewed as a mechanism to reduce the future cost of government in the area of crime and social services. They deal with the problems of the children before they develop into serious crime-related or mental problems. Many grandparents are turning to their communities and local churches for help because their needs are not being served through the social systems. The service that these grandparents are providing for humanity is not being recognized by the government the way that it should be.

The issue of providing support for grandparent caregivers and grandparents seeking visitation rights is about challenging our value systems in order to extend a helping hand to two oppressed groups, children and the elderly. It is about paying tribute to them through providing support for the complex issues involved in their plight. Their merging of these two oppressed groups may account for the historic lack in social, economic, political, and legal support for their cause. As a democratic society, we must recognize the rights of these two groups who have been co-joined in their efforts to survive and form a new type of family.

Grandparents are filling an important gap in our society and are worthy of the utmost support as they

embark upon the difficult and challenging responsibility of parenting their grandchildren and seeking visitation rights. We cannot turn a deaf ear to our children and elders. The ties of blood, love, and commitment are the elements that cause these valiant individuals to face difficult odds. Grandparent caregivers and those seeking visitation rights must be recognized for their contribution to society and be provided with adequate support from social, governmental, and legal agencies in order to face complex sociological, psychological, and legal challenges for the benefit of providing emotional support and stability for their grandchildren.

As we have discussed, the issues related to grandparent caregivers and those seeking custody are complicated. Grandparent caregivers should be entitled to greater financial, social, and legal support on the county, state, and federal levels. Due to medical, psychological, and emotional problems related to trauma, children in the care of grandparents are in dire need of many support modalities. The recognition of grandparent caregiver issues in the political arena is recent. Recent progress thus far has been due principally to the lobbying efforts of the grandparents themselves. The professional literature concerning grandparent caregiver issues and those seeking visitation rights needs to be expanded and updated. Social workers and mental health professionals should begin to make a greater contribution to this cause through education, research, policy, and program development.

Joanne Danner was born in Brooklyn, New York and currently resides in Kings Park, New York. She is a certified social worker experienced in working with psychiatric, geriatric, and developmentally disabled populations. Joanne studied social work because she wanted to devote her life to improving the quality of life for others. She earned her Master's Degree from the School of Social Welfare at the State University of New York at Stony Brook. Joanne became interested in working with grandparent caregivers through personal experience when grandparents helped her to raise her son, who is now 16 years of age. She devoted her Master's Thesis to the subject of grandparental issues. She does volunteer work with Grandparents Reaching Out, a non-profit organization in Patchogue, Long Island, which serves the needs of grandparents on Long Island who are seeking custody and visitation rights. Joanne is the administrator of a grandparent support group associated with Grandparents Reaching Out and provides counseling for emotional issues when requested. Joanne is currently employed by the New York State Office of Mental Retardation and Developmental Disabilities. Professional affiliations include membership in the National Association of Social Workers and the American Red Cross. Honors include earning the Presidential Scholarship for undergraduate studies at Adelphi University, Dean's list for all semesters of undergraduate studies, and a member of Phi Theta Kappa National Honor Society. Hobbies include inspirational writing, music, nature, and animals. Joanne enjoys writing poetry and music. Several poems and songs have been published. The most recent publication of poetry was published by the International Library of Poets in the 1999 edition of *The Whirling Sea*. Joanne believes that inspiration comes from perceiving value and excellence of character in others and by being cognizant of the beauty in life that surrounds us.

# ELDER LAW NEWS

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# CASE NEWS

By Judith B. Raskin

## Medicaid Recovery

**DSS appealed from a decision extinguishing its lien against the proceeds of an infant's personal injury action where no portion of the recovery represented past medical costs.**

**Reversed. *Santiago v. Craigbrand Realty Corp.* N.Y.L.J., March 31, 2000, p. 25, col. 3 (App. Div., 1st Dep't).**



A personal injury action was settled on behalf of an infant plaintiff for \$140,000. DSS asserted a lien of \$12,857.06 against the proceeds with which the plaintiff intended to fund a supplemental needs trust. The plaintiff argued that, following *Baker v. Sterling*, and pursuant to SSL 104, DSS cannot recover from the personal injury proceeds of an infant except those allocated to past medical expenses. The Supreme Court extinguished the lien because no portion of the proceeds represented recovery of past medical expenses. DSS appealed.

The Appellate Division, First Department reversed. The court reviewed the statutory and case history of this issue. It concluded, following *Cricchio* and *Calvanese*, that the right of recoupment is based on SSL §§ 366(4)(h)(1) and 367-a(2)(b) and not SSL 104. These sections do not distinguish the right to recovery upon whether the recipient is an adult or an infant. The court states that this analysis comports with the view that Medicaid is the payor of last resort and the fact that the plaintiff is an infant does not change that primary goal of the Medicaid program.

**An estate appealed a decision granting DSS the right to recovery from the estate where the estate received proceeds from a personal injury action and the decedent was survived by his wife. Affirmed. *Estate of Vivas v. NYCDSS*, \_\_A.D.2d\_\_, \_\_N.Y.S.2d\_\_ (1st Dep't, 2000).**

The Surrogate's Court granted summary judgment to NYCDSS on its claim for reimbursement against the estate of Adolfo Vivas. The estate appealed.

Mr. Vivas had received Medicaid benefits after being injured in an accident. Following his death, his estate received proceeds from a personal injury

action. DSS sought recovery from the proceeds. The estate argued that DSS could not recover because the decedent's spouse was still alive and DSS had not filed a lien.

The first department upheld the lower court decision. SSL § 369, at the time of decedent's death, did not permit Medicaid to recover from a recipient's estate if the recipient was over 65 and his spouse was still alive. However, § 369(2)(c) provides that Medicaid can recover from third party payors under § 104(b) regardless of the survival of a spouse. Although 104(b) authorizes the filing of a lien against third party payment, the right of recovery exists whether or not a lien is filed.

**Plaintiff DSS sought recovery from a community spouse where he did not disclose the existence of a self-settled irrevocable trust. Granted. *Case v. Fagnoli*, \_\_N.Y.S.2d\_\_ (Sup. Ct., 1999).**

DSS brought an action to recover \$131,774 from Mr. Fagnoli. His wife received Medicaid benefits for home care and then nursing home care before her death in 1996. DSS claimed the defendant had excess resources when the benefits were provided. Mr. Fagnoli failed to inform Medicaid in 1990, when he first made application for his wife, that he was the grantor of an irrevocable trust. This trust directed that the trustees, his children, make distributions of income and principal from the trust to support his standard of living. It also gave him as grantor a limited power of appointment. (The court stated, "As a practical matter, a power to change the remainder interests in a self-settled trust is very nearly a power to dispose of the principal.") The parties differed as to when DSS was given information about the trust but it was not until the action was commenced in 1997 that DSS received full information. DSS sought legal fees based upon its additional claim that the defendant violated Debtor Creditor Law.

Defendant argued that the six-year statute of limitation barred the claim and it began to run when DSS found out about the trust.

The Court held that the principal of the trust was an available resource because the standard upon which distributions could be made was insufficient to provide a measure to the trustees of the trust assets available for distribution. Therefore, the defendant, as a legally responsible relative, had an implied contract with Medicaid that its costs could be recov-

ered. The transfer was not a fraudulent conveyance because DSS failed to show that the defendant was insolvent or facing large debts in 1987 when the trust was funded. Therefore, DSS was not awarded legal fees.

## Article 81

**Petitioner, as guardian of the property of an incapacitated person, moved to confirm court ordered gifts contested by the beneficiary of the IP's estate. Reversed in part. *In re Burns*, \_\_A.D.2d\_\_ (3d Dep't, 1999).**

The petitioner was the article 81 guardian for the property of Marion Burns. Marion Burns had executed a will in 1968 appointing her brother as beneficiary. Her brother predeceased her, leaving his son, the respondent, as the sole beneficiary of her estate. In 1998, the Supreme Court authorized the petitioner to make four gifts to charities of \$10,000 each. The respondent successfully moved for reargument but the court reaffirmed its order. The respondent appealed.

He argued that he did not receive notice of the original hearing and that the petitioner's evidence failed to meet the standards of MHL § 81.21 for making gifts. The petitioner cited Marion Burns' testimony that she did not want her nephew to get her entire estate, that the evidence was properly analyzed and that any defect in the notice was corrected when the respondent participated in the reargument proceedings.

The Appellate Division reversed that part of the order, finding that the petitioner complied with notice requirements and remitted the matter of notice for further proceedings. § 81.21(c) requires that notice be given to

at least one of the incapacitated person's living relatives in the nearest degree of kinship . . . the presumptive distributees of the incapacitated person, and any person designated as a beneficiary in the incapacitated person's will whose rights or interests would be adversely affected by the relief sought in the petition.

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.

# FAIR HEARING NEWS

By Rene Reixach and Ellice Fatoullah

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 M. F.***

### **Holding**

Where the appellant resided with the spouse in a nursing home through the entire full month portion of a penalty period, but the spouse died shortly before the end of that month, the penalty period must be apportioned between the spouses where the application is made in the next month.



**Ellice Fatoullah**

### **Facts**

The appellant had resided in a nursing home for 17 months as of October 1998, and the appellant's spouse had been institutionalized in the nursing home for 16 months as of his death in late September 1998. Uncompensated transfers of \$196,943.40 were made as of January 1997, resulting in a 36.22-month penalty period at the applicable regional penalty rate of \$5,437.

The appellant's son and attorney-in-fact had contacted the agency in late 1997 concerning the computation of the penalty period, and in June 1998, he had written the agency advising that there had been \$171,043.41 of uncompensated transfers. By letter dated June 22 1998, the agency wrote the son that "Based on the information you have given us, the penalty period for your parents would end in October 1998." (This had been calculated at a lower regional penalty rate since the 1998 rate had not been released).

An agency appointment was scheduled for October 1998, but in late September 1998, the appellant's spouse died. The son appeared for the appointment and was advised by the caseworker to submit the application for the appellant only in a few month's

time. At that time he was given an "Additional Information Request" form listing several verification items, which he submitted in November 1998. The Agency completed a Transaction Tracing Record in November 1998 as well. In December 1998 there were a few additional gifts, plus the son advised the agency that a car had been gifted to the appellant's granddaughter.



**René Reixach**

A face-to-face interview was conducted in early January 1999. The agency found that the appellant had excess resources of \$2,777.44. The case worker made a preliminary finding in April 1999, that the case should be opened effective January 1 1999, with the appellant being liable for \$4,936.19 for that month, consisting of the \$2,777.44 of excess resources, \$1,200 of remaining transfer penalties, and the regular net available monthly income figure. That preliminary determination, in effect, acknowledged that apportionment of the transfer penalty between the appellant and spouse, taking into account the months of their respective institutionalizations, was appropriate.

After a regional Medicaid training program conducted later in April 1999, the agency re-evaluated the application and determined that apportionment of the penalty period between the appellant and the deceased spouse could not be made pursuant to N.Y.S. Dep't of Social Services Administrative Directive 96 ADM-8. By letter in late April 1999, the agency advised the son that since the spouse had never applied for Medicaid, none of the transfers could be apportioned per 96 ADM-8. The agency computed the transfers as totaling \$184,443.40, with a penalty period running from February 1 1997 to Jan-

uary 31, 2000 with a \$375 partial penalty for February 2000. The son was afforded an opportunity to rebut the presumption that the transfers had been for the purpose of becoming eligible for Medicaid.

In late May 1999, the agency sent the appellant a formal notice of decision denying the January 1999 application on the ground that the appellant was not eligible because \$164,443.40 of assets had been transferred, resulting in a 36-month penalty at the applicable regional penalty rate of \$5,113 per month. The agency became aware of certain data entry and mathematical errors with that notice, and issued a new notice in June 1999, denying the January 1999 application on the ground that the appellant was ineligible until February 2000 because \$184,443.40 of assets had been transferred for less than fair market value, resulting in a penalty period of 36.08 months commencing February 1, 1997, at the \$5,113 monthly regional penalty rate.

In June 1999, after a meeting among the appellant's son, his counsel, the agency and agency counsel, the son submitted a separate Medicaid application for his deceased parent. That application was denied by the agency and review of that decision was not sought.

Subsequent to issuance of the June 1999, notice, the agency became aware of additional uncompensated transfers of resources which had taken place during October 1998, but which had not previously been taken into account. The agency thus recalculated the amount of transferred assets and the period of ineligibility again, and issued a second amended notice in early September 1999, denying the January 1999 application on the ground that the appellant was ineligible until April 2000, because \$195,743.40 of assets had been transferred for less than fair market value starting in January 1997, resulting in a penalty period of 38.28 months at the \$5,113 monthly regional penalty rate.

The agency then became aware of additional mathematical errors in its computation, and the agency was also advised by General Information System message GIS 99 MA/025, issued September 8 1999, that the 1999 regional penalty rate had been increased to \$5,437. Thus, in October 1999, the agency issued a third amended notice denying the application on the ground that the appellant was ineligible until February 2000, because \$196,943.40 of assets had been transferred for less than fair market value, resulting in a 36.83-month penalty period at the applicable 1999 regional penalty rate of \$5,437 per month (another error; the correct result of that computation is 36.22 months).

The appellant requested a fair hearing to review the initial May 1999 decision, and subsequently amended the fair hearing request to include additional review of the agency's amended September and October 1999 decisions.

### Applicable Law

Sections 360-4.1 and 360-4.8(b) of 18 N.Y.C.R.R. (the "Regulations") provide that all income and resources actually or potentially available to a Medicaid applicant must be evaluated, but only those which are found to be available may be considered in determining eligibility. A Medicaid applicant whose available non-exempt resources exceed the resource standard will be ineligible until incurring medical expenses equal to or greater than the excess resources.

Section 366.5(d) of the New York Social Services Law and § 360-4.4(c)(2) of the regulations govern transfers of assets made by an applicant or spouse on or after August 11 1993. Generally, in determining Medicaid eligibility for a person receiving nursing facility services, any transfer of assets for less than fair market value made by the person or spouse within or after the "look-back period" will render the person ineligible for nursing facility coverage. The "look-back period" is the 36-month period immediately preceding the date that a person receiving nursing facility services is both institutionalized and has applied for Medicaid, except that if payments are made to or from a trust which may be deemed assets transferred by the applicant, a 60-month period is used in place of the 36-month period.

A transfer for less than fair market value, unless it meets certain exceptions in the Regulations, 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 on the date the person first applies for Medicaid as an institutionalized person.

Section 360-4.4(c)(2)(vii) of the regulations provides:

Apportioning periods of ineligibility.

In the case of a transfer by the spouse of an individual which results in a period of ineligibility for the individual, *if the spouse becomes eligible for MA before such period of ineligibility ends, the remaining portion of the period of ineligibility will be divid-*

*ed equally between the individual and the spouse so long as both remain eligible for MA (emphasis added).*

Administrative Directive 96 ADM-8(g) states at p. 16:

*Apportioning Penalty Periods Between Spouses*

If either spouse transfers an asset (before eligibility is established) that results in a penalty for the institutionalized individual, the penalty must be apportioned equally between the spouses if the community spouse subsequently becomes in receipt of nursing facility services and applies for MA. If one spouse is no longer subject to a penalty (e.g., the spouse dies), the remaining penalty period for both spouses must be applied to the remaining spouse.

A person who is 65 years of age or older, blind or disabled, who has income or resources which exceed the standards of the SSI program but is otherwise eligible for SSI may be eligible for Medicaid, provided that such person meets certain financial and other eligibility requirements for Medicaid. Social Services Law § 366.1(a)(5). If the applicant's resources exceed the resource standards, the applicant is ineligible for Medicaid until he/she incurs medical expenses equal to or greater than the resource standards. 18 N.Y.C.R.R. § 360-4.1. Administrative Directive 91 ADM-17 sets forth procedures for the treatment of an application where the applicant has resources in excess of the applicable resource standard. Eligibility determinations must include a snapshot comparison of excess resources as of the first of the month to viable bills. This comparison must be done for each month in which eligibility is sought, including each of the three retroactive months. The client is not eligible until the amount of viable bills is equal to or greater than the amount of excess resources remaining after the purchase of burial-related items. Eligibility will be authorized after excess resources and any excess income are fully offset by viable bills.

### **Fair Hearing Decision**

The agency's determination to deny the appellant's January 1999 application for Medicaid on the grounds that the appellant had made transfers of \$196,943.40 for less than fair market value, resulting in a 36.83-month period of ineligibility, was not correct and is reversed. The agency is directed to process the application based on an October 1998 filing date and apportion the penalty period between the appel-

lant and the appellant's late spouse to account for their respective periods of institutionalization

### **Discussion**

At issue is the issue of apportionment of the penalty period between the appellant and the appellant's late spouse. The appellant contended that the correct way to compute the penalty period was as follows. The appellant had been institutionalized and self-paying for 17 months from May 1997, through September 1998; the appellant's spouse had as well for 16 months from June 1997 through September 1998; the remaining three months should be charged to the time both were still in the community from February through April 1997. The appellant would thus have been eligible as of October 1 1998, subject to an increased spend down for that month for the 0.22 fractional penalty month.

The appellant relied on 42 U.S.C. § 1396(c)(4) which requires the agency to use a "reasonable methodology (as specified by the Secretary)" for apportioning such a penalty period "if the spouse otherwise becomes eligible" for Medicaid. The appellant further relied on the Health Care Financing Administration State Medicaid Manual, § 3258.5(j), which provided an example of how such apportionment should be done. The appellant argued that the agency's failure to apportion was not "reasonable" since the import of the rule, and economic sense, call for assessing the penalty period against both spouses when they are both incurring nursing home expenses. The appellant also argued that it was arbitrary and capricious to attribute the entire penalty period to the appellant because of an event totally out of the appellant's control, namely the death of the spouse a few days too soon.

The agency contended that Regulation 360-4.4(c)(2)(ii) required that apportionment could not commence until both spouses have been determined to be eligible, which can only be accomplished by filing an application and completing the application process. The agency noted that Regulation 360-4.4(c)(2)(i)(c) defines the look-back period as the 36 months preceding the date of institutionalization and the date the individual has "applied" for Medicaid. The agency contended that the application was not filed until January 1999, so it could not cover any time during which the appellant's spouse was eligible to receive assistance, since it could only provide for retroactive coverage back three months prior to the month of application, i.e., back to October 1998.

While the agency acknowledged that the son had appeared at its office in October 1998, at which time the appellant had excess resources, the agency indi-

cated that it had advised the son to return in a few months to file the application, after the remaining assets had been spent on the appellant's care. The agency also contended that, even if the application were considered to have been filed in October 1998, the appellant and her spouse would have been ineligible due to excess resources, and therefore apportionment of the transfer penalty would not be allowed.

In response to the agency's interpretation of Regulation 360-4.4(c)(2)(ii), the appellant contended that the federal law and interpretive manual only made sense if the requirement that the spouse be "otherwise eligible" merely meant that the spouse met categorical and financial eligibility without regard to the penalty period. The appellant contended that the spouse would have been eligible during his stay in the nursing home but for the penalty period which was concededly in effect. This was in contrast to the three-month period from February through May 1997, when he was not in the nursing home, and in which apportionment could not be required.

Finally, based on the testimony of the appellant's son that he had been told repeatedly that apportionment would be made and that he would have filed in October 1998 but for being told not to by the agency, the appellant contended that had the son been properly advised by the agency he would have had ample time, through December 1999, to file an application to cover part of the time the deceased spouse had still been alive. Thus the appellant contended that the agency had made "affirmative misstatements" in violation of the requirements to notify applicants of their rights and responsibilities under Regulation 350.7(a).

The agency's determination was not sustained for the following reasons. In determining eligibility, the agency must review resource eligibility, and the look-back period is 36 months prior to the first day of the month in which the individual was institutionalized and had applied for Medicaid coverage. The decision found that the agency's claim that an application was not filed to cover any time period that the spouse was eligible to receive assistance was not supported by the record. Based on the appellant's testimony, and documentary evidence that the agency had been processing the matter between October 1998 and January 1999, the decision found that the application had been filed for both the appellant and spouse in October 1998. Thus, the matter was remanded for the agency to process the application based on an October 1998, application date, after which a new determination must be rendered based on apportionment of the penalty period.

The decision further noted that an applicant's "resources" include both non-exempt uncompensated transfers during the look-back period, and assets in existence at the time of the application. The fact that the appellant had excess resources in October, 1998, would not have precluded the agency from computing the applicable penalty period or apportioning the penalty period as against both spouses. The Discussion in the Fair Hearing Decision thus concluded: "Therefore, the agency must apportion the penalty period in this case."

### **Editor's Comment**

This lengthy (14 pages) decision and protracted (five months from hearing to decision) process demonstrates several things. First, it was critical that the appellant presented a detailed set of evidentiary materials plus an explanatory memorandum laying out both the sequence of events, the issues and the legal arguments. While the agency did likewise, it was probably not helped by the fact that it had repeatedly calculated the penalty period incorrectly. While some of those calculations were in error due to the State issuing the penalty rate in the late summer retroactively to January, others were just computation errors. It should also be noted that, in order to protect the record and avoid statute of limitations questions, a separate fair hearing request (each referencing the prior ones) each time the agency issued an amended notice of decision.

The favorable result was also probably helped by the fact that the appellant appeared by two separate counsel, one from the local area and one with considerable expertise in Medicaid eligibility issues. Likewise, the materials they submitted included federal policy transmittals not set forth in federal regulations, but only available in the State Medicaid Manual, so the appellant's position had obviously been thoroughly prepared. There was nothing to indicate that the appellant would be deterred from pursuing her rights by an adverse fair hearing decision, so the decision apparently received considerable time and attention both from the Administrative Law Judge and from the supervisory fair hearing staff in Albany.

The decision appears to turn on the fact that the October application could cover a period during which the deceased spouse was still alive, suggesting that the result might have been different if the October application had not been credited. That would appear to be the requirement of Administrative Directive 96 ADM-8, which refers to apportioning where the spouse enters a nursing home and "applies for MA." Should that make a difference? Suppose, for example, that the spouse had died in

June rather than September. Then, even if the penalty period had been apportioned between the spouses during the months they resided in the nursing home, it would have run through December rather than September. If the appellant had then applied in January, would apportionment be denied because it could not go back to provide coverage for the spouse in June?

That distinction, if there is one, certainly would make no economic sense. It also puts the appellant in the odd position of having to apply prematurely, when it is clear that the penalty period has not run, in order to come within the apparent holding that the application has to cover a period when the spouse was still living. That distinction would also seem to violate the language of 42 U.S.C. § 1396p(c)(4), which requires not only that the period of ineligibility be apportioned but also “any portion of such period.”

This dispute is also evidence of the fact that both Congress and those who administer the Medicaid program, both in Washington and Albany, have difficulty writing policy clearly. If one is ineligible during the penalty period, what does it mean to say that the penalty period should be apportioned only if the spouse is “otherwise eligible?” State Regulation 360-4.4(c)(2)(vii) is even more confusing, requiring apportionment “if the spouse becomes eligible for MA before such period of ineligibility ends.”

The most helpful administrative material was a case example in the federal State Medicaid Manual

which, when the names of the appellant and spouse were substituted for Mr. and Mrs. Able in the manual, was almost precisely that of the appellant and spouse. It also stated that where one spouse was no longer subject to a penalty because of death, “the remaining penalty period otherwise applicable to both spouses must be served by the remaining spouse.”

The decision also demonstrates that it may be helpful to provide the Administrative Law Judge and Fair Hearing Section a way to rule in the appellant’s favor while still upholding State policy. In this case, since State policy in 96 ADM-8 seems to require an actual application for the spouse, and the State seems to interpret that to mean an application that could cover the spouse prior to death, the way out was for the State to find that the events of October, 1998 amounted to an October filing date rather than January, 1999 as the agency contended. That way the State policy did not need to be called into question since it resulted in eligibility being determined. Had the application been found to have been made in January, it would not have covered any of the time the spouse was alive, which might have put the State policy at risk of being overturned by the courts.

The appellant at this fair hearing was represented by René H. Reixach, Esq., of Rochester, New York and Timothy J. Buckley, Esq., of Geneva, New York.

**Ellice Fatoullah is the principal of Fatoullah Associates, with offices in Manhattan and New Canaan, CT. She has worked in the field of Elder Law since 1980. She is Co-chair of the Medicaid Committee of the New York State Bar Association’s Elder Law Section, a Fellow of the National Academy of Elder Law Attorneys, and a board member of Friends and Relatives of the Institutionalized Aged (FRIA), a New York City advocacy group monitoring quality of care issues in nursing homes. 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.**

**René H. Reixach, Jr. is an attorney in the law firm of Woods, Oviatt, Filman, Sturman and Clarke LLP, where he is a member of the firm’s Health Care Law Practice Group and responsible for handling all health care issues. Mr. Reixach received his J.D. degree from Harvard Law School, and his B.A. degree from Yale College. Prior to joining Woods, Oviatt, Mr. Reixach was the Executive Director of the Finger Lakes Health Systems Agency. Mr. Reixach authors a monthly health column in the *Rochester Business Journal* and has written for other professional, trade and business publications. He has lectured frequently on health care topics. 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. Among Mr. Reixach’s civic and charitable involvements are serving as a board member and president of the Foundation of the Monroe County Bar, president of Greater Upstate Law Project, Inc., and board member of the Yale Alumni Corporation of Rochester.**

# LEGISLATIVE NEWS

By Howard S. Krooks and Steven H. Stern

## President Clinton Signs Into Law H.R. 5— Senior Citizens' Freedom to Work Act of 2000

On March 1, 2000, the House passed by a vote of 422 to 0 (13 members did not vote) H.R. 5 (known as the "Senior Citizens' Freedom to Work Act of 2000"). The bill proposes to eliminate the Social Security retirement earnings test effective with respect to tax years ending after December 31, 1999. The current law would apply to those individuals who turn 65 during calendar year 2000 for those months of the year preceding their birthday in 2000. The Senate passed a similar measure (S.279) on March 22, 2000. The bill was sent back to the House for consideration of a minor Senate amendment which cleared the House on March 28, 2000 and then was forwarded to the White House for President Clinton's signature. The President signed the bill into law on April 7, 2000. Pub. Law No. 106-182.



**Howard S. Krooks**

Under prior law, Social Security recipients were forced to give up all or part of their retirement benefit if they earned more than \$17,000 a year (scheduled to increase to \$30,000 by 2002). Thus, the law required the country's elderly population to pay \$1 in Social Security benefits for every \$3 earned over \$17,000 in any one year. The increase in the earnings limit to \$30,000 by 2002 was of little use to seniors currently in or about to enter the workforce. The earnings limit was intended to discourage older persons from continuing in the work force. However, with the current unemployment rate at one of its lowest levels in history and concomitant labor shortage, the case for eliminating the test is overwhelming. As it is expected that the United States will face an ever-increasing labor shortage due to the retirement of baby boomers, repealing this provision would seem to be appropriate as penalizing seniors who wish to continue to work serves no purpose in the current environment.

Comments in support of the bill from hearings held in the House of Representatives on March 6, 2000 focused on the inequities posed by current law on senior citizens. The Honorable Max Sandlin (Representative from the First Congressional District of Texas), who co-sponsored H.R. 5, states as follows:

[t]he Senior Citizens' Freedom to Work Act is about basic fairness. There are numerous reasons seniors may choose

to continue working past the age of 65. Many seniors would like to retire but have to continue working simply to make ends meet. It is outrageous that the government penalizes these individuals for trying to support their most basic needs. Other seniors may continue to work simply for the pleasure and pride they take in contributing a lifetime's worth of skills and knowledge to their chosen profession. The government should not deprive industry of this dedicated, skilled, and resourceful population of workers. Regardless of the reason, America's seniors deserve the benefits they earn whether or not they choose to continue working beyond the national retirement age. . . .



**Steven H. Stern**

I became a co-sponsor of H.R. 5 last year because I feel so strongly about the merits of this legislation. According to the Social Security Administration, over 800,000 seniors lose part or all of their Social Security benefits because of the earnings limit. With the retirement of the massive baby boom generation fast approaching, the number of seniors affected by this penalty will increase significantly over the next decade. Today, we have the opportunity to prevent that injustice.

During a Senate hearing held on March 20, 2000, Senator Orrin Hatch (Senator from Utah), stated that there are five main reasons why the earnings limit should be repealed:

First, the earnings limit is plainly unfair to senior citizens. What kind of message does the current law send to a worker turning age 65, Mr. President, when he or she learns that there will be a 33 percent penalty for continuing to work once his or her earnings exceed \$17,000.00? Yet, at the same time, senior citizens who are fortunate enough to have interest, dividend, or

capital gains income from stocks, bonds, or mutual funds, or income from a private pension, are not penalized, no matter how much of these kinds of income they receive. Even if the earnings limit otherwise had merit, which it doesn't, it punishes the very people who most need to work to make ends meet.

Second, the earnings limit is outdated. The limit was a feature of the original Social Security Act in 1935. It was included to encourage seniors to retire so their jobs would be available to the millions of younger workers who were unemployed in the difficult job market of the Great Depression. That was a different era. What was appropriate in 1935 is clearly not appropriate in 2000, when it's workers, not jobs, that are scarce.

Third, the earnings limit places extremely high marginal tax rates on workers between the ages of 65 and 70 who continue to work. Consider the example of a 66-year-old plumber I will call Howard. Along with his son, Howard has run a small plumbing business in Ogden, Utah, for over 20 years. Now that he is over 65, Howard has decided to turn the management of the business over to his son. Howard, however, still wants to work, and because of an aged mother whom he takes care of, he still needs some income. Howard works three days a week and earns \$35,000.00 per year. Believe it or not, when the earnings limit penalty of 33 percent is combined with the income tax rate of 28 percent, the self-employment tax rate of 15.3 percent, and the effect of taxing his Social Security benefits at 85 percent, Howard faces a marginal tax bracket of 88.8 percent, not counting the Utah income tax. This high a marginal tax rate is unconscionable and indefensible any way you look at it.

Fourth, the earnings limit is terrible for our economy. The biggest problem our economy faces right now is a severe shortage of workers. This is especially true in the high technology fields, where our shortages are so severe that we must increase the number of H1B

visas allowed this year so our high tech firms can stay competitive.

Finally, the earnings limit is no longer relevant, considering the growing longevity of Americans. In 1935, when the earnings limit was added to the Social Security Act, life expectancy in this country was 62 years. Now, it is 77 years. Moreover, senior citizens are the fastest growing segment of our population. There is absolutely no reason these citizens cannot keep on working if they desire to do so. I have read articles that the life expectancy of the American people may soon be approaching 85.

Therefore, I am gratified to see that this earnings limit repeal is about to pass the Senate. And again, I am especially pleased that President Clinton has agreed to put aside election year politics and sign this legislation.

## **Medicaid Applicants and Advance Directives**

Elder law attorneys know that the Patient Self Determination Act of 1990 requires health care facilities to educate patients of their rights, including the right to execute an advance directive in order to ensure that their wishes regarding medical decisions are honored. However, for too many of our seniors, this may be the first and only time they receive such information. Proposed legislation in the New York State Assembly would require that applicants for Medicaid be given an opportunity to execute a living will and health care proxy. Also, the new law would provide for an inquiry to be made as to existing living wills and health care proxies, and would require the results to be forwarded to providers.

New York State Bill A03404 would add a new requirement to the Social Services Law, enabling Medicaid applicants to become educated on advance directives and to have an opportunity to execute health care proxies and/or living wills at the time of the Medicaid application process. Essentially, this new law would expand the responsibility of providing information from just health care facilities (where for many it may be too late to do an advanced directive) to further out on the front lines within the community. The hope is that many more seniors will execute these important documents at a time that is not surrounded by an immediate health care need or crisis. It provides an opportunity for planning.

Examining the bill's justification, it is interesting to note that this proposal is not only to further the rights of seniors to make their own medical decisions, but is also an attempt to control health care costs. The language states,

Death control, which is stipulated by the living will, enables patients to plan ahead and thus greatly reduces scarce medical resources. It has been proven that many of the efforts utilized to sustain the lives of elderly patients are not adequate enough to work. In cases such as these, the patient dies, but not before their medical bills have been raised by tens of thousands of dollars.

This legislation further explains, "in order to benefit the future generations of our nation, the money that has previously been used toward unsuccessful life saving attempts of elderly patients can now be used to improve health care for infants and children."

According to the bill's primary sponsor, Assemblyman Robert C. Wertz, there is a growing interest in all parts of the state to enable seniors to take the control of the planning process in a way that goes far beyond what is currently available. With special training from the New York State Department of Health, workers at the local social services agencies would be able to disseminate the necessary information and documents for execution. It is also interesting to note that, although New York State law does not provide for a statutory living will, the bill's sponsor feels that this legislation could give New York a *de facto* statutory living will.

## Goodbye to *Crummey*, in a Good Way?

For estate planning attorneys, preserving the annual exclusion pursuant to IRC § 2503(b) when utilizing trusts can be challenging. Working with clients and other involved advisors on an annual basis to ensure that proper procedures are followed, particularly *Crummey* notices, requires constant counsel. President Clinton's budget includes several proposals relating to gift and estate tax, including a modification of the annual exclusion requirements.<sup>1</sup>

Under the President's proposal, new rules would coincide with the generation skipping transfer rules, so that the annual exclusion for gifts would not apply to transfers to individuals unless specific requirements are met. These requirements would be as follows: First, during the life of such individual, no portion of the corpus or income of the trust may be distributed to (or for the benefit of) any person other than such individual, and second, the assets of such trust will be includible in the gross estate of such individual if the trust does not terminate before the individual dies. Essentially, this proposal would allow gifts in trust to qualify for the annual exclusion without the use of *Crummey* powers. However, in order to meet the above requirements and qualify for the exclusion, separate trusts would be necessary for each individual beneficiary.

## Endnote

1. See "General Explanation of the Administration's Fiscal Year 2001 Revenue Proposals," at the government website: [www.treas.gov/taxpolicy](http://www.treas.gov/taxpolicy).

Howard S. Krooks, J.D. is a partner in the law firm of Littman Krooks Roth & Ball P.C., with offices in New York City and White Plains. Mr. Krooks devotes substantially all of his professional time to Elder Law and Trusts & Estates matters, including representing elderly clients and their families in connection with hospital discharge and nursing home admission issues, preservation of assets, Medicaid, Guardianship and related Elder Law matters. Mr. Krooks received his undergraduate degree (summa cum laude) from the State University of New York at Albany and his J.D. degree from the University of Pennsylvania. Mr. Krooks is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association, where he serves as the Co-chair of the Medicaid Committee. Mr. Krooks co-authored a chapter ("Creative Advocacy in Guardianship Setting: Medicaid and Estate Planning including Transfer of Assets, Supplemental Needs Trusts and Protection of Disabled Family Members") included in a book entitled *Guardianship Practice in New York State* published by the New York State Bar Association. Mr. Krooks is the author of the Elder Law Update Column which appears in a quarterly publication of the Health Law Section of the New York State Bar Association entitled *Health Law Journal*. Mr. Krooks has lectured frequently on a variety of elder law topics for the National Academy of Elder Law Attorneys, the National Guardianship Association and the New York State Bar Association. In addition, Mr. Krooks serves as an instructor for the Certified Guardian & Court Evaluator Training: Article 81 of the Mental Hygiene Law program sponsored by the Association of the Bar of the City of New York.

Steven H. Stern is a partner in the law firm of Davidow, Davidow, Siegel and Stern, LLP with offices in Islandia and Melville, Long Island. Originally founded in 1913, the firm concentrates solely in the practice areas of elder law, business and estate planning. Mr. Stern is a member of the National Academy of Elder Law Attorneys and is the current Co-chairman of the Suffolk County Bar Association's Elder Law Committee. He also serves as a member of the Suffolk County Elder Abuse Task Force's Consultation Team. With a strong commitment to educating the local senior community, he is a frequent speaker and published author and also hosts "Seniors Turn to Stern," a radio program dedicated to the interests of seniors and their families on WLUX.

# REGULATORY NEWS

## Revisiting Regulation of the Primary Residence

By Louis W. Pierro and Edward V. Wilcenski

The more elder law practice changes, the more some facets remain the same. As our estate and long-term care plans change to accommodate the increase in the purchase of long-term care insurance, or the intricacies of planning for tax-qualified assets such as 401(k) and Individual Retirement Accounts, protecting the primary residence (the “homestead”) continues to be a vital concern. This column discusses some of the well-established rules that elder law attorneys must address in planning for the primary residence, as well as a recent administrative provision that will impact planning for this important asset for disabled individuals under the age of 65 receiving benefits under the Supplemental Security Income program.



Louis W. Pierro

### Medicaid

#### Medicaid Regulations and Administrative Directive 96 ADM-8

In a Medicaid context, the homestead continues to receive “exempt status,” but only under limited circumstances. A homestead which is essential and appropriate to the needs of the homeowner continues to be an exempt resource.<sup>1</sup> The homestead of a person who is 65 or older, certified blind or certified disabled loses its exempt status if the owner moves out of the home without the intent to return, and no individual who would qualify the house as exempt (a spouse, a child under twenty-one (21) years of age, certified disabled or blind child or other dependent relative) is living in the home.<sup>2</sup> If the Medicaid applicant is in a nursing home, the homestead can also be considered an exempt asset as long as he or she expresses an intent to return home, although under certain circumstances a lien may be imposed against the residence.<sup>3</sup>

In order to preserve the home, or its value, transfers are undertaken in generally one of three (3) forms:

1. An outright transfer to children or other beneficiaries;

2. Transfer of a remainder interest with a retained life estate to the grantor; or
3. Transfer to an irrevocable income-only trust.

The rules regarding transfers with a retained life estate and transfers to a trust are generally synthesized in Administrative Directive 96 ADM-8, discussed infra.



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If an individual makes an outright transfer of the home, a penalty period will be imposed based upon the value of the home using the standard penalty calculation as set forth in 96 ADM 8. If the homestead, or a remainder interest therein, is transferred to a “qualified individual,” however, the *transfer will be exempt*.<sup>4</sup> In most cases, however, the transfer of an interest in real property, including the residence, will result in a penalty period for the grantor if institutionalization or “waivered services” are later required. (The transfer penalty provisions currently apply only for institutional care, not home care.)<sup>5</sup>

Although the retained life estate, or life use, generally has little or no real value because of a lack of marketability, it is given a value based upon actuarial tables in 96 ADM-8 for transfer penalty purposes. Notwithstanding its “transfer” value, the Department of Social Services is prohibited from conditioning medical assistance eligibility on rental of a life estate in a residence retained by a Medicaid applicant.<sup>6</sup> Therefore, the transfer of a remainder is, as a practical matter, effective in eliminating the real property from the countable assets of a client for Medicaid purposes.

Specifically, 96 ADM-8 provides that “a life estate will not be a countable resource, and no lien may be placed on the life estate.”<sup>7</sup> If the property is sold during the lifetime of the life tenant, however, the *proceeds of the sale* attributable to the life estate interest become a countable resource. If the fair market value of the proceeds from sale of the life estate are not returned to the Medicaid recipient, a penalty may be imposed due to the imputed transfer of the uncom-

pensated value. It is important to note that if the owner of the life estate dies prior to the sale of the property, no portion of the life estate is recoverable through the Medicaid recipient's estate, since the life estate interest ceases upon his or her death. Therefore, absent a sale during lifetime, the transfer of real property with a retained life estate appears to be effective in eliminating the property from the recoverable estate of a Medicaid recipient, while retaining for the recipient the right to live in the property for the remainder of his or her lifetime, and preserving for the remainderman the full value of the property if it is held until the life estate is extinguished.

If a Medicaid recipient chooses to rent property subject to a life estate, it will be treated as income-producing property, and the rents will be treated as available income. Any charges against the real property which are the responsibility of the life tenant, such as taxes and maintenance charges, can be deducted from the rent, and only the net rental will be available as income to the Medicaid recipient. In drafting the life estate, it is beneficial to assess all charges against the property to the life tenant, to insure that the expenses can be paid from income which would otherwise become part of the monthly income spend-down for Medicaid eligibility purposes.<sup>8</sup>

In valuing the transfer of a remainder for Medicaid purposes, the Health Care Financing Administration has published tables in its State Medicaid Manual (Transmittal No. 64) which utilize one specific interest rate table in order to calculate life estate and remainder values. Those same tables are incorporated into 96 ADM-8. For example, if a client who is 77 years old transfers a remainder interest in real property, the retained life estate represents 48.742% of the total value of the property, and the transferred remainder represents 51.258%. If the property has a fair market value of \$100,000, the remainder interest transferred will be valued at \$51,258. To determine the waiting period for Medicaid eligibility, divide \$51,258 by the average cost of monthly nursing home care in the applicant's area. Assuming for illustration purposes that the applicant resides in the Northeastern New York region, where the average monthly cost of nursing home care is \$5,400, the transfer of a remainder interest valued at \$51,258 by a 77-year-old client would result in a 9.49 month period of ineligibility.

If the life estate itself is later transferred, a penalty will be imposed on the value of the life estate at the time of the transfer, in accordance with the actuarial table for the donor's age at that time. Again, if property subject to a life estate is sold, the life tenant will be attributed a proportionate share of the proceeds.<sup>9</sup>

With regard to capital gains taxes, if a home is gifted outright to children or another third party, the recipient will receive a "carry-over" basis. Thus, a sale of the property by the donee could result in significant capital gains tax exposure. Moreover, real property taxes may be affected because of the loss of exemptions, such as Senior Citizens,' Veteran's and the Star Exemption. If only a remainder interest is transferred, and a life estate retained, the remainderman will receive the full value of the property upon the death of the life tenant with a "step-up" in basis, such that the new basis will equal the fair market value on the date of death. If the property is sold during lifetime, however, only the retained life estate portion would be exempt from capital gains tax as a sale of the donor's principal residence, whereas the remainder interest would be fully taxable to the *remainderman*, unless it also qualified as the remainderman's principal residence.

With regard to the real property tax exemptions, a properly worded deed retaining a life estate should preserve the Veteran's, Senior Citizens' and Star Exemption. Life Estates are commonly created by the grant of "Use and Possession" of property, and the term "Use" has been held to give to the recipient a life estate in the property, and not merely the right to occupy it.<sup>10</sup> The term "Use" also gives the grantee the right to any rents and profits that may flow from ownership.<sup>11</sup> It has been reported to the author, however, that certain counties, including Nassau County, are refusing to grant the Star Exemption based upon the reservation of a "Life Use and Occupancy," and are requiring that the exact term "Legal life estate" be retained in the deed. It has also been reported that several cases involving property ownership in trust are currently on appeal in Nassau County.

If a client contemplates selling the homestead prior to death, or the "discount" in transfer value based upon the retained life estate is not essential, consideration should be given to utilizing a trust to facilitate the transfer. By vesting ownership of the real property in the name of a trustee, and retaining only an income interest in the trust, the home would not be a countable asset.<sup>12</sup> Moreover, if the home is sold in the future, the entire proceeds from the sale would remain in the trust, thereby not jeopardizing Medicaid eligibility following the sale. If the trust is drafted using a "special power of appointment," for capital gains purposes all of the gain will be treated as passing back to the grantor of the trust, which would qualify the entire property for the exemption from capital gains tax based upon sale of the donor's principal residence. If the home is not sold during the donor's lifetime, the trust would also provide the remainderman with a "step-up" in basis, thereby

allowing sale of the property with a basis equal to the fair market value on the date of death.

With regard to real property tax exemptions, ownership of the property by a trust should not terminate the exemptions, provided that the grantor remains the sole beneficiary of that portion of the trust owning the real estate. Although careful drafting of a trust is required to preserve the Medicaid and tax benefits pertaining to a principal residence, the fair hearing decision reported in the most recent issue of this *Elder Law Attorney* indicates that the trust remains a viable technique for preserving the value of the home and other property.<sup>13</sup>

## SSI

### Program Operations Manual (POMS) Rules Regarding Trust Ownership of the Home

In August of 1999 the Social Security Administration (SSA) added subsection F to section SI 01120.200 of the Program Operations Manual (POMS) governing Trust Property. The section attempts to clarify how a home owned by an irrevocable trust, including a valid special needs trust, will impact the trust beneficiary's eligibility for benefits under the Supplemental Security Income (SSI) program. According to the SSA, which emphasized that the subsection is simply a clarification of its income and resource rules and does not represent a policy change, the subsection "was added because of an increasing number of questions on that topic."<sup>14</sup>

Attorneys representing disabled individuals who are the beneficiaries of special needs trusts will certainly appreciate the clarification. One of the most difficult parts of developing a comprehensive future care plan for an individual who receives income under the SSI program is ensuring that distributions from the trust will not be considered "In Kind Support and Maintenance" or "ISM" under the SSI program rules, or if an ISM distribution is made, ensuring that the impact of the distribution on the beneficiary's continuing eligibility is ascertainable with some degree of certainty. Receipt of ISM, which is defined as items of food, clothing or shelter paid directly to a third party on a trust beneficiary's behalf, will be valued under either the "one-third reduction rule," or the "presumed maximum value rule," depending on the beneficiary's living arrangement.<sup>15</sup>

Applying the ISM rules can be quite complicated. Moreover, most of the provisions of the POMS were drafted prior to the enactment of 42 USC § 1396p(d)(4)(A) and EPTL § 7-1.12, establishing the first and third party special needs trusts as planning tools, and presumably did not contemplate the extent to which SSI beneficiaries would be relying on trust

arrangements to supplement or support their living arrangements. As a result, when a trust owns a home in which an SSI recipient resides, determining the impact of otherwise standard discretionary distributions from the trust on a beneficiary's SSI benefit level can be quite difficult to predict. For example, if a trustee repairs a leaking roof, does the cost of the repair constitute a shelter expense subject to a penalty as an "In Kind Distribution?" If the beneficiary paid no rent to the trust, is the fair market value of waived rent obligation income?

Subsection F of SI 01120.200 answers many of these questions, and provides some needed guidelines that can be used by practitioners in determining whether home ownership through the use of a special needs trust is a practical and feasible means of supporting a disabled individual in the community. For example, subsection (F)(2) states that the Social Security Administration will not consider rent-free shelter as ISM when the beneficiary is residing in a home owned by an "exempt trust" (i.e., irrevocable and otherwise in compliance with the SSI program's trust rules). Likewise, under subsection (F)(3)(c), neither improvements nor renovations will be considered ISM, as they are distinguishable from "household operating expenses," which have always been shelter expenses under the SSI rules.<sup>16</sup> Other sections of the regulation discuss items such as mortgage payments made by a trustee, and the impact of a purchase of a home by a trust when title is taken in the name of the individual receiving benefits.

While grateful for the efforts on the part of the SSA, it bears mention that the program clarification does not necessarily make it easier for all disabled individuals receiving SSI to reside in a home owned by a trust. The planner and client still need to consider how the day-to-day operation of the home will be managed within the traditional framework of the ISM rules—the electric bill still needs to be paid, the garbage needs to be picked up, etc. These "shelter items" will impact SSI eligibility, and depending on the beneficiary's income, there may not be enough to adequately support the living arrangement. Nonetheless, and from the planner's perspective, it is reassuring to have some well-defined rules to use as a starting point in determining whether a proposed arrangement is possible.

**NOTE:** In the last issue of the *Elder Law Attorney*, we reported on the Health Care Financing Administration's interim final rule of July 1998, which deleted 42 CFR § 409.33(a)(1)-(3). The deleted provision had listed *overall management and evaluation of a care plan, observation, assessment, and patient education* as examples of skilled nursing services subject to Medicare coverage. In July of 1999, however, in response to the

significant number of comments on the issue, 42 CFR 409.33(a)(1) through (3) were reinstated in full. In the text of the Federal Register discussing the reinstatement, HCFA recognized the problems caused by the removal of the regulatory language, stating: “. . . in order to avoid possible confusion on this point, we are accepting the commentors’ suggestions to reinstate these categories as specific examples in the SNF level of care regulations.”<sup>17</sup>

## Endnotes

1. 18 N.Y.C.R.R. §§ 360-4.7(a)(1), 1.4(k).
2. 18 N.Y.C.R.R. § 360-4.7(a)(1)(ii).
3. 18 N.Y.C.R.R. § 360-7.11(a)(3).
4. 18 N.Y.C.R.R. § 360-4.4(c)(2)(iii)(b).
5. N.Y. Social Services Law § 366.5(d)(1)(vii); 366.5(d)(3).
6. 96 ADM-8.
7. 96 ADM-8.
8. 96 ADM-8.
9. 96 ADM-8.
10. 18 N.Y.C.R.R. 360-4.4(c)(2)(iii)(b).
11. *Brokaw v. Fairchild*, 135 Misc 70, 237 N.Y.S. 6, *aff’d* 231 A.D. 704, 245 N.Y.S. 402; *Commercial Nat’l Bank v. Erwin*, 277 A.D. 378, 100 N.Y.S.2d 200.
12. 96 ADM-8.
13. *In re Appeal of Antoinetta G.*, NYSBA Elder Law Attorney, Spring 2000, Vol. 10, No.2, p. 32.
14. SSA Publication No. 68-0501120 (Transmittal No. 34) August 1999.
15. *See, generally*, 20 CFR 416.1130(b), POMS SI 00835.001.
16. *See* SI00835.350.
17. 64 FR 41669 (July 30, 1999).

Louis W. Piero is a graduate of Lehigh University and Albany Law School of Union University, Mr. Piero 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. Piero 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. Piero 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. Piero 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. Piero 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.

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## PRACTICE NEWS

### Keeping Your Eye on the Money (Grandparents Helping Grandchildren while Protecting Assets)

By Vincent J. Russo

When seniors come in to see us, there are typically two areas of major concern: the financing of long-term care and minimizing taxes. As part of an asset protection plan, we are often implementing a plan of divestiture whether through outright gifts or by the establishment and funding of Irrevocable Trusts. As planners how do we advise our clients in these situations? Are we maximizing the senior's asset protection plan by considering the needs of family members (i.e., grandchildren)? Let's keep our eye on the money and analyze some of our typical planning recommendations.



#### The Tax Bite

As we are aware, there are no adverse gift or estate tax consequences if our client has less than the applicable exclusion amount which is currently \$675,000 for 2000–2001 (increasing in stages to \$1 million by the year 2006).<sup>1</sup> Yet, there are significant adverse federal estate taxes upon one's demise if one's asset level exceeds the applicable exclusion amount. Estate taxes can range from 37% to 55% on the value of the assets in excess of the applicable exclusion amount.<sup>2</sup> These taxes can be avoided by implementing appropriate estate planning which often includes a gifting program.

Each calendar year, gifts can be made of up to \$10,000 to a donee without using the applicable exclusion amount.<sup>3</sup> In addition to the \$10,000 annual exclusion, one can make unlimited gifts by paying directly a medical service provider for medical expenses of another or by paying directly an educational institution for tuition.<sup>4</sup> Books and supplies do not qualify for this unlimited exclusion. Hence, one can pay for certain medical and educational expenses of family members without any gift tax consequences. As of January 1, 2000, the New York State gift tax law was repealed which now allows for more flexibility when implementing a gifting program.<sup>5</sup>

For larger estates, the use of Grantor Retained Annuity Trusts (GRATs), Qualified Personal Resi-

dence Trusts (QPRTs), Family Limited Partnership (FLPs) and Limited Liability Corporations (LLCs) may be appropriate ways of reducing estate taxes by leveraging the gifts.

#### Medicaid Planning

It is also important for our elderly clients to consider making gifts in the context of long-term care planning. Since Medicare and Medicare Supplemental Insurance do not cover long-term care either at home or in a nursing home (with certain very limited exceptions), there are only two sources available today to finance long-term care: Long Term Care Insurance and Medicaid.

If the senior needs to access the Medicaid Program to pay for long-term care, the senior will either have to spend down his or her assets or transfer them to trusted family members as a way of protecting these assets. Transfers by the senior (i.e., gifts) are subject to the Medicaid transfer penalty rules for nursing home care. If a senior is already in crisis, then divestiture of assets is critical in saving a portion of these assets for the senior and his or her family.

#### Grandchildren in Need

As planners, we should take into account the entire family situation in order to properly advise our seniors. There may be grandchildren who have needs which the senior can help meet. A grandchild may not be able to pay for college or medical expenses. Direct gifts to the educational institution or to the medical provider are excluded from the gift tax laws and are not counted as part of the \$10,000 gift tax exclusion amount. Hence, the senior can help a grandchild or grandchildren while reducing the size of his or her estate which saves estate taxes. If the senior is not interested in making outright gifts to grandchildren, then there are several options available.

1. If the grandchild is a minor, then the senior can make gifts to the minor grandchild by placing assets in the parent's name as custodian under the Uniform Transfer to Minors Act. In New York, the grandchild will have a right to access the asset at age 18 or 21.

2. The senior can set up individual trusts for each grandchild. This type of trust is known as a “2503(c) Trust” (commonly referred to as a “Minor’s Trust”). The trust must meet certain requirements under § 2503(c) of the Internal Revenue Code. Typically, the primary purpose will be to pay for a college education. The parent of the grandchild can be the trustee. The grandchild will have a right to access the asset at age 21. This Trust will automatically qualify the gifts to the Trust for the annual \$10,000 gift tax exclusion each year.
3. The senior can also set up one Trust (“*Crummey* Trust”) for all of his or her grandchildren with the trustee disbursing the funds for the benefit of the grandchildren, in his or her discretion. There are additional administrative requirements as to this Trust in order to qualify the gifts for the \$10,000 annual exclusion.<sup>6</sup> The grandchildren must receive the balance of the funds as provided for in the Trust, such as, at a stated age or upon the occurrence of a stated event.

In addition, these gifts may not be subject to the Medicaid transfer penalty rules if made for a purpose other than to qualify for Medicaid.<sup>7</sup> We have been involved in several cases where Medicaid has been approved by the caseworker or on appeal at a Fair Hearing because we were able to establish a pattern of gifting or that the gift was made for the purpose of helping a family member in need and not for the purpose of qualifying for Medicaid.

If a grandchild is disabled, then the senior can establish a Third Party Supplemental Needs Trust for the grandchild’s benefit.<sup>8</sup> The funding of the trust may not create a Medicaid transfer penalty if it was not made for purposes of qualifying for Medicaid. On the other hand, if immediate Medicaid is desired, then the funding of the trust can qualify as an “exempt transfer” if the trust is established for the sole benefit of a disabled individual, such as a grandchild.<sup>9</sup>

## When the Children Are Well Off

As we ask our client questions about his or her family situation, we should look beyond the assets of the client and ask about the assets of the children. If the children are well off and have taxable estates of their own, we need to ask: “What is the benefit of passing assets directly to the children?” In fact there may be terrible adverse estate tax consequences created since the client’s assets will be subject to federal

estate and gift taxes followed by the assets being subject to a second round of estate taxes in the estates of the client’s children.

For example, \$1 million could be subject to an estate tax at 50% in two estates leaving the grandchildren with a \$250,000 inheritance. The amount passing to grandchildren can be doubled with the grandchildren inheriting \$500,000 by the client providing directly for the grandchildren. As an alternative to direct gifts to grandchildren, a generation skipping trust can be established for the benefit of both children and grandchildren, with the assets passing ultimately to grandchildren, without taxation in the children’s estate. The estate tax savings can be even greater when you factor in appreciation.

## Generation Skipping Transfer Tax

If the plan is to skip a generation, then the federal generation skipping transfer tax (GSTT) must be considered, which is a separate tax imposed along with the gift or estate tax ordinarily due upon a transfer. It is applied at a flat rate (not a graduated rate) equal to the highest federal estate tax rate applicable at the time of the transfer.<sup>10</sup> The highest federal estate tax rate is currently 55%.<sup>11</sup> So any generation-skipping transfer will incur a GSTT at 55% of its value in addition to the ordinary gift or estate tax due.

A direct skip which qualifies for the \$10,000 federal annual gift tax exclusion is also exempt from the GSTT,<sup>12</sup> as well as a transfer which is exempt from federal gift tax because it falls within the tuition or medical exclusion.<sup>13</sup>

For the year 2000, up to \$1.03 million of the senior’s estate can be used to skip the children’s generation without a GSTT due to the \$1.03 million lifetime exemption.<sup>14</sup> This amount is indexed annually for inflation, rounded to the next lowest multiple of \$10,000.<sup>15</sup> High net worth seniors should take advantage of the GSTT exemption to the fullest extent possible.

## Summary

Since the senior is often focusing in on his or her immediate need of protecting assets as to the financing long-term care and minimizing taxes, it is our charge as elder law attorneys to broaden the alternatives available to seniors to include passing assets to or for the benefit of grandchildren as a way to meet the senior’s objectives. **Keeping Your Eye on the Money** will allow your client to maximize an asset protection plan not only for the client but for his or her family, as well.

## Endnotes

1. 26 U.S.C.A. §§ 2010, 2505.
2. 26 U.S.C.A. § 2001(c).
3. 26 U.S.C.A. § 2503(b). Note: The exclusion amount will be indexed annually for inflation.
4. 26 C.F.R. § 25.25036 (b) and (c).
5. New York State Budget Bill of 1997 Chapter 389, S. 5785, A. 6781.
6. *Crummey*, 397 F.2d 82, 68-2 USTC & 12,541 (9th Cir. 1968), *affirming*, 25 T.C.M. (CCH) 772, T.C. Memo. 1966-144 (1966); *Estate of Cristofani*, 97 T.C. 74 (1991), *acq. in result only*.
7. New York State Department of Social Services 89 ADM-45.
8. EPTL § 7-1.12.
9. HCFA Transmittal No.64 (November 1994).
10. 26 U.S.C.A. §§ 2602, 2641.
11. 26 U.S.C.A. § 2001(c).
12. 26 U.S.C.A. § 2642(c).
13. 26 U.S.C.A. § 2611(b).
14. 26 U.S.C.A. § 2631(a).
15. Taxpayer Relief Act of 1997 § 501(d), adding a new 26 U.S.C.A. § 2631(c).

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## Letter to the Editor

Dear Mr. Davidow:

I am writing to you concerning the Winter 2000 issue of the *Elder Law Attorney*. I finally had the opportunity to review all of the articles in depth and was somewhat amazed by the article written by Assemblyman Richard N. Gottfried, entitled: "Healthcare and the Elderly: Albany Agenda." As I started to read the article, I thought I would be reading an objectively written piece concerning what issues will be taken up by the State Legislature and Governor in the coming year or two. As I read into the article, it became apparent to me that it was more of a liberal political statement than an objective report of the issues involved.

I certainly respect Assemblyman Gottfried's right to his opinion on these issues. However, I do not think a State Bar Association section publication is the correct forum for this. I stopped becoming a member of the American Bar Association in the year that it, as a Bar Association, officially supported abortion. I do not believe any Bar Association is the proper forum for a political party to advance its position. I think Assemblyman Gottfried's article could have been written much more objectively and stated only the facts of what issues are being considered in Albany.

Let's keep our Section publication neutral and deal with the issues in an unbiased manner.

I know that you did not have anything to do with the article, since you are the incoming Editor, but since you are the Editor, I thought it appropriate to write to you.

Very truly yours,

BRADY, BROOKS & O'CONNELL, LLP  
Kameron Brooks

# TAX NEWS

## Save For Education and Save on Taxes Too: New York State College Choice Tuition Savings Program<sup>1</sup>

By Ami S. Longstreet and Anne B. Ruffer

### I. What's It All About?

The New York State College Choice Tuition Savings Program (the "Program") has recently been established to enable residents of New York and other states to contribute to accounts on a tax-favored basis to fund qualified higher education expenses of beneficiaries for whom the accounts are created.<sup>2</sup> The Program is also intended to attract students to public and private colleges and universities in New York, although the program is not limited to funding expenses at New York schools.



Ami S. Longstreet

What are some of the Program's benefits? The Program enables parents, grandparents, relatives, friends, or even the students themselves to contribute to "accounts" of future students. The first \$5,000 contributed each year is deductible by the "account owner" for New York State income tax purposes. None of the investment earnings will be taxed by New York State as long as the money is used for "qualified higher education expenses" of the "designated beneficiary" at an "eligible educational institution,"<sup>3</sup> which need not be located in New York. Federal income tax on the earnings is deferred until the money is used for the student's qualified expenses. Then, the earnings are taxable at the student's income tax rate.

None of the contributions are includable in computing the New York taxable income of the designated beneficiaries for New York personal income tax purposes. Earnings on an account are not includable in computing the New York taxable income of either the account owner or the designated beneficiary of the account as long as they remain in the trust. Withdrawals from an account to pay for qualified higher education expenses of the designated beneficiary of the account are not includable in computing the New York taxable income of either the account owner or the designated beneficiary.

Under federal income tax law (§ 529 of the Internal Revenue Code), earnings in the account are gen-

erally not subject to federal income tax until they are withdrawn from the account. Earnings included in a withdrawal to pay for qualified higher education expenses are includable in computing the federal taxable income of the designated beneficiary of the account, not that of the account owner.



Anne B. Ruffer

### II. The Details

The Program is designed to encourage savings for qualified higher education expenses by enabling account owners and designated beneficiaries to avail themselves of the federal, New York State and local tax benefits available under the Program. Pursuant to § 529 of the Internal Revenue Code and the New York State College Choice Tuition Savings Program Act (codified as Article 14-A of the Education Law), individuals participating in the program establish accounts in a statutory trust fund in which the State Comptroller is the trustee.

The account owner makes cash contributions to an account which are invested in a blend of equity, bond and money market investments through a limited liability company managed by Teachers Insurance and Annuities Association of America (TIAA). The investment blend is based on the number of years that the beneficiary has remaining until the projected use of the assets by the beneficiary. In other words, a larger percentage of the assets are allocated to equity investments in the early years of each beneficiary's life. Declining percentages are allocated to equity investments as the beneficiary approaches age 18. The actual investment mix is in accordance with ranges contained in allocation guidelines recommended by TIAA. No account owner or designated beneficiary, pursuant to New York and federal law, is permitted to direct the investment of any contributions to any account or any earnings of any account either directly or indirectly.

Up to \$100,000 may be contributed under the Program by one or more account owners for the benefit of a designated beneficiary. The designated beneficiary need not be related to the account owner. The

account must be open for 36 months. If the beneficiary does not use the money for college, another beneficiary in the family may be designated. If the money is withdrawn (not used for college) the entire withdrawal becomes subject to New York State income tax. Investment income in that case will be subject to federal income tax and a penalty will be imposed on the investment income.

Assets in an account are not to be taken into consideration in determining the eligibility of the designated beneficiary for financial aid under any New York State-administered financial aid program, but may be counted in determining eligibility under other aid programs (e.g., federal programs).

### III. The Contributions

The minimum initial contribution to open an account is \$25, except that the minimum initial contribution is \$15 if the account owner opts to make periodic contributions by payroll deduction or automatic deduction from a bank account.<sup>4</sup> There is no limit as to how much an account owner can contribute annually to accounts, except that under New York law no more than \$100,000 can be contributed by account owners to all accounts having the same designated beneficiary.

### IV. The Designated Beneficiary

An account may only be used to fund qualified higher education expenses of one designated beneficiary of the account. A separate account is necessary for each designated beneficiary. An account owner may replace a designated beneficiary of the account with a substitute designated beneficiary who must be a "member of the family" of the replaced designated beneficiary.

The term "member of the family" is defined by § 529 of the Internal Revenue Code. The definition is fairly broad, including children, grandchildren, stepchildren, step-siblings, nieces and nephews, in-laws and spouses. An account owner is not permitted to designate a successor account owner.

### V. Withdrawals

An account owner may make a withdrawal from his account at any time. An account owner may also terminate the account and directly withdraw the entire account balance. While a withdrawal may be made, withdrawals other than "qualified withdrawals" will be subject to a penalty to be withheld from the withdrawal, currently at the rate of 10% on the earnings portion of the withdrawal. Any applicable income tax will also be due.

A qualified withdrawal is a withdrawal from an account that is used to pay the qualified higher edu-

cation expenses of the designated beneficiary of the account after the account has been open for at least 36 months. Thereafter, there is no specific deadline for the use of assets in an account to pay such expenses. For these purposes, qualified higher education expenses are tuition, fees and the costs of books, supplies and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution. Also included is an amount for room and board of a designated beneficiary incurred while attending an eligible educational institution at least half-time. The designated beneficiary, however, need not be enrolled at least half-time to use a qualified withdrawal to pay for expenses related to tuition, fees, books, supplies and equipment. There are also limits on the room and board amounts.

An eligible educational institution is an institution described in § 481 of the Higher Education Act of 1965, as in effect on August 5, 1997. Such institutions generally are accredited post-secondary educational institutions offering credits toward a bachelor's degree, an associate's degree, a graduate-level or professional degree, or other recognized post-secondary credential. Certain proprietary institutions and post-secondary vocational institutions are also eligible institutions.

### VI. Tax Consequences: Benefits and Concerns

Many of the consequences of the Program have been touched on previously in this article. The purpose of this section is to discuss in further detail the tax consequences of the Program.

Contributions by an account owner to accounts are deductible in computing the account owner's New York taxable income for New York personal income tax purposes in an amount not to exceed \$5,000 in the aggregate for all contributions to all accounts of the account owner in any taxable year. A husband and wife who each own one or more separate accounts and make contributions in a year may each deduct up to \$5,000 in the aggregate for all contributions to all of their own accounts for that year. Thus, a married couple filing jointly could deduct \$10,000 in determining their New York adjusted gross income if each spouse owned a separate account and each made contributions of \$5,000 to their own account in a year.

Contributions are not includable in computing the New York taxable income of the designated beneficiary for New York personal income tax purposes. No portion of any qualified withdrawal will be includable in computing the New York taxable income of either the account owner or the designated

beneficiary of the account for New York personal income tax purposes. The entire amount of any withdrawals, other than qualified withdrawals from an account, will be includable in computing the New York taxable income of the account owner of the account for the year in which the withdrawal is made, regardless of whether the contributions to the account were previously deductible for New York state personal income tax purposes.

Regarding federal income tax treatment, the program is designed to constitute a "Qualified State Tuition Program" under § 529 of the Internal Revenue Code. As such, undistributed earnings in the trust are exempt from federal income tax. Earnings of the trust will not be includable in computing the federal taxable income of the account owner or the designated beneficiary of the account until the funds are withdrawn from the account. Unlike the treatment for New York personal income tax purposes, contributions are not deductible for federal income tax purposes.

Under § 529, a portion of each qualified withdrawal from an account will be included in computing the taxable income for federal income tax purposes of the designated beneficiary whose qualified higher education expenses are paid with the amount withdrawn. If there are earnings in the account, each qualified withdrawal consists of two parts. One part is a return of the amount of the contributions withdrawn, which is not taxable. The other part is a withdrawal of earnings, which part is includable in computing the federal taxable income of the designated beneficiary.

Also under § 529, all other withdrawals from an account by an account owner (i.e., non-qualified withdrawals and withdrawals as a result of death, disability or scholarships for the designated beneficiary) will be includable in computing the account owner's taxable income for federal tax purposes in the year in which the withdrawals are paid. Again, a pro rata allocation is made between the non-taxable return of contribution made to the account and a taxable distribution of the earnings. If the withdrawal is subject to the non-qualified withdrawal penalty as discussed above, that penalty will reduce the amount to be included in computing federal taxable income.

Contributions to an account are considered completed gifts for federal, state, gift and generation-skipping transfer tax purposes.<sup>5</sup> Except for the one situation described below, if an account owner of an account were to die while there was still a balance in the account, the value of the account would not be included in the account owner's estate for federal estate tax purposes. However, amounts distributed on account of the death of the designated beneficiary are

included in the gross estate of that designated beneficiary for federal estate tax purposes.

As discussed above, a maximum of \$5,000 may be contributed per year by each individual to be deductible for New York state income tax purposes. There is no annual maximum contribution however. Contributions to all accounts for any beneficiary are subject to a lifetime maximum of \$100,000. Under the Program, contributions to an account on behalf of any designated beneficiary are treated as a completed gift. If the amount of the gift exceeds the limitation under § 2503(b) "such aggregate amount shall, at the election of the donor, be taken into account for purposes of such section ratably over the 5 year period beginning with such calendar year."

In other words, if \$100,000 were contributed to an account, the \$10,000 annual exclusion amount (\$20,000 for husband and wife) could be allocated over the 5 year period, thus utilizing the account owners annual exclusion for the next 5 years. However, if the account owner dies before the end of the 5 year period, the portion of the contribution allocable to the remaining years in the 5 year period (not including the year in which the account owner died) would be includable in computing the account owner's gross estate for federal estate tax purposes.

Because contributions to an account are treated as completed gifts for federal transfer tax purposes, an account owner may also need to be concerned about the generation-skipping transfer tax for himself or herself or for the designated beneficiary of the account. Each taxpayer has a \$1.03 million generation-skipping transfer tax exemption that will be allocated to transfers that are subject to the generation-skipping transfer tax. For this reason, this tax is unlikely to apply to many account owners or designated beneficiaries. However, when it does apply, it is imposed at a flat 55% rate.

## **VII. Program Risks and Other Significant Considerations**

New York's College Savings Program is outlined in much more detail in the Program Brochure dated March 30, 1999 and its addendum dated October 1, 1999 implemented by the Comptroller of the State of New York and the New York State Higher Education Services Corporation (HESC). Teachers Insurance and Annuities Associations of America (TIAA) has been selected as the initial manager of the Program. The Program Brochure indicates that there can be no guarantee that the Program's investment objectives as set forth in the Program will be realized. As stated previously, neither the account owner nor the designated beneficiary has any control over the investments of the accounts.

For its services in connection with the program, TIAA will be paid an annual management fee equal to 65/100th of a percent (.65%) of the average daily net assets of each of the underlining portfolios, with a provision for an upward adjustment under certain circumstances.

New York has applied to the IRS for a private letter ruling confirming that the Program is a Qualified State Tuition Program (QSTP) under § 529 of the Internal Revenue Code in order for the federal tax benefits discussed in this article to apply.<sup>6</sup> To date, the Program has not yet received such a ruling from the IRS. It has received verbal confirmation from the IRS that the Program is a Qualified State Tuition Program.<sup>7</sup> Until such ruling is obtained, however, there is still some uncertainty regarding the federal tax consequences of the Program.

Further, proposed regulations have been issued under § 529, upon which taxpayers may rely until final regulations are issued. The proposed regulations do not, however, provide guidance on various aspects of the Program. It is uncertain when final regulations will be issued.

Regarding the New York State tax consequences, TIAA, the Comptroller of New York and the New York State Higher Education Services Corporation have received an advisory opinion from the State Department of Taxation and Finance regarding the tax aspects of the Program, as described above, assuming the Program is a Qualified State Tuition Program under § 529.

## VIII. Conclusion

Subject to the provisos mentioned above, the New York State College Savings program is a great tool in the quest for college savings. It is a plus to all who are interested in a college savings program. Unlike many other tax savings programs, which are subject to income maximums, whereby those with earnings above a particular amount earn too much to enjoy the benefits of a savings program, this Program does not contain those limitations. Furthermore, the initial contribution amount is reasonable enough to

allow those with even modest incomes to take advantage of the Program and save for their loved ones. The Program is a wonderful estate planning tool for parents and grandparents alike in that they can begin a college savings account, take a New York State income tax deduction, defer federal income tax on the earnings, and reduce their estates for estate planning purposes. Furthermore, any earnings eventually taxed (federally) will be taxed in the designated beneficiary's bracket, rather than in the donor's, presumably much higher, bracket, assuming the withdrawals are qualified withdrawals.

The Program is outlined in greater detail in the program brochure dated March 30, 1999 and its addendum dated October 1, 1999. For further information on the Program, the website is [www.nysaves.org](http://www.nysaves.org) and the telephone number is 1-877-NYSAVES.

## Endnotes

1. Much of the information for this article was obtained from "New York's College Savings Program" program brochure dated March 30, 1999, as amended by addendum dated October 1, 1999, with the consent from the publishers of the program brochure.
2. The Program was established pursuant to Article 14-A of the Education Law.
3. Quoted terms in this article are terms which are more particularly described in "New York's College Savings Program," a program brochure dated March 30, 1999, available on the Program's website, [www.nysaves.org](http://www.nysaves.org), or by calling 1-877-NYSAVES. There is also an addendum to the program brochure dated October 1, 1999.
4. The original minimum contribution amounts of \$250, or \$25 for periodic contributions by payroll, was changed pursuant to an addendum to the Program dated October 7, 1999.
5. New York has repealed its gift tax effective January 1, 2000. Contributions to, and withdrawals from, an account will not constitute taxable gifts subject to New York gift tax prior to that date.
6. Section 529 of the Internal Revenue Code provides that a Qualified State Tuition Program established and maintained by a state may be established under the rules of § 529.
7. Other states operating similar programs also have not yet received written confirmation from the IRS approving their programs.

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# HEALTH CARE CONTINUUM NEWS

## Medicare Part A Coverage for Skilled Nursing Care in a Skilled Nursing Facility

By Ellyn S. Kravitz and Ari Markenson

The elder law practitioner is frequently requested by their clients to assist with the placement of a loved one in a skilled nursing facility (SNF). As a threshold matter, in order to effectuate placement in a facility in New York, a Patient Review Instrument (PRI) and Screen must be completed by a nurse and/or physician. The PRI/Screen is necessary regardless of whether the patient is being transferred from a hospital or being directly transferred from their home. Information contained in the PRI/Screen will be used by the facility to determine initially whether the individual meets Medicare criteria for Part A coverage.



Ellyn S. Kravitz

Medicare Part A covers benefits for skilled nursing care in a skilled nursing facility. In order to be eligible for such benefits, a Medicare beneficiary must meet a number of requirements. Firstly, the beneficiary must be enrolled in Part A. Secondly, the beneficiary must have a three-day inpatient hospital stay prior to the admission to the skilled nursing facility. One must keep in mind that the date of admission to the hospital is counted as a hospital inpatient day. However, the day of discharge is not considered a hospital inpatient day. A patient may also qualify for coverage in a skilled nursing facility, if placement is made to a skilled nursing facility within 30 days after the discharge from the three-day inpatient hospital stay.

The patient must require daily inpatient, skilled nursing care and/or skilled rehabilitation services. If the care is deemed custodial in nature, then Medicare Part A will not cover the services provided at the skilled nursing facility. This is important since the source of payment to the facility will be very important at the time of placement. The elder law practitioner should be forthright in providing the facility with all necessary financial documentation.

If the above requirements are satisfied, then the patient should be covered under Medicare Part A. The benefit period for a skilled nursing facility is a maximum of 100 days. If the above requirements are

not satisfied, the patient will either be a private pay patient at the facility or may be eligible to pursue benefits under the Medicaid program.

To understand what an admissions coordinator of a skilled nursing facility looks at when accepting a patient to their facility, one must have an understanding of the Medicare Part A payment system.

On July 1, 1998, the Medicare Part A skilled nursing facility reimbursement structure changed. Skilled nursing facilities are no longer reimbursed on a cost based system but rather via a prospectively determined per diem rate. This form of reimbursement is referred to as the Prospective Payment System (PPS). Medicare Part A reimburses a skilled nursing facility a fixed per diem or daily fee based on the patient's classification with the Medicare RUGS III guidelines. RUGS is an acronym for Resource Based Utilization Groups. These guidelines are a measure of the type of care the patient requires and what it costs the skilled nursing facility to provide that care to the patient.

A RUGS-III system is used to classify a patient into a payment category by using a patient's characteristics and health status information such as diagnoses, activities of daily living (ADL) and treatment. The skilled nursing facility evaluates a patient's health condition based on a standardized assessment form (called the MDS 2.0 or Minimum Data Set) provided by the Health Care Financing Administration (HCFA). The MDS is generally completed within five days of the patient's admission to the facility. The information from the MDS 2.0 is then used to assign the patient a RUGS III category. There are seven major patient type categories. They are: (1) rehabilitation; (2) extensive services; (3) special care; (4) clinically complex; (5) impaired cognition; (6) behavior only; and (7) physical function reduced. Numbers (1) through (4) are deemed by Medicare to be skilled level of care. Based on the patient type categories, the payment structure is based on a combination of ADL score, signs and symptoms of depression and the number and intensity of the services.

Under the PPS, the skilled nursing facility is financially responsible for all Medicare Part A and B services (with some exceptions) provided to a patient while in a so-called Part A stay. However, practition-

ers should be aware that there are certain services provided or arranged for by the SNF that are not covered under the PPS rate the facility receives. These services generally will be billed by either the SNF or the provider of the service to Medicare Part B. In that respect, if billed to Part B the patient would be responsible for the 20% co-insurance amount under Medicare Part B.

The services that are outside the skilled nursing facility's Part A reimbursement can be found in both the Balance Budget Act of 1997 (BBA) P.L. § 105-33, The Balanced Budget Refinement Act of 1999 (BBRA) P.L. § 106-113 and Medicare Program Memorandums. These services are the following:

- Chemotherapy and the Administration of Chemotherapy\*
- Radioisotope services\*
- Customized Prosthetic Devices\*
- Ambulance Services furnished in conjunction with Part B Dialysis Services

*\*these exclusions apply only to the HCPCS or procedure codes identified in the BBRA.*

Outpatient Hospital Services that HCFA has identified as being outside the scope of SNF care along with associated ambulance services, these services are

- Cardiac Catheterization
- CT Scans
- Ambulatory Surgery in an Operating Room
- Emergency Services
- Radiation Therapy
- Angiography
- Venous and Lymphatic Procedures
- Physicians Services
- Physician Assistant Services
- Nurse Practitioner and Clinical Nurse Specialist Services
- Qualified Psychologist Services
- Certified Registered Nurse Anesthetists Services
- Certified Nurse-Midwife Services
- Home Dialysis Supplies and Equipment, Self Care Home Dialysis Support Services, and Institutional Dialysis and Supplies

- Erythropoietin (EPO) for Certain Dialysis Patients
- Hospice Care
- Ambulance Trips to the Facility for Admission and Trips from the Facility Upon Discharge.

The discussion above explains the basics of the Medicare Part A payment system as well as coverage requirements for such care. However, with an understanding of the reimbursement system, practitioners should also be aware of the basics concerning when and how a patient could be denied Medicare Part A coverage.

Under applicable Medicare rules, the skilled nursing facility is generally the first to inform a patient or their representative that they will no longer be covered by Medicare Part A. A skilled nursing facility is required to provide a denial of Medicare Part A coverage to patients in one of two circumstances, either the patient upon admission does not meet coverage guidelines or at some point after admission the patient no longer meets coverage guidelines. In either circumstance, a notice of Medicare Determination of Noncoverage on Admission or a Determination of Noncoverage on Continued Stay must be issued by the facility depending on whether the determination is made upon admission or on the date the Medicare benefits have ended. The facility is responsible to mail this Notice. The Notice must be in writing and mailed and/or given to the patient and/or the responsible party. The Notice should be specific as to why the facility believes that the services provided are not Medicare covered services. The Notice will provide the patient and/or responsible party an explanation regarding the submission of the bill to Medicare. The notice must also inform the patient and/or responsible party of their right to demand that the facility submit a bill to Medicare and receive a Medicare determination as to coverage. This process is generally called requesting a "Demand Bill."

If your client calls you and advises you that the social worker told him or her that she is no longer eligible for Medicare Part A coverage, your first question must be: "Did you receive written notice from the facility?" If the answer is no, then you must make a decision as to whether you ask the facility for the notice. If the facility failed to provide the written Notice, depending on the facts surrounding whether or not the patient received notice of non-coverage, Medicare may indemnify the patient from their private responsibility to pay for non-covered care. Medicare will only allow the facility to bill the

patient for care the patient knew or should have known was non-covered. Medicare uses the notice of non-coverage as a presumption that the patient knew the services were non-covered.

Understanding the basics of the coverage process, the basics of the reimbursement system and the non-coverage process can greatly enhance the elder law practitioner's ability to effectively counsel clients as to their financial options and rights in seeking skilled

nursing facility care. Medicare Part A coverage can cover a significant portion of the first months of skilled care in a facility. These months can oftentimes be the most expensive and difficult for families and loved ones. Assisting clients in securing appropriate Medicare Part A benefits should be an essential element of advice provided to clients either seeking skilled nursing care for themselves or their loved ones.

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 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.

Mr. Markenson received his undergraduate degree from Syracuse University, his law degree from Brooklyn Law School, and his Masters of Public Health in Health Policy and Management from Columbia University. Mr. Markenson is admitted to practice in New York and The District of Columbia. Mr. Markenson primarily provides counsel to health care providers on legal and regulatory compliance, Skilled Nursing Facility survey, certification and enforcement, health care decisionmaking and refusal of treatment issues, Medicare, Medicaid, managed care and private insurance reimbursement issues, and provider contracting and transactional issues. Mr. Markenson is a participating member of the American and New York State Bar Association Health Law Sections, The American Health Lawyers Association, and The American Public Health Association. He has written several articles which address corporate compliance, refusal of treatment-related issues, the skilled nursing facility prospective payment system and dialysis services in skilled nursing facilities. He served as the editor of the program manual presented to participants of the New York State Bar Association's 1998 Health Care Fraud and Abuse Program and he co-chaired the New York State Bar Association's Fall 1999 Program, *Health Law and the Internet: The Basics and Beyond: A Must for Health Law Practitioners*. Mr. Markenson is also Editor-in-Chief of *Long Term Care Facility Survey and Certification Guide*, a comprehensive publication on the federal long-term care survey and certification process to be published in the Summer of 2000.

# PUBLICATION NEWS

By Daniel G. Fish

**ANOTHER COUNTRY: NAVIGATING THE EMOTIONAL TERRAIN OF OUR ELDERS** (Riverhead Books, New York, 1999) by Mary Pipher, Ph.D.

Mary Pipher's novel thesis is that aging is a foreign land. It is uncharted territory, an unexplored frontier. Approaching aging is to her analogous to visiting a distant planet. The old rules and signposts do not apply. To succeed in our contact with the inhabitants of this *terra incognita* we will need a Baedeker. The contemporary experience of aging is so foreign that we cannot communicate with our current language. We will need a new language to communicate. *Another Country* is the guidebook for the new region.



The author devotes Chapter 9 of *Another Country* to an examination of grandparenting. Instead of boring the reader with the by now familiar demographic statistics of longevity, she draws upon the vibrant personal examples of her own practice (as a psychologist) and personal life. Her rich personal stories create a guidebook to assist us all in making our way through this new territory. She explores the tri-gener-

ational landscape of grandparenting. She notes the very special relationship between grandchild and grandparent which almost excludes the middle generation. She points out the need for contact; to avoid the ghettoization of the elderly. She shows the benefits to all from such contact. Failure to heed this warning can lead to isolation and segregation of the elderly and a loss to the younger generation.

Grandparenting has not been a widely recognized topic within elder law. Now that *Troxel v. Granville* has been argued before the Supreme Court of the United States, grandparenting has been put fully on the map of the complete elder law practice. It can no longer be ignored. The case is a warning bell; announcing the presence of an area of concentration to which we must pay heed. Until now, the focus of elder law has been upon the crushing financial pressure of long-term custodial care upon the frail elderly. *Troxel* forces us to confront the intergenerational pressures upon the healthy elderly.

The most appropriate book to have reviewed in this issue on grandparenting would have been *Heidi* by Johanna Spyri. However, it is significant that *Another Country* is a bestseller. It is a strong indication of the broad relevance of this field. It touches a raw nerve. The more that the public demonstrates that this is an important topic, the more likely that serious attention will be paid.

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

## Help for Grandparents on the Web

By Stephen J. Silverberg

The issue of the place of grandparents in a family seems simple on its face. However, with the increase in the divorce rate and the rise of the single parent family, the rights of grandparents are not that clear anymore. Furthermore, there are an increasing number of children being raised by their grandparents. As usual, the Internet contains a wealth of information regarding the position of grandparents in the family.



A prime site is [www.grandparenting.org](http://www.grandparenting.org). This website, which has been online since 1988, is sponsored by The Foundation For Grandparenting, a not-for-profit, tax-exempt corporation. It is dedicated to raising grandparent consciousness and grandparent identity. Through education, research, programs, communication, and networking, it promotes the benefits of grandparenting and the involvement of grandparents as agents of positive change for families and society.

This site contains information for both grandparents and their professionals. There are numerous links to worldwide resources, articles regarding raising grandchildren and state by state criteria for grandparent visitation.

[Www.grandsplace.com](http://www.grandsplace.com) is devoted to the grandparent who is raising a grandchild. It maintains a large database of information replete with links to

related sources. One of these is [www.divorcesource.com/NY/index.shtml](http://www.divorcesource.com/NY/index.shtml). This provides the criteria for grandparent visitation in New York. Information on all 49 other states are also available.

The Samuel Sadin Institute on Law of the Brookdale Center On Aging of Hunter College ([www.brookdale.org/gpc/index.html](http://www.brookdale.org/gpc/index.html)) received a grant from the Nathan Cummings Foundation to establish a Grandparent Caregiver Law Center. The Center was created to address the financial and legal issues faced by grandparents who are the primary caregivers of their grandchildren. The Center publishes a multi-volume set entitled *Help for Grandparent Caregivers* covering a range of issues including Legal Custody, Foster Care, Guardianship, Standby Guardianship, Adoption, Visitation, Housing Issues, Education, Medical Consents and many other issues. Written by Melinda Perez-Porter, J.D., former Director of the Grandparent Caregiver Law Center and Associate Staff Attorney at the Samuel Sadin Institute on Law, all six volumes are available from the Brookdale Center for \$25.

As usual, the surface has only been scratched. These are just a few of the websites that you and your clients can use to obtain information. The internal links in each site will take you further, but don't stop there. A simple search at Ask Jeeves ([www.askjeeves.com](http://www.askjeeves.com), a powerful search engine) revealed at least seven more relevant sites. These should be a great basis for any research into the multi-faceted topic.

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# ADVANCE DIRECTIVE NEWS

By Ellen G. Makofsky

This article is the first of a series of regular columns entitled Advance Directive News, which will explore various advance directive issues. In my first column, I thought it would be instructive to see how elder law attorneys around New York State are preparing advance directives. All of us strive to create unambiguous



advance directives, which reflect the client's wishes in regard to health care and are easily understood. Attorneys also seek to draft advance directives that are readily accepted by health care providers. Sometimes understanding what other practitioners are doing is helpful. Accordingly, I devised a short survey and submitted it to members of the Elder Law Executive Committee for their responses. I received 25 completed responses.

The survey, although informal, proved interesting. Twenty-four of the 25 responding attorneys recommended advance directives to most or all of their estate planning clients. Approximately 50 percent of the respondents indicated that they prepared both a health care proxy and living will for the client. If only one document was prepared, the majority prepared a health care proxy.

Responding practitioners had differing views on health care proxies. In my survey I asked whether the attorneys had clients execute the health care proxy form distributed by the New York State Department of Health. Six respondents use this preprinted form. In explaining why he relies upon the New York State Department of Health form, Robert M. Freedman of Freedman and Fish of New York City responded, "The New York State Department of Health form is clear and familiar and widely recognized. Any other form may be scrutinized to see what it provides, especially what limits may be placed on the agent."

Murial S. Kessler of Kessler & Kessler, located in New York City, said that she uses "... the standard form because it is easily recognizable and is generally accepted as 'gospel' by facilities and health care providers." Rita K. Gilbert of Hyman & Gilbert located in Larchmont, puts a slightly different twist on the standard form. She uses the standard form and notes that this form "gives the least amount of 'agita' to my

clients at a time when they need comfort," while at the same time Ms. Gilbert encourages customization by having her clients hand write their specific health care instructions on the form.

Thirteen of the responding attorneys agree on the merits of the standard New York State form but opt to generate the standard form of the document on their computers. Howard S. Krooks of Littman Krooks Roth & Ball P.C., located in White Plains, wrote, "We use the computer generated form for convenience (it allows us to change names, addresses, etc.) [T]he form [we use] is identical to the State form. We prefer the State form because it is widely recognized and has a greater chance of being honored by medical professionals." Rene H. Reixach, Jr. of Woods Oviatt et al., located in Rochester, noted that "recognition of [the] State form by providers is helpful to clients. Putting it on computer permits customizing if needed." Walter T. Burke of Burke, Casserly & Gable, P.C., located in Albany, noted the computer-generated New York State form allows for, "More control over changes requested by [the] client [and the computer generated forms are] more professional looking."

The majority of attorneys who modified the standard form inserted directions in regard to artificial nutrition and hydration to give the health care proxy more complete authority in regard to these matters. Typically the respondents insert optional instructions such as, I have discussed with my agent and successor agent my wishes in regard to artificial nutrition and hydration.

A smaller percentage of attorneys prepare more individually drafted advance directives. Jacob J. Epstein, who practices in Jeffersonville, is representative of those attorneys who believe it is important to individualize each advance directive. Mr. Epstein wrote, "Life or anticipation of life ending with [a] request for dignity at the end, *can not* be boiler plate forms." Accordingly Mr. Epstein individualizes advance directives and drafts particularized instructions depending upon "the client's needs and requests." Albert Kukol of Levene Gouldin & Thompson, located in Johnson City, customizes his health care proxy by inserting language to authorize, "the agent to make the [health care] decision based on the circumstances—is it cancer or is it pneumonia—the underlying disease may change the agent's answer to these questions."

Several attorneys forwarded to me copies of the advance directives they use in their practices. A good number of them combined the health care proxy and living will into one document. These combined documents included statements regarding: the wish for pain relief even if such care prolongs dying or shortens life; directions in regard to Do Not Resuscitate Orders; hold harmless provisions; definitions of a triggering event upon which life sustaining treatment shall be withdrawn; the power to select, employ and discharge health care providers; the wish to live last days at home; the donation of body parts; the authorization to receive medical information; and statements of acceptance by the Health Care Agent.

The final survey question did not go to substantive issues but asked whether the attorney reduced the health care proxy to a wallet-sized card. Eight of

the respondents do distribute wallet sized health care proxies or similar documents to clients. Kathryn Grant Madigan of Levene, Gouldin & Thompson, LLP, located in Vestal, has a variation on this idea and indicated that she provides, "a wallet card to clients which has the name [and] phone number of [the] primary agent; [the] name [and] phone number of [the] doctor and lawyer (me) noting that we [Ms. Madigan's firm] each have copies of the health care proxy."

I would be happy to explore the aftermath of advance directive drafting in future columns. If you have encountered interesting situations in which you were either successful or unsuccessful in persuading health care professionals to honor an advance directive contact me so that I can explore the issue in this column. Your experience may help us all draft better advance directives.

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 Health Care 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 the First Vice President of the Port Jewish Center in Port Washington, New York.

Ms. Makofsky 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.

## SNOWBIRD NEWS

### What Are the Requirements for a Durable Power of Attorney to Be Valid for the Management of Florida Assets?

By Julie Osterhout

The Florida Statute pertaining to Durable Powers of Attorney is 709.08. The document must be in writing and executed with the same formalities required for a conveyance of real property (i.e., must have two witnesses and must be notarized, one of the witnesses may be the notary, but they must sign in both capacities separately).



The document must also contain the words: "This Durable Power of Attorney is not affected by the sub-

sequent incapacity of the principal except as provided in S.709.98, Florida Statutes" or similar words.

Any natural person over 18 may serve or a trust company in Florida may serve as agent.

To create, amend, modify or revoke any document or other disposition effective at the principal's death (i.e., a Trust Agreement) or transfer assets to an existing trust, the document must expressly authorize this.

Case law in Florida requires specific authority to make gifts to anyone, including the agent.

Julie Osterhout has been practicing law in the Fort Myers, Florida area since 1980. She received her Juris Doctorate in 1980 from Mercer Law School and opened her private practice in 1990. She has concentrated on the laws and issues affecting the elderly since 1982. Her practice includes estate planning, probate, guardianship, asset protection planning and Medicaid qualification. In 1995, Julie was certified as an Elder Law Attorney by the National Elder Law Foundation. Julie is the immediate past chair of the Elder Law Section of The Florida Bar. Julie is a current member of the Board of Directors of the National Academy of Elder Law Attorneys, and was named a Fellow of the National Academy of Elder Law Attorneys in 1997.

*Save the Dates!*

## **ELDER LAW SECTION SUMMER MEETING**

**August 8-11, 2001  
Florence, Italy**

# PUBLIC ELDER LAW ATTORNEY NEWS

By Valerie Bogart

## 1. Pro Bono Opportunity— Neighborhood Legal Services Assistive Technology Project

The Assistive Technology (AT) Project represents low-income people throughout New York State in appealing denials of Medicaid payment for durable medical equipment such as motorized wheelchairs and other technology needed by persons with disabilities.

The AT Project recruits pro bono lawyers statewide who will commit to accept two Medicaid administrative hearings during a 12-month period. The Project screens and refers the cases, and provides tremendous training and technical support. The pro bono attorney may, but need not, commit to pursuing an Article 78 if the client loses the hearing. Through a special partnership with Erie County's Volunteer Lawyer's Project, many Buffalo law firms and solo practitioners have committed to taking cases. The Project is looking for firms and lawyers around the state to take cases in their counties, with full support from its office. These cases provide a challenging opportunity for lawyers and make an immense difference in the quality of life of the client. Contact: Marge Gustas, Neighborhood Legal Services, Inc. 295 Main Street, Room 495, Buffalo, NY 14203; [www.nls.org](http://www.nls.org); Phone (716) 847-0650; (716) 847-1322 TDD; [atproject@nls.org](mailto:atproject@nls.org)



## 2. U.S. Supreme Court to Review Legal Services Restrictions

On April 3, 2000, the United States Supreme Court agreed to decide whether the U.S. Congress

violated the First Amendment by prohibiting Legal Services lawyers from making arguments that challenge the validity of welfare reform laws. In 1996, Congress prohibited programs funded by the Legal Services Corporation, which represents low-income people in civil legal matters, from bringing class actions, engaging in legislative advocacy, claiming attorney's fees, representing many immigrants and raising constitutional claims when they represent clients in appeals of decisions denying or terminating welfare benefits. Represented by the Brennan Center for Justice of NYU School of Law, a coalition of New York legal services lawyers, indigent clients, and supporters challenged the restrictions in *Velazquez v. Legal Services Corporation*. On January 7, 1999, the Second Circuit struck down the restriction that prohibits LSC-funded lawyers from challenging the constitutionality of welfare laws in the context of appeals of welfare denials. The Court held that Congress had violated the First Amendment by seeking to stifle the speech of citizens who object to welfare laws. Unfortunately, the Second Circuit upheld all the other restrictions. The Ninth Circuit had earlier upheld all of the restrictions, creating a conflict as to the legality of the welfare restriction. The Supreme Court granted certiorari solely on the welfare restriction, but has held in abeyance its decision of whether to review all the other restrictions. David S. Udell, Director of the Brennan Center's Poverty Program and a former senior attorney for Legal Services for the Elderly in New York City, states: "Our system promises 'Equal Justice Under Law.' *Velazquez* illustrates the inherent unfairness of a two-tier system that applies one set of rules to lawyers for the poor and another to lawyers for clients with money." The Supreme Court is expected to hear the case in the Autumn of 2000, and issue its decision in 2001.

Valerie Bogart has been a senior attorney with Legal Services for the Elderly in New York City since 1990, specializing in litigation, training and policy in Medicaid and access to long-term care services. Since 1997, with a grant from the New York Foundation, she founded and has directed on a part-time basis The Home Care Project at the Center for Disability Advocacy Rights (CeDAR), a non-profit organization established in part to do class actions prohibited by federal restrictions on legal services offices. She is a graduate of NYU School of Law.

## Addendum

There was an inadvertent omission from the statewide Directory of Civil Legal Services for the Elderly, which was published in the Spring 2000 issue of the *Elder Law Attorney*. This Addendum was provided by Ellen Makofsky.

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## BONUS NEWS

### Court Appoints Parents Trustee of Child's SNT

By Beth L. Polner

For more than two decades, trusts for the disabled have been the subject of litigation and legislation. Since 1993, federal legislation<sup>1</sup> has helped to standardize many of the requirements for these kinds of trusts—called supplemental needs trusts—so that the disabled person will continue to receive government benefits, such as Medicaid. In New York, the selection of a trustee gave rise to judicial determinations which have largely prevented family members from appointment based upon a ‘serious conflict of interest’ as trustee and contingent remaindermen. The theory of the conflict of interest arose out of an Appellate Division, Second Department, decision in *DiGennaro v. Community Hospital of Glen Cove*.<sup>2</sup> Last October, that presumed conflict of interest was rejected by H. Patrick Leis, III (Justice, Supreme Court, Suffolk County), in his decision in *In re Pace*.<sup>3</sup>



In *DiGennaro v. Community Hospital of Glen Cove*, the Appellate Division affirmed an order from Suffolk County Supreme Court, disapproving the creation of a special needs trust for a disabled infant. The Appellate Division determined that disapproval of the trust by the lower court was appropriate, *inter alia*, because the trust named the infant's parents as both co-trustees and remaindermen of the trust.

Following the Appellate Division's decision affirming *DiGennaro*, a series of holdings strictly adhered to a presumption of a conflict of interest which prohibited parents from serving as trustees of their child's SNT if the trust also named the parent as remainderman and/or contingent beneficiary. In 1995, in *In re DeVita*,<sup>4</sup> the court twice rejected the proposal of an Article 81 appointed guardian to fund a supplemental needs trust on several grounds:

First, the trust provides that the trustee is to be Grace DeVita, the mother of the infant, Anthony DeVita. The proposed trust also provides that upon the death of Anthony DeVita the trust shall terminate 'and the State shall be reimbursed for total medical assistance provided to

Anthony DeVita during his lifetime as consistent with federal and state law.' (citations omitted) However, it further provided that '[a]ll remaining principal and accumulated income shall be distributed pursuant to the laws of intestacy. This apparently renders Grace DeVita a potential beneficiary of the trust corpus . . . presenting a 'serious conflict of interest' (citing *DiGennaro*).

Following the decision in May 1995, the guardian re-submitted the SNT for the Court's review. This time, the guardian argued that the concerns raised by the Appellate Division in *DiGennaro* had been diminished with the passage of the federal mandates in OBRA 1993.

The court was not swayed. Noting, *inter alia*, that the language of the SNT relating to accountings had been changed by the guardian to require an annual account to court-specified individuals, and in accordance with the accounting provisions in 81.31 of the Mental Hygiene Law, the court nonetheless rejected the guardian's request that she act as trustee without relinquishing her intestacy rights:

The Court finds these arguments insufficiently persuasive as reasons not to adhere to the unambiguous and unrecanted pronouncement of the Appellate Division . . . In some cases, it is true, the amount due the State at the termination of the trust will exceed the principal and leave nothing for a contingent remainderman. But this will not always be so. . . . Moreover, the discretion of the trustee to spend the principal of the trust, it seems to this Court, increases rather than decreases the conflict of interest, since a disposition of the principal to promote an interest of the beneficiary will directly impact the amount which might be available to a contingent remainderman. . . . Finally, if as a practical matter the petitioner believes that if after reimbursement to the State upon the termination of the trust there will be

nothing left to distribute to any contingent remainderman, it should be of little concern to the trustee to waive rights to any theoretical interest in this trust. . . .

In July 1995, in *In re McMullen*, the court again held that co-trustees who were potential remaindermen was an “impermissible conflict.”<sup>5</sup>

In the same month, however, Justice Sebastian Leone of the Kings County Supreme Court, issued the seminal decision, in *In re Morales*, setting forth the standards by which supplemental needs trusts are still drafted.<sup>6</sup> In that case, the mother of an incapacitated daughter was appointed guardian under Article 81 of the Mental Hygiene Law and sought approval to establish and fund an SNT. Acknowledging the mandates set forth in both the state and federal statutes, and the New York State regulations,<sup>7</sup> the court articulated standards for the SNT and specifically addressed the issue of “conflict” in analyzing the trust’s remaindermen provisions. The *Morales* trust provided that all remaining trust principal be paid to the “legal representative of the estate of the beneficiary.” This language, the court determined, eliminated the “serious conflict of interest identified in *DiGennaro v. Community Hospital*.” Citing the statute itself, Justice Leone pointed out that § 81.19 of the Mental Hygiene Law did not bar a family member from serving as a guardian. The court stated, “. . . there is no prohibition against a family member who potentially may inherit the estate of an incapacitated person from serving as such incapacitated person’s guardian.” The Justice added, “[i]ndeed, the courts of this State have expressed a strong preference for the appointment of family members as guardians.”

The decision in *In re Pace* also distinguishes the Appellate Division’s holding in *DiGennaro*. As well, the Suffolk court has begun the process of articulating standards by which the suitability of a parent/trustee can be measured.

In *In re Pace*, the parents of a 29-year-old young man, John Pace, who had suffered a brain injury following a moped accident in 1985, were appointed the Article 81 co-guardians for his person and property. The parents, as co-guardians, were authorized by the Court to establish a supplemental needs trust with the proceeds of a structured settlement received through a 1987 infant’s compromise order.

The supplemental needs trust proposed that the parents act as co-trustees, and John’s brother act as successor trustee. The trust, according to the decision, also provided that at the young man’s death, after

repayment to Medicaid, “all remaining income and principal shall be paid to the legal representative of the estate of John Pace.” The court noted that since the incapacitated person did not have a will, the funds would pass by intestacy to his parents, if living, and if not, to his brother.

Citing *DiGennaro*, the Suffolk County Department of Social Services (the Medicaid provider) objected only to the appointment of the parents as trustees because of the potential that they would inherit as contingent remaindermen.

The Court first examined EPTL § 11-2.1 as the starting premise. That section states that a trustee (including the trustee of a supplemental needs trust) must act impartially and with due regard to the respective interests of the income beneficiary and the remainderman (*citations omitted*). Referring to the provisions of OBRA 1993, the Court found similar requirements in the New York Social Services Law and its regulations. For example, the court noted that in order to fulfil its fiduciary obligations to the State (or Medicaid entity) as a remaindermen of the SNT, the trustee of the SNT—whether parent or independent trustee—is required to notify the appropriate Medicaid district when the trust is established or funded. The court noted further that the regulations mandate other notice provisions imposed on any trustee: when the disabled beneficiary dies; in advance of transactions which will tend to substantially deplete principal;<sup>8</sup> and in advance of transactions transferring principal for less than fair market value. Finally, the regulations also require proof of surety bonding of the trustee.

Acknowledging that it was adopting the reasoning in *In re Morales*, the court went further to distinguish *DiGennaro* stating that prior cases<sup>9</sup> which interpreted that decision as prohibiting family members who are potential remaindermen from serving as trustees of an SNT “. . . do not address the fact that the *DiGennaro* trust was a Medicaid qualifying trust and not a supplemental needs trust drafted in accordance with current law.”

The Court noted that the proposed SNT in *Pace* had been drafted “in conformity with current law.” This protects the State’s interest as a remaindermen and, significantly, the Court added:

To interpret *DiGennaro* as creating a blanket rule prohibiting all parents or relatives who are remaindermen from serving as trustees of supplemental needs trusts would deprive many disabled beneficiaries of the

appointment of the best possible trustee and violate the strong public policy established in this State for appointing family members rather than strangers to administer the funds of those who are not competent to care for their own assets.

Taking *Pace* one step further than *Morales*, the decision sets forth some guidelines for assessing whether parents will be suitable trustees of an SNT. The points for judicial inquiry were discussed by the Court:

The decision as to whether to appoint an independent trustee over a family member can only be made after the court has inquired into the relative fitness of the proposed family member to act as a fiduciary. Items such as the proposed trustee's: history of caring and sacrificing for the disabled person; proven financial and fiduciary skills; attitudes concerning the appropriate use and expenditure of the disabled person's funds will bear on the family member's qualifications to serve as a fiduciary. In addition, the proposed trustee's personal financial stability and credit history, including any existing judgments and bankruptcies, would be a relevant area of inquiry.

The inquiry into 'caring and sacrificing' may likely be measured by a higher standard than that set forth in the guardianship statute. In Article 81, a property management guardian (and personal needs guardian) is only required to visit his or her ward a minimum of four times.<sup>10</sup> Under the *Pace* standard, one might expect this initial inquiry to center not only on visitation, as the child may reside in the home, but the quality of involvement in the disabled child's life. Quality of involvement may include parental involvement with special education and training program staff, participation in development of continuing care plans, monitoring of health care and assistance, and interaction with health and social work professionals, etc.

The court's inquiry into "proven financial and fiduciary skills" and the proposed trustees' "personal financial stability and credit history," may be viewed as an extension of a court's evaluation of the appointment of a guardian under Mental Health Law § 81.19. There, when selecting a guardian, a court is required

to, *inter alia*, consider "the educational, professional, and business experience relevant to the nature of the services sought to be provided."<sup>11</sup> Balanced against that standard is the court's evaluation of the nature of the financial resources involved.<sup>12</sup> If the proposed parent/trustee does not have the financial sophistication which matches the size of a personal injury or medical malpractice settlement or award, the parents' professional relationship with a reputable investment brokerage company and/or certified financial planner may weigh in the parents' favor. There, it would seem likely that testimony from the proposed financial planner, or the presentation of an investment plan, may also be a suitable line of inquiry by the court. Responsible steps by a parent to manage their child's funds through professional assistance, although the parents may never have been independently wealthy, should not preclude appointment as a trustee.

Finally, consideration of any existing credit problems of the parents, including judgments and bankruptcies, pose some issues that go beyond the scope of the SNT. Credit history reports, under federal and state consumer credit laws, may take some time to obtain, judgments in bankruptcy may pre-date the child's disability, and credit reports may contain inaccuracies. In some cases, parents may have a limited credit history, either because credit cards are not used and/or because there has never been any credit extended such as a mortgage or home equity loan because a family resides in rental housing. Certainly, lack of a credit history (versus a poor credit history), should not create a presumption of unfitness to serve as a trustee. Yet, it is likely that in those instances, inquiry into potential conflicts may become more relevant based upon the other considerations raised by the court in *Pace* (i.e., level of financial sophistication needed for investment of the SNT assets, possibility of conflict of interest over day to day use of funds for the benefit of the disabled person, and attitudes concerning appropriate expenditures of SNT funds).

Selection of the trustee of a pay back supplemental needs trust is a key issue for family members of a disabled child. Future litigation will determine whether the Appellate Division Second Department decides to revisit and revise its decision in *DiGennaro*. The decision in *In re Pace* brings us firmly post-OBRA, joining *In re Morales* and its progeny, allowing parents to be considered as trustees, although they may ultimately be contingent remaindermen of the supplemental needs trust. Practitioners must not only draft their SNTs in conformity with current law and judicial decisions, but give careful consideration to

the selection of a trustee and the presentation of the facts and evidence to support that trustee nomination as part of the SNT process.

## Endnotes

1. Omnibus Budget Reconciliation Act of 1993, P.L. 103-66.
2. 611 N.Y.S.2d 591 (2d Dep't 1994).
3. \_\_\_Misc. 2d\_\_\_ (10/14/99).
4. 2/17/95 N.Y.L.J. 33 (col. 5) and 5/22/95 N.Y.L.J. 32 (col. 2).
5. 166 Misc. 2d 117 (S. Ct., Suffolk Co. 1995).
6. 1995 WL 469523 N.Y.
7. 18 N.Y.C.R.R. § 360-4.5 (iii)(a)-(e).
8. 18 N.Y.C.R.R. § 360-4.5 defines "substantial depletion" based upon a percentage and value of the trust principal and accumulated income, if any. For example, for trusts valued at \$100,000, a transaction representing 5% of the trust is required to be reported.
9. The decisions referred to by the Suffolk Court included *In re Kacer*, N.Y.L.J. 11/1/94, p. 33, Sup. Ct., Suffolk Co.) (conversion of Article 77 to Article 81 where petitioner sought to

establish special needs trust. Judge Luciano outlined the differences between SNT's pre-OBRA 1993 and following its enactment, distinguishing the concerns of the court in *In re DiGennaro*, *supra*, with respect to the substantive terms of the trust. Nonetheless, the court refused to appoint a family member as a trustee of the SNT because of the *DiGennaro* conflict of interest); *In re DeVita*, *supra*, and discussed above; *In re McMullen*, *supra*, see above for discussion; and *Merer v. Romoff*, 172 Misc. 2d 807 (S. Ct., N.Y. Co. 1997) (infant compromise settlement for disabled child under age 18 in which New York County Supreme Court appointed independent trustee for SNT rather than parents, citing *DiGennaro*. This conflict of interest may be more difficult to overcome where an SNT is established for a child under age 18 based on a statutory duty of parental support until the age of majority. This court specifically declined to follow the holding in *In re Morales*, *supra*).

10. Mental Hygiene Law § 81.20(a)(5).
11. Mental Hygiene Law § 81.19(d)(5).
12. Mental Hygiene Law § 81.19(d)(6).

Beth I. Polner is an associate with Davidow, Davidow, Siegel & Stern and practices in the areas of estate planning and estate administration, Article 81 guardianship litigation, and elder law (including Family Court litigation under *Gomprecht* and Medicaid fair hearings). Ms. Polner, who has worked for Nassau/Suffolk Law Services Committee, Inc., L.I. Housing Services, and the FDIC during the past 18 years, devotes a significant amount of time *pro bono* representing disabled clients in the guardianship and SNT subject areas, and advising nonprofit advocacy and service providers who assist the disabled. She is a member of the Nassau and Suffolk Bar Associations, and the NYS Bar Association, is currently Secretary of the Senior Umbrella Network of Nassau, and is a member of the Board of Trustees of North Shore Synagogue in Syosset, New York. Ms. Polner is a 1981 graduate of Franklin Pierce Law Center, in Concord, New Hampshire.

## REQUEST FOR ARTICLES

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

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