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Elder Law Attorney

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

Message from the Chair

Sharon Kovacs Gruer

The Elder Law Section is committed to informing our members, on a timely basis, about issues that affect our practice. As you know, Governor Andrew M. Cuomo submitted a proposed appropriation bill on February 1, 2011. It included language that for the next fiscal year, the Commissioner of Health could implement the recommendations of a newly created Medicaid Redesign Team (MRT), including modifying or discontinuing Medicaid program benefits.

On February 24th, 2011, the MRT passed a number of recommendations, which the Governor has endorsed. David Goldfarb and Valerie Bogart prepared a summary of the recommendations that primarily impact on our clients' eligibility for Medicaid and the provision of Medicaid services, and the summary was sent by EBlast to our members and put on the list serve.

Some of the proposals that affect our clients and us are as follows:

- the proposed elimination of spousal/parental refusal
- the proposed implementation of a 60 month look back for non-institutional long term care
- the proposed expansion of estate recovery and expansion of the definition of estate

The official list of MRT adopted proposals is at the following link: http://www.health.ny.gov/health_care/medicaid/redesign/docs/approved_proposals.pdf.

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The Elder Law Section wants you to be informed about what is being proposed, even though it is early in the process and there could be many changes. We are committed to providing information on a current basis.

The hard work by the Section's New York State Budget Task Force is keeping our Section informed and up to date on the implications to our clients of any Budget proposals or proposed changes by Cuomo's Medicaid Redesign Team. The Section thanks Michael Amoruso, Howard Angione, Val Bogart, Tim Casserly, Anthony Enea, David Goldfarb, Howard Krooks, Kate Madigan, Amy O'Connor, Fran Panteleo, Lou Pierro, Ira Salzman, David Stapleton and Richard Weinblatt.

Our Power of Attorney Task Force had important input in the recent improvements to the form, and has analyzed the results of a recent survey sent to attorneys with regard to the current power of attorney form. We thank Kate Madigan, Michael Amoruso, Tim Casserly, David Goldfarb, Lee Hoffman, Amy O'Connor and Richard Weinblatt for their work on this matter.

Our Elder Law Section committees are busy working for our members. Some additional highlights of ongoing projects are as follows:

- The Legislation Committee has prepared a position statement for our Section in support of spousal impoverishment protections.
- The Guardianship Committee has analyzed *Deanna W. v. Rosenblut*, dealing with the use of NAMI funds to compensate guardians, and is working on recommendations with regard to this issue, and is also analyzing similar cases in other jurisdictions. The Committee is working with the Special Needs Planning Committee on suggesting improvements with regard to 17A guardianship proceedings.
- Our Special Needs Planning Committee is continuing its work on guidelines for trustees of special needs trusts, and updating the pooled trust list as a resource for our members.
- The Section's Trusts and Estates Committee has prepared a survey regarding the varying procedures of the Surrogate's Courts in the different counties to assist our members in practicing in the different counties.
- The Section's Practice Management and Technology Committee is continuously providing information on practice issues for our members.
- Our new Ethics Committee has prepared a survey to be sent to our members.
- The Law School Task Force has been busy informing law school students about the field of elder law and assisting the schools in developing activities and projects related to elder law.
- Our other committees are also working to provide timely information to our members.

The Elder Law Section's language database currently encompasses sixteen (16) languages, spoken by over forty-five (45) attorneys, and it continues to grow. This database is intended to assist us in better serving our culturally diverse communities. If you fluently speak more than one language, please provide that information for our database.

Our committees are looking for volunteers to assist with ongoing and new projects. Some of the projects can be done collaboratively, and others can be done independently, so that you can participate regardless of the amount of time you have to devote.

We want active members. If there is an issue impacting your practice of law, call the chair of the committee regarding that issue to discuss what can be done. Write an article for the *Elder Law Attorney* on a topic that interests you. Attend our informative and interesting section meetings.

I look forward to seeing you at our *UN*Program in April.

Sharon Kovacs Gruer

Message from the Co-Editors in Chief

We are striving to make the *Elder Law Attorney* a publication that addresses critical issues affecting the complicated planning and drafting decisions we must make as attorneys, our advocacy of elder law rights, and the community and care issues pertinent to the problems our clients and their families face.

We always welcome new ideas, new authors and your contribution to this publication. We ask that you, our readers, keep the *Elder Law Attorney* in mind in your day-to-day interaction with other attorneys, social workers, physicians, public health professionals and others whose contributions to the community of the elderly can be reflected in these pages for the benefit of our Section.

Among her initiatives as our new Section Chair, Sharon Kovacs Gruer has introduced the practice of having this publication include regular contributions from the Elder Law Section Committees, which articles will include updates and analysis pertaining to their areas of concern.

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The Least Restrictive Environment: The Tie That Binds Guardianships and Educational Needs

By Patricia Howlett, Maggie Blair and Charles F. Howlett

> It was once said that the moral test of Government is how that Government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy and the handicapped.
>
> **—Hubert H. Humphrey**

Introduction

Patricia Howlett

Maggie Blair

Charles F. Howlett

These two topics, guardianships and educational needs for the disabled, are often perceived as mutually exclusive in terms of application of the law. Yet, rather interestingly, they are tied by a common thread—that any proposed plan involving disabled persons reaching the age of eighteen must be determined by the least restrictive environment and be narrowly tailored to meet their needs. Providing the greatest autonomy for such persons in terms of medical and educational needs has become one of the more pressing concerns in society today. While Article 81 of the Mental Hygiene Law (MHL) deals primarily with the elderly population, there is a portion of the practice where Elder Law attorneys and professional educators should work hand-in-hand: that of disabled individuals ranging in age from eighteen to twenty-one. It is this time frame where the practitioners of education and law need to combine forces to serve the best interest of the younger, adult disabled person. Equally important, why not even consider a remedy after the age of twenty-one when education law no longer requires further learning? Both professions have a vast array of knowledge and practical experience, which can assist, promote, and further the ideals of caring for individuals that the late Vice President Hubert Humphrey referred to as those in the "shadows of life."

To begin, what do you do when you have a client who is soon to turn eighteen years of age, is severely disabled, and/or possesses significant assets? How will you ensure that this individual's personal property, personal needs, and educational needs are met? This is where both Mental Hygiene Law and Education Law come into play. Article 17-A of the Surrogates Court Procedure Act (SCPA) does not provide the flexibility for property management and personal needs that is afforded the individual under Article 81. Clearly, Education Law and Mental Hygiene Law overlap in their focus on developing an Individualized Plan—what are the needs of the Incapacitated Person? The Mental Hygiene Law refers to specific areas of limitation of activities of daily living, which include but are not limited to mobility, eating, toileting, dressing, grooming, housekeeping, cooking, shopping, money management, banking, and driving or using public transportation.[1] A plan of action must be established meeting the specific needs for the disabled now entering the legal definition of adulthood. The activities of daily learning are also the focus of the Individual Education Plan (IEP) as set forth in Federal Regulations and State Education Law and allows for disabled students to remain in school until the age of twenty-one.[2] Moreover, in terms of special education, an individualized plan of action is established determining how best such classified students are to be educated and which resources must be made available to them. Within each school district a Special Education Committee is established and those who petition for intervention must meet certain guidelines for approval. If a student is classified as in need of intervention, the Special Education Committee will then create an IEP specifically tailored to meet his/her learning needs.[3] In both instances, as it applies to Mental Hygiene Law and Special Education, an individualized plan of action is required. It is one that calls for the least restrictive environment. It is also one that aims at giving these individuals an opportunity to have a "determinative" voice concerning their own care and needs.

With respect to Mental Hygiene Law, a guardian will be appointed if the court finds that the appointment is necessary to provide for the personal needs of the Alleged Incapacitated Person (AIP) or to manage

the AIP's property. A court further finds that the AIP either consents to the appointment or is "incapacitated."[4] Incapacity generally exists if the AIP is unable to engage, without assistance, in the activities of daily living (ADLs).[5] The AIP has functional limitations due to this inability and the AIP cannot understand that he or she has such limitations, and fails to appreciate the consequences of those limitations.[6] Moreover, these same limitations of activities of daily living also require that Special Education teachers develop a plan of care (care which will continue to the age of twenty-one). Developing an educational plan of action when the disabled adolescent reaches the age of eighteen may also necessitate a guardianship proceeding. This is the tie that binds them together. How can both procedures produce an effective legal and educational individualized plan of action working in the best interests of the incapacitated young adult, which guarantees the least restrictive environment?

More importantly, after the age of twenty-one, the school system will no longer provide a free and appropriate education. Consequently, a transition plan must be put in place.[7] This can be a serious challenge for parents who must now consult not only with those in education, but also those that practice in this area of law. This transitional period can prove very traumatic and the discussion directly below addresses how some states are dealing with those disabled individuals who are over twenty-one and still continuing their education. Meaningful post-secondary educational experiences should be made available for those whose intellectual capacities deserve such opportunities. In addition, even those not seeking a post-secondary educational experience should be provided with proper transitional planning for those capable of performing in the world of work.

Individual Education Plans and Transitions

Regarding matters in special education, for instance, it is noteworthy to point out that as the first generation of challenged students move through the education system with IEPs, and the daunting prospect of entering into to post-secondary life, the nation, states, local school districts, and, most importantly, parents, are faced with the challenge of transitioning these young men and women to meaningful life experiences. Consequently, transition planning as a mandated component of IEPs for classified, special education students was introduced in the authorization of the Individuals with Disabilities Education Act of 1990 (IDEA). This IEP mandate required a statement of needed transition services be included for classified students sixteen years of age or older. The re-authorization of IDEA in 1997 reaffirmed the original transition mandate of 1990 but lowered the age at which transition planning begins to fourteen. IDEA of 2004 again reaffirmed the transition planning mandate but focused on the results of effective transition planning by requiring Committees on Special Education (CSE) to specifically include measurable post-secondary goals and a summary of student performance on students' Individual Education Plans. IDEA of 2004 also readjusted the age at which transition planning begins to sixteen. In New York State, the Part 200 Regulations of the Commissioner of Education stipulate that transition planning begins not later than the first IEP to be in effect when the student is age fifteen or at an earlier age if determined appropriate by the CSE.

Effective September, 2011, New York State will be implementing a revised IEP. The sections relating to transitional supports, services, and planning in the new IEP have been expanded and intrinsically linked to other components of the document, specifically the student's present levels of performance in academic achievement, social development, physical development and management needs. The CSE will be required to address transition planning through the multifaceted lenses of the student's levels of knowledge and development in core curriculum, skill areas including activities of daily living, level of intellectual functioning, adaptive behavior, expected rate in acquiring skills and information, and learning styles. In addition, the CSE will also be required to analyze the degree and quality of the student's relationships with peers and adults, feelings about self, and social adjustment to school and community environments as well as the student's degree and quality of motor and sensory development, health, vitality and physical skills or limitations. All of the above are explored and discussed in terms of the student's strengths and deficits through which long-term goals for living, working, and learning as an adult are identified and recorded. Based on the long-term goals identified, the CSE then must determine specific transition service needs that focus on the student's course of study in the following areas: instruction, related services, community experiences, development of employment, and other post-school adult living objectives as well as acquisition of daily living skills and functional vocational assessments if applicable to that student.

Transition planning has been explored, discussed, and documented on students' IEPs during CSE meetings since 1990. During the Model Transition Program—Long Island Transition Training Conference in March, 2009, Dr. Ed O' Leary, co-author of *Transition Requirements: A Guide for States, Districts, Schools, Universities and Families*, stated that eighty-eight percent of states have failed to ensure compliance with IDEA's secondary transition services provision.[8] The primary reason for this non-compliance statistic is that people generally do not know "what to do" or "how to do it." Post-secondary planning options for meaningful life experiences have been both limited and limiting. Frequently CSE transition planning for challenged

students on Long Island involves referrals to New York State Vocational and Educational Services (VESID), the Office for People with Developmental Disabilities (OPWDD), and private, state-approved agencies for day programs, job training, respite care, and/or group home placement. As the numbers of students with IEPs who exit the domain of IDEA have grown, the availability of appropriate options which would enable them to access their basic rights as citizens has remained stagnant. Often families play a waiting game for living arrangements, social opportunities, and possible work experience for their children.

In a recent article in *The Miami Herald*, Associated Press writer Heather Hollingsworth notes that "Eight years ago, disability advocates were able to find only four programs on university campuses that allowed students with intellectual disabilities to experience college life."[9] In 2009, according to Debra Hart, head of Think College at the Institute for Community Inclusion, University of Massachusetts Boston, that number had grown to more than 250 college experiences for students with disabilities across more than three dozen states. One such program, Next Step, is facilitated through Vanderbilt University's Kennedy Center. This experimental program is funded by a three-year grant and focuses on independent living and career skills. The ultimate goal of this program is an independent life for its participants. Next Step students ages nineteen to twenty-nine attend the program for two years and graduate with a certificate. Their schedules include courses tailored to meet their developmental needs in the areas of daily living skills and job training. In addition, they audit one university class each semester with the support of Vanderbilt student volunteers.[10] The University of Arizona Tucson also sponsors a program for students with intellectual disabilities. Project FOCUS, funded by the Department of Education, is one of twenty-seven model projects nationwide and will begin during the summer of 2011 with an orientation program.[11]

However, according to Dr. Beth Mount, a person-centered planning expert and founder of Capacity Works, there are currently only seventeen sites for college experiences available in New York State. This begs the question as to how equipped is New York State and its legal representatives when it comes to shaping special education needs for disabled young adults who would benefit from a post-secondary educational experience. At present, the law in New York State only mandates educating special needs children until the age of twenty-one. How many more could be serviced if intellectually disabled youths were to extend their education beyond that age in a college setting? More importantly, how can attorneys work to provide a least restrictive environment when these individuals are no longer under the legal jurisdiction of educational mandates?

In addition to college experiences, school districts are also developing transition models for intellectually challenged students to improve graduation rates for students with disabilities and to assist these students as they transition to college or work. The Ithaca City School District (ISCD) in New York partnered with VESID in September, 2007 to initiate the ICSD Model Transition Program. This program, which starts in the seventh grade and intensifies as the students move into eleventh and twelfth grades, offers tutoring for state assessments, a college success seminar, a transition course, and internships to students with an IEP.[12] In 2009, furthermore, Kevin Musson, a special education teacher in the Saline Area Schools, received the Michigan Association of School Boards Education Excellence Award for a unique and comprehensive transition model for developmentally disabled students ages eighteen through twenty-six who haven't received a high school diploma. This program appears to focus on the specific strengths and deficits of the students and addresses three specific components related to effective transition planning: activities of daily living, self-determination initiatives, and peer mentoring. The goal of this program is to prepare students to successfully transition to college, a vocational school, a work experience or, when appropriate, a group home. If the now-adult student with disabilities is unable to make these decisions due to a lack of cognitive ability, who has the authority to make those decisions?

Guardianships: Articles 81 and 17-A

Along with an educational transition plan for the disabled child, parents should also consult an attorney to explore if an Article 81 Guardianship should be established for the disabled child who is now turning eighteen years old and is legally classified as an adult. A Property Guardianship is important in those instances where the child received a personal injury award or other significant assets. In most instances, this applies to a recipient of a financial settlement or someone born with a birth disability. It is important to ensure that the now-adult disabled person is protected and not manipulated or exploited by others, both financially and legally.

Such a Guardianship can be personalized as needed, a living thing so to speak, which allows disabled persons to live comfortably and with dignity in the least restrictive setting possible. Most importantly, legislative findings and the purpose for the creation of Article 81 of the MHL are based on similar concepts as that of Education Law as it applies to special needs children and mainstreaming. In education, the purpose for mainstreaming is to minimize labeling those children with special needs. By incorporating them into the regular classroom, their dignity and wholeness as a person are being protected and guaranteed: the least re-

strictive environment. Thus, the intent of the legislature with respect to Article 81 is also to highlight the importance of "individual dignity" by promoting the "greatest amount of independence and self-determination." According to the "Practice Commentaries":

> [It]…hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.[13]

Moreover, as the practitioner in Elder/Disability Law is aware, there are two provisions under which an application for a Guardianship can be made: 1) Article 81 of the MHL; and 2) Article 17-A of the SCPA.[14] While similar in concept to appointing a Guardian to help those unable to help themselves, the process for obtaining the guardianship, the fees, need for counsel, and court oversight do vary significantly. So, how is one guided when faced with distinctions between Article 81 and Article 17-A?

Most instructive regarding these differences is Justice Kristin Booth Glenn's analysis in *In re Appointment of a Guardian for Chaim A.K.*[15] This decision provides an excellent comparison and breakdown of the differences and applications respecting these two proceedings. Accordingly, an Article 81 Guardianship can be obtained for minor adults who suffer from mental retardation or developmental disabilities. Unlike Article 81, however, Article 17-A centers on the diagnosis rather than the functional capacities of the individual. Further, if both parents make the petition, or the survivor of the parents does, no hearing is required.[16] Judge Glenn's point is well taken that "the desire of parents to pursue their disabled children's best interest may have provided justification for this lack of judicial oversight in 1966, but those assumptions are highly questionable in light of today's longer life expectancies and advances in medical knowledge."[17]

Judge Glenn's decision not only rests with advancing medical technology but also changing American attitudes regarding disadvantaged individuals. Great strides have been made in society since the late 1960s concerning the treatment of the disabled. Vice President Humphrey's statement about dealing with those in "the shadows of life" exemplifies that progressive change. Certainly, the decade of the 1960s was one characterized by social change and political ferment. Marked by the Women's Liberation Movement, the anti-Vietnam War Movement, and the notable strides made by the Civil Rights Movement under the spiritual leadership of Dr. Martin Luther King, Jr., the call for legislation seeking to improve the rights of medically and educationally challenged persons received impetus from the above-mentioned movements. Relying upon the judicial insights of the late jurist Oliver Wendell Holmes, Jr., who insisted that the nature of law is not its logic, but experience, social-minded legislators began carving out new legal interpretations, which would extend protections for those incapable of addressing their own special needs. It became clear to political and legal activists that the law should be stable, but never stand still. Changes in Constitutional Law would now find a receptive home in the areas of special education and persons with disabilities.

The social and political changes of the 1960s transformed the way Americans viewed their society. It became incumbent upon elected officials and those practicing law to examine how best all citizens should be treated. The notion that disabled persons and those who were mentally challenged, for instance, should be placed in state hospitals and forever labeled as forgotten no longer held legitimacy. Historically, advocates for disabled Americans relied on the Civil Rights Act of 1964, which rested on the Commerce Clause, as a model for legislation that evolved slowly and resulted in the 1990 Americans with Disabilities Act. However, during the intervening twenty-six years, Americans benefited from the Medicare and Medicaid and vocational rehabilitation laws of 1965. Lyndon B. Johnson's "Great Society" legislative initiatives also led to the passage of the Rehabilitation Act of 1973 over Richard Nixon's veto, which prohibited discrimination against the disabled. Legal advocacy on behalf of the disabled finally culminated with the 1990 Act, which gave "those in the shadows of life" full legal citizenship for the first time in the nation's history.[18]

In addition, efforts to assist the disabled as well as those in advanced years, neglected due to fractured family situations or no relatives to take care of their immediate needs, also gained the attention of experts specializing in Mental Hygiene Law. It would be in this area that Justice Holmes' words took on greater significance as lawmakers witnessed the passing of one century and the dawn of a new one. Greater autonomy for the disabled received a sympathetic hearing from the legal profession and advocates in the area of Mental Hygiene Law.

Nonetheless, there were some bumps in the road. Prior to April 1, 1993, for example, when Article 81 came into effect, adults with decreased mental abilities were made wards under the supervision of a Conservator or Committee. As such, the law was more restrictive and did not allow for flexibility and individual tailoring necessary for meeting the specific needs of Guardianships serving the disabled person. Under Article 81 of the MHL, the premise is that as an adult the individual is presumed to be fully capable of rendering decisions, requiring clear and convincing evidence to prove otherwise.[19] Little notice, initially, was given to the least restrictive environment. The prevailing assumption was that a disabled person be classified in one category and all applications would be the same—one size fits all was the prevailing belief. However, over time and with increasing progressive legislation respecting a disabled person's autonomy, due process of law, including the presence of the AIP at the hearing, and other safeguards, subsequently increased the protection of the individual. A guardian should therefore be appointed when there is no other least restrictive alternative. Much like IEPs in education, the lesson for practitioners in Elder Law is to strive for the least restrictive environment. Where more vigilance and oversight is needed is regarding those disabled adolescents who turn eighteen and are now legally classified as adults. It is here where the autonomy of the least restrictive environment takes precedence.

Unlike both the guardianship under Article 81 and IEPs in special education, moreover, a guardianship under Article 17-A does not require oversight and the filing of ninety day, or yearly reports. Without a minimal reporting requirement and evaluations, there is no way of assessing if the guardianship is serving the disabled adult.[20] Is the current plan adequate or is there a need for change? Respect for the incapacitated/disabled person's functional ability should be the fundamental objective when dealing with a disabled person, either in law or education. Again, why not seek to encourage disabled individuals with intellectual capacities to further their learning skills beyond the mandated cut-off of twenty-one years of age? Or, why not provide a transitional plan based on the least restrictive setting, which allows them to perform a work task befitting their physical and mental capabilities?

Conclusion

There are four cardinal principles that apply equally to those who practice in Education Law and Elder Law when dealing with a disabled or mentally incapacitated person entering the legal definition of adulthood:

1. Respect for the individual is paramount during this difficult period of transition.
2. Unless it can be shown by clear and convincing evidence in law and education that certain individuals cannot handle a task or function, they should be permitted nevertheless to function in that area. A person suffering a disability in one aspect of life does not mean that all other functions are affected. The "wholeness" of the individual must be preserved.
3. The least restrictive standard is the only standard to be used in both law and education for dealing with disabled individuals.
4. All powers and restrictions and functional plans involving disabled persons should be reviewed at the very least on an annual basis to ensure that the least restrictive environment standard is being met.

While at first blush it appears that matters related to education and guardianships are separate entities, a closer look reveals a hidden truth: they are intertwined philosophically and ethically. In both areas of professional practice, the mantra is "the least restrictive environment." Discharge Planning/Transitional Planning presents a problem for both professions. We all want to do "the right thing," "to help." One is reminded of an article written in the *American Journal of Nursing*, appearing in 1987. The author, Jane Barrett, concluded her piece, *In Search of Advocacy*, by noting: "Jill's ordeal forced me to consider all those children who would suffer as she did—children well informed about their diseases and capable of making rational choices. Why can't they have a voice in decisions about their own care?"[21]

Hopefully, now that the least restrictive environment is the litmus test, a professional realization that these young adults with disabilities are capable of making decisions directly affecting their own well-being, will all the "Jills" in this world be heard? It is time that practitioners address that gray area between eighteen-twenty-one years of age with respect to educational needs and guardianship protection. In doing so it elevates the importance of individual dignity by maintaining the least restrictive environment. That is what we are ordained to do as lawyers and educators. This is our most pressing mission at the moment.

Endnotes

1. N.Y. Mental Hygiene Law § 81.02(c) (McKinney 2010).
2. 20 U.S.C. § 1400(d)(1)(A) (2004); Part 100 and Part 200 of the Commissioner's Regulations.
3. A school district's Special Education Committee is required to meet on a periodic basis during the school year and address each student's individual needs. The Special Education Teacher charged with maintaining a student's IEP will report to this committee and detail the student's academic and behavioral progress. The teacher is responsible for adhering to the IEP for each and every student under his or her charge. In addition, mainstreaming special education students, as opposed to confining them to a particular room or place within a school building, reflects the application of "least restrictive environment." 20 U.S.C. § 1400(d)(1)(A) (2004); 20 U.S.C. § 1412(a)(3) (2005); 29 U.S.C. § 794-794(c) (2002); N.Y. Education Law § 4401–10 (McKinney 2007); Part 200 of the Commissioner's Regulations.
4. N.Y. Mental Hygiene Law § 81.02 (McKinney 2010).
5. *Id.*
6. *Id.*
7. Transition services are included in the changes to New York State Education Law § 4401(9), effective June 30, 2012.
8. Edward O'Leary, J. Storms & J. Williams, *Transition: What, Why and How at the Model Transition Program*, Molloy College, Mar. 18, 2009.
9. Heather Hollingsworth, *More Intellectually Disabled Youths Go to College*, Associated Press, Oct. 16, 2010, *available at* http://news.yahoo.com/s/ap/20101017/ap_on_re_us/us_disabled_in_college.
10. *Vanderbilt's Next Step Program Helps Students with Disabilities*, Nashville Tennessean Online, Oct. 12, 2010.
11. Becky Pallack, *Special-Ed Grads to get New Path at UA*, Arizona Daily Star, Nov. 8, 2010, *available at* http://azstarnet.com/news/local/education/college/article_a36b8608-7fee-5be9-b4ae-cd2a0e07d780.html.
12. Rachel Stern, *ICSD Shapes Special Education Improvements*, The Ithaca Journal, Nov. 10, 2010.
13. Rose Mary Bailly, Practice Commentaries, N.Y. Mental Hygiene Law § 81.02 (McKinney 2006).
14. N.Y. Surrogate's Court Procedure Act § 1750–61.
15. *In re* Chaim A.K., 885 N.Y.S.2d 582 (Sur. Ct. 2009).
16. N.Y. Surrogate's Court Procedure Act § 1754(1) (McKinney 1989).
17. *In re* Chaim A.K., 885 N.Y.S.2d 582 (Sur. Ct. 2009).
18. For an interesting historical perspective consult, The New Disability History: American Perspectives (Paul K. Longmore & Lauri Umansky, eds., 2001) *passim*.
19. Rose Mary Bailly, Practice Commentaries, N.Y. Mental Hygiene Law § 81.02 (McKinney 2006); *see In re* John J.H., 896 N.Y.S.2d 662 (Sur. Ct. 2010); Brad H. Rosken, *Education Law and the Role of the Grandparents*, Elder Law Attorney 20, No. 4 (Fall 2010): 20-22.
20. *See In re* Mark C.H., 2010 N.Y. Slip Op 20156 (Sur. Ct. 2010).
21. Jane E. Barrett, *In Search of Advocacy*, American Journal of Nursing 87, No. 12 (Dec. 1987): 1730.

Patricia Howlett received the 2010 NYS Bar Association's Elder Law Section Pro Bono Award. She has been a practicing attorney for over twenty years and works for the law firm of Passarelli and Abiuso, Babylon, NY. She received her JD from Touro Law Center where she won the Mead-Data Lexis Award. She is also a Registered Nurse and author of numerous articles in law, education, and nursing.

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Charles F. Howlett is an Associate Professor in the graduate education program at Molloy College. He is the author of 10 books and numerous articles in the fields of history and education. A Fulbright Scholar and Woodrow Wilson Foundation Teaching Fellow, he holds a doctorate in American Intellectual and Social History. A veteran, he received the 2009 United States Air Force Academy's Admissions Liaison Officer of the Year Award (Retired/Civilian) for Northeastern United States.

An Introduction to the State Legislative Process and Budget Cycle

By Michael D. Cathers

To most New Yorkers, including many attorneys, the State legislative process and the State's Budget cycle are a mystery. With the many odd goings-on which occurred during the last legislative session and especially with the enactment of the 2010 State Budget, even those who thought they knew the governmental processes had to stop and think, and rethink, what they knew, or thought they knew, about the processes. Indeed, 2010 proved that there were things we didn't know; we didn't know, for example, that a Lieutenant Governor could be appointed by a Governor to fill the vacancy created when the former Lieutenant Governor became Governor upon the resignation of the elected Governor.

This article will attempt to summarize both the legislative process of the State of New York and the State's Budget cycle, drawing upon the State Constitution, the Laws of the State and the Rules of the Senate and Assembly. Where appropriate, examples will be given using the 2011 calendar year as a reference.

A. The Legislative Year

The State Constitution provides for both the Legislative Year and the annual Budget cycle. The political year and legislative session begins, appropriately enough, on January 1 of each year.[1] Unfortunately, this is the clearest statement of the legislative year and Budget cycle included in the Constitution, or in the law, or the rules of either house of the Legislature.

The Constitution[2] mandates the actual dates and time for convening the legislative session and for submitting the Executive Budget not by specifying any particular date, but by requiring that they be done on a specific day of the week, as measured from January first.

Under the Constitution, the Legislature is required to convene on the first Wednesday after the first Monday in January at 12:00 noon in the Assembly Chamber.[3] At that time, the Governor customarily addresses a joint session of the Legislature reporting on the state of the State, fulfilling his constitutional duty to "communicate by message to the legislature at every session the condition of the state."[4] Thereafter, the Governor is required to submit his Budget.

B. Budget Cycle

Although the political year and legislative session begin in January of each year, the Budget process actually begins before January 1 of each year. The Constitution provides for an early start by requiring the head of each department of State government, except the Legislature and judiciary, furnish the Governor with estimates and information as he may require to prepare his Budget.[5] Generally, agencies will begin work on their Budgets in September with preliminary submissions due to the Governor's Division of the Budget in October.

Additionally, itemized estimates of the financial needs of the Legislature, certified by the presiding officer of each house, and of the judiciary, approved by the Court of Appeals and certified by the Chief Judge, must be sent to the Governor not later than the first day of December in each year for inclusion in the Governor's Budget, without alteration.[6]

The Executive Budget is required to be submitted to the Legislature by the Governor on or before the second Tuesday following the first day of the annual meeting of the Legislature. Provided, however, that in a year following the election of the Governor, the Executive Budget is required to be submitted on or before the first day of February.[7]

At that time, the Governor also is required to submit any bills containing appropriations or re-appropriations included in the Executive Budget and any proposed legislation which he has recommended in the Executive Budget.[8] Thereafter, the Governor may amend his Budget and/or any appropriations bills or proposed legislation within thirty days.[9]

After this thirty-day period, the Governor may amend or supplement the Budget and submit amendments to any bills submitted or submit supplemental bills only with the approval of the Legislature.[10]

Example 1:

For the year 2011, the political year begins January 1, 2011. The Legislature is required to begin session on January 5th (that being the first Wednesday following the first Monday in January) at Noon. The Governor will, likely, give his "State of the State" address to a joint session of the Legislature at or about 2:00 p.m. that day.

The Governor is required to submit his Budget to the Legislature on or before February 1, 2011, this

being a year following an election for Governor. He then has 30 days, until March 3, to submit any amendments to his Budget, or enabling legislation. Had this been a year NOT following an election for Governor, he would have had to submit his Budget on or before January 18, with amendments due on or before February 17.

The Governor and agency heads have the right to appear before legislative committees concerning the Budget and must appear when requested by the Legislature or its committees.[11]

Under the Legislative Law,[12] within ten days of submission of the Executive Budget by the Governor, the Legislature, by concurrent resolution, must prescribe a procedure for establishing a joint Budget conference committee(s) to reconcile the Governor's Budget and such Budget resolution or Budget bills as may be passed by each house. The Legislative Law also requires[13] the Legislature, by concurrent resolution, to prescribe a procedure for establishing a joint Budget conference committee(s) to reconcile the Governor's Budget and such Budget resolution or Budget bills as may be passed by each house.

Furthermore, within that ten-day period, the Speaker and the Temporary President of the Senate must develop a schedule for the consideration and passage of Budget appropriations and related bills, including dates for public hearings, dates for the issuance of financial forecasts, a date for the establishment of joint Budget conference committee(s), a date by which the joint Budget conference committee(s) shall issue their final reports and dates for the passage of the appropriation bills. The Speaker may develop such a schedule jointly with the Temporary President of the Senate, or they may develop separate schedules.[14]

In considering the Governor's Budget and adopting alternatives, the Legislature is limited in what it may do.[15] The Legislature may only strike out or reduce items of appropriation and add items which are stated separately and distinctly from the original items of the bill and which only refer to a single object or purpose. This means that the Legislature may not "substitute" items, but, may, only strike an item and add a new one, or reduce an item.

Example 2:

The Governor's Budget proposes:

"$1,000,000.00 to be used solely for the purpose of enhancing revenue of elder law attorneys within the state."

If the Assembly believes that this amount is too low and wants to add an additional Billion dollars to the appropriation,

the Assembly may NOT, do the following:

*" ~~$1,000,000.00~~ **$2,00000,000** to be used solely for the purpose of enhancing revenue of elder law attorneys within the state."*

However, the Assembly may:

~~"$1,000,000.00 to be used solely for the purpose of enhancing revenue of elder law attorneys within the state;"~~

and

*"**$2,000,000.00 to be used solely for the purpose of enhancing revenue of elder law attorneys within the state.**"*

If the Assembly had thought the amount too generous, it could have:

*"~~$1,000,000.00~~ **$500,000.00** to be used solely for the purpose of enhancing revenue of elder law attorneys within the state."*

*[Material in **BOLD** being added and material in ~~strike-out~~ being deleted].*

Until the Legislature has acted upon the Governor's Budget, it may not consider any other appropriation, except upon a message of necessity from the Governor to continue State operations.[16] Thereafter, any appropriation bill may only relate to a single object or purpose, no "riders."[17]

Once both houses of the Legislature have passed a Budget, the appropriation bills become law immediately without further action by the Governor. Except that the appropriations for the Legislature and Judiciary and any separate items added to the Governor's bills by the Legislature are subject to veto by the Governor, "line-item veto."[18]

This provision[19] further explains why the Legislature may only strike and/or add items to the Governor's Budget. Using Example 2 above, in the first instance the Governor may line-item veto the added material, leaving nothing for elder law attorneys. The Legislature and Governor would then have to negotiate a resolution to their disagreement in the amount. In the second instance, the Governor may accept the lower amount and negotiate to increase the amount in a supplemental appropriation later in the year, or veto the amount provided and enter into negotiations for a supplemental appropriation.

This Constitutional scheme sets the stage for a "game of chicken" between the Legislature and the Governor. Should the Legislature believe that an item of appropriation in the Governor's Budget is too low, it can strike that item and add a larger amount. However, it risks the Governor vetoing that "legislative add" and

leaving nothing for the appropriation. If this were an item of low priority for the Governor, (s)he may just do that and save additional funds to balance the Budget.

The courts have recognized this and have opined that this is precisely what the Constitution intends.[20] This forces the Governor and the Legislature to negotiate the Budget and to arrive at an appropriation amount which serves the need to fund the item and balance the Budget. Naturally, faced with a Governor who refuses any increases or refuses to negotiate, the Legislature is forced to risk a veto or to "stonewall" the Governor and not act on any appropriations in order to bring the Governor to the negotiation table. This stalemate can result in numerous "emergency appropriations" to keep government operating pending passage of a Budget.

In arriving at its version of the Governor's Budget, the Legislature must first negotiate with itself, the Senate and Assembly agreeing to and passing the *same* appropriations and implementing legislation. In an effort to achieve this end, the Legislature, as noted hereinabove, has required itself[21] to establish a schedule for consideration and passage of Budget-related bills and resolutions; and to establish joint Budget conference committee to reconcile the Governor's Budget and such Budget resolution or Budget bills as may be passed by each house.

C. Legislative Process

1. Generally

The legislative process is a member driven process by which individual members of the Legislature develop and introduce legislation for consideration of the body for passage and eventual enactment into law. Only a member of the particular house of the Legislature may introduce a bill for consideration of that house and bills may be introduced in either house or both.[22] Exceptions are made for bills provided with and in support of the Governor's Budget or within the 30-day period following presentation of the Executive Budget to the Legislature (Budget Bills or Art. VII Bills noted hereinabove), and for bills introduced via a report from a standing committee or by order of the house.[23]

On occasion, the Governor may request the leadership of a house to introduce a bill during a Session of the Legislature. However, only a member of the particular house may introduce such a bill. Often such a bill will be introduced by the leadership of the house and designated as "introduced at the request of the Governor."

Every bill must include the "enacting clause" and no bill may become law without it, *viz*. "The People of the State of New York, represented in Senate and Assembly, do enact as follows."[24]

Generally, there are no limits on the number of bills which a member may introduce and any member may introduce a bill on any subject. However house rules limit the number of bills which may be introduced at the end of the Session.[25] Each year the Assembly considers approximately two thousand bills after having been approved by the appropriate standing committee(s). The Senate would consider fewer bills in the same time period. Each bill has a number assigned to it in the order in which it is introduced. An "A" preceding the bill number designates an Assembly bill. An "S" preceding the bill number designates a Senate bill.

As bills move through the process and are amended a letter is added following the bill number to indicate the revised version of the bill. For example, bill number A. 1120-B would be the third version of Assembly bill number 1120, the 1,120th bill introduced in the current Session.[26]

Since members of the Legislature are elected for two-year terms, the Legislature operates on a two-year bill cycle. Bill numbers will carry over and remain in viable for up to two years depending upon the time of introduction. The two-year cycle also prevents members from voting to change their benefits or compensation while they are serving in office.[27]

Example 3:

> *Assemblyman Jones wishes to rename a section of state highway as the "Elder Law Attorneys Appreciation Highway" in order to honor the work of elder law attorneys in the State. His staff would draft the bill and submit it to the Bill Drafting Commission for technical review and conformance with drafting guidelines (i.e. spelling, proper use of numerals, numbering of sections, etc.). The bill is assigned a number and is then printed. The number would reflect the order in which the bill was submitted. Copies of the bill are delivered to each member's desk in the house chamber. If the bill fails to pass in the first year after a general election, it will carry over to the next year and retain its bill number and status in the legislative process.*

2. Committee Process (in Assembly)

After the bill is introduced, it is assigned to a standing committee. The committees are comprised of members of the house who are assigned to the committee by the leaders of the majority and minority in approximately the ratio that the majority and minority comprise the full house. The committee to which the bill is assigned is based upon the primary purpose and subject matter of the bill. Occasionally, a bill will be assigned to more than one committee or will be passed out of one committee to another. The Chair of the committee may hold hearings on the bill. Once approved by a majority vote of committee members attending a meeting of the committee, the

bill is moved to the appropriate calendar for consideration of the full house.[28]

Example 4:

Assemblyman Jones's bill is introduced and assigned to the proper committee for review and consideration. Depending upon the nature of the bill and the perceived importance of the bill, the Chair of the committee may hold public hearings on the bill before it is brought up in committee for a committee vote. Hearings may be held in Albany, at the location most affected by the bill, or at several locations around the State. The Chair may call for a vote on the bill and, if passed, the bill will proceed to the floor for consideration of the full house. Should the Chair not call for a vote on a bill, the full house may vote to "discharge" the bill from the committee.

3. Calendar Procedure

Each bill upon which action may be taken by the house is placed upon a calendar and delivered to the desk of each member of the house. A bill must be on the members' desks in printed form for three days before it may be passed by the house.[29] The only Senate bills which appear on the Assembly calendar are bills which have already passed the Senate, and *vice versa*. If there are identical Senate and Assembly bills, both numbers will be listed.

The heading of each bill will carry the title of the bill, the introducer`s name and a brief description of the subject matter of the bill. If a bill has not been on the members' desks for the required three days, an "H" (for High Print) will precede a bill number to indicate that and cannot be passed unless the Governor sends a "Message of Necessity."

Should the Governor believe that a bill requires immediate passage, the Governor may issue such a message, stating the reasons therefor, and the bill may be considered as soon as it is placed upon the members' desks in final form.[30]

Should a committee Chair not bring a bill to vote in committee to free it to be placed upon a calendar, a member may make a motion to discharge the bill from committee. This is a motion to bring a bill to the floor without the favorable report of a committee. If the motion is successful, the bill is brought to the floor for consideration without the required committee action. A calendar will be prepared which shows that such a motion has been made and it will indicate the bill number, the date the motion was made, the introducer and the title of the bill. Three days' notice is required before the motion may be made.[31]

Should the sponsor of a bill not wish it to be considered, the sponsor may have the bill "starred." A star (*) preceding the bill number means that action on the bill has been deferred by or on behalf of the sponsor. A bill cannot be considered by the house until one day after the star is removed.[32]

Bills are taken up, generally in the order they appear on the calendar, by the clerk reading the calendar number, bill number, name of sponsor and title of bill.

4. Floor Procedure

Once a bill is called from the active calendar, if a member decides to debate a bill or has a question about it, the member will say "Lay it aside," and no vote will be taken at that time. If the bill is not laid aside, generally the presiding officer will then say, "Read the last section." The clerk will then read the effective date of the bill. The presiding officer then says, "The clerk will record the vote." Those who desire to vote "No" must enter a negative vote through a voting station. All others are recorded as a "Yes" vote, except for those who are absent, excused or abstained. After the voting is completed the clerk announces the results.

After the clerk goes through the calendar once, the bills which have been laid aside are considered. The bill title is read again and at that time the bill is debated and the vote taken. The vote will be as noted above unless a member demands a "slow roll call." If a slow roll call has been requested members must enter either a "yes" or "no."[33]

No amendments may be made to a bill on its last reading.[34] A bill called for a vote cannot be amended from the floor, but an immediate vote must be taken on its passage and the votes recorded in the journal.

No bill may become a law until passed by a majority vote in each house of the Legislature.[35] In the Assembly all bills must have at least seventy-six votes to pass. In the Senate all bills must have at least thirty-two votes to pass. Often the majority party will conference bills in advance (meet with only party members to discuss a bill) to assure that there are enough votes to pass a bill. In New York a bill is rarely brought to the floor for a vote unless the majority party is assured that there are sufficient votes to pass the bill. It should be noted that since only members of a house may vote on a bill before the house, the President of the Senate (i.e., the Lieutenant Governor) may not vote on a bill to comprise a majority for passage of the bill (only persons elected to the Senate may vote on bills). The Lieutenant Governor, as President of the Senate, may, however, vote on procedural matters before the house.

After the bill passes one house, it is sent to the other for approval. If the *same* bill has already passed the other house, it then is sent to the Governor for his approval, or veto.[36]

5. Action by the Governor

Under the Constitution,[37] the Governor has ten days, excluding Sundays, to act on a bill presented by the Legislature. If he fails to act by signing the bill into law, or vetoing the bill, the bill will automatically become law *if* the Legislature is still in session. However, *if* the Legislature has concluded its session and the Governor does not act, the bill is considered vetoed ("pocket veto") and must re-pass by the Legislature.

If the Governor vetoes a bill while the Legislature is still in session, the bill is returned to the Legislature with a veto message indicating the Governor's objections to the bill. The house in which the bill originated may then initiate a veto override. If two-thirds of the members of each house vote to pass the bill following the Governor's veto—declaring that the bill shall become law notwithstanding the veto of the Governor—the bill will become law without the Governor's signature.[38]

6. Special Sessions

The State Constitution provides a method for convening the Legislature to address specific legislation in the event the leader of the house fails or refuses to do so. The members of a house may call for such a "special session" by petition including the names for two-thirds of the members of the house.[39] Only items specified in the petition may be addressed in such special session.

Similarly, the Governor may call the Legislature into "extraordinary session" if he deems it necessary to address specific items of immediate concern. Again, the specific items to be addressed in special session must be enumerated and only those items may be considered in the special session.[40]

D. Commentary

The specific processes described hereinabove are taken in large part from the Rules of the Assembly. A similar process exists for the State Senate and a bill must navigate both processes prior to being sent to the Governor or becoming law. In the Senate, the "clerk" is referred to as the "secretary," and the committees are organized by different subjects than the Assembly Committees and contain fewer members, reflecting the smaller number of senators.

As was evidenced in the most recent session of the Legislature, the Budget process does not always move smoothly and the self-mandated legislative conference committees do not always form, or meet, to resolve differences between the houses of the Legislature. Often the failure to meet to resolve differences is a result of one house, or the other, not being able to pass legislation or resolutions relating to the Budget, or to pass meaningful proposals for addressing its concerns about the Governor's proposed legislation implementing the proposed Budget.

If the majority of a house cannot agree as to the changes required, or as to a means to assure that the Budget is, indeed, a balanced Budget, then no legislation or resolution will be passed by that house which can then be brought to the conference committee(s) for negotiation. In general, issues will be discussed in "conference" before being brought to the floor for vote. Each party in each house maintains a conference of the members of that party which meets regularly to provide open and candid discussion of issues to arrive at a conference consensus on the issue. If the majority party in either house cannot come to a consensus and muster the votes needed to pass legislation, then it cannot be assured that it will receive favorable treatment on the floor.

In the past, the Legislature has been able to form an "oversight committee" or "mother ship" and several "issue area committees" to address differences in their proposed amendments to the Governor's Budget. The mother ship [comprising the Speaker and Temporary President of the Senate, Minority Leaders and Deputies] would set parameters within which the various issue oriented committees could negotiate—"thou shall not expend more than $ X.00." The issue specific committees [comprising the Chairs and members of the relevant legislative committees] would then reach agreement on items of appropriation and implementing legislation for their subject area (e.g., Health Care). If agreement were not possible on all items, the unresolved items would be forwarded to the mother ship for resolution.

Once the issue committees had resolved their differences (or agreed to disagree on some issues), the oversight committee would reconcile the recommendations of the issue committees to form a full, balanced Legislative Budget which could be passed by both houses. The Governor would then have the power to veto any "legislative adds" or any appropriations for the Legislature or the Courts.

In actual practice, in prior years, theGovernor's staff would become involved in the legislative negotiations with the staff of the issue specific committees in order to assure three-way agreement and enactment of necessary and appropriate implementing legislation. The Governor could then, with the consent of the Legislature, introduce amendments to the Budget after the 30-day amendment period or merely agree not to veto any legislative adds, thus avoiding the Constitutional "game of chicken."

However, where we have an equally divided house, any one member of the "majority" could defeat consensus and block conference agreement on a Budget. Failing an agreement within the majority party, no agreement to a Budget resolution could be assured passage.

The Budget process has been criticized by several "public interest" groups for a lack of "openness" and

"stagnation." On the positive side, however, the process assures that the public is heard via legislative public hearings on the Governor's proposed Budget. Also, all members are heard by their conference leaders in open and frank, if not public, conference committee meetings and their positions are considered by the conference in developing a consensus position for the majority and minority conferences of each house. The leaders of each house can then represent the house in negotiations with the other house and the Governor in a controlled, limited debate. It is hard to imagine what an open, public debate by all 212 members and the Governor would look like or accomplish.

As noted hereinabove, the Budget process is designed to create "stagnation" in that the Legislature is very limited in the alterations it may make to the Governor's Budget given the Constitutional restrictions on substitution and the Governor's line-item veto power over legislative adds. Absent a willingness of all parties to the process to negotiate a middle ground (or a legislative super-majority in both houses, assuring veto overrides), a final Budget cannot be easily enacted.

Finally, it should be noted that all committee hearings are open to the public and all sessions of both houses of the Legislature are broadcast live and rebroadcast throughout the day on cable television and are streamed live via the internet. In the end, each member of the State Legislature stands for election on his record every two years and the people have ultimate control of the process via the ballot box.

Endnotes

1. N.Y. Const. Art. VIII § 4.
2. N.Y. Const. Art. VIII § 4.
3. N.Y. Const. Art. VIII § 4.
4. N.Y. Const. Art.VII § 3.
5. N.Y. Const. Art. VII § 1.
6. N.Y. Const. Art. VII § 1.
7. N.Y. Const. Art. VII § 2.
8. N.Y. Const. Art. VII § 3.
9. N.Y. Const. Art. VII § 3.
10. N.Y. Const. Art. VII § 3.
11. N.Y. Const. Art. VII § 3.
12. N.Y. Leg. L. §§ 53; 54a.
13. N.Y. Leg. L. § 54-a.
14. N.Y. Leg. L. §§ 53; 54-a.
15. N.Y. Const. Art. VII § 4.
16. N.Y. Const. Art. VII § 5.
17. N.Y. Const. Art. VII § 6.
18. N.Y. Const. Art. IV § 7.
19. N.Y. Const. Art. IV § 7.
20. *See e.g., People v. Tremaine*, 257 AD 117 (N.Y. Sup. Ct. App. Div. 1939).
21. N.Y. Leg. L. §54-a.
22. N.Y. Const. Art. III § 12.
23. *See* N.Y. Assembly R. IV § 2; Senate R. VI.
24. N.Y. Const. Art. III § 13.
25. *See* N.Y. Assembly R. III § 2; Senate R. VI § 5.
26. *See* N.Y. Assembly R. III § 2; Senate R. VI § 4.
27. *See* N.Y. Assembly R. III §§ 3 & 4; Senate R. VI § 8.
28. *See* N.Y. Assembly R. IV; Senate R. VII.
29. N.Y. Const. Art. III § 14.
30. N.Y. Const. Art. III § 14.
31. *See* N.Y. Assembly R. IV § 7.
32. *See* N.Y. Senate R. VIII § 7.
33. *See* N.Y. Assembly RR. II & V; Senate RR V & VII.
34. N.Y. Const. Art. III § 14.
35. N.Y. Const. Art. III § 14.
36. N.Y. Const. Art. IV § 7; *see also* N.Y. Assembly R. III § 9 (regarding time frames for submission of bills to the Governor).
37. N.Y. Const. Art. IV § 7.
38. N.Y. Const. Art. IV § 7.
39. N.Y. Const. Art. III § 18.
40. N.Y. Const. Art. IV § 3.

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Mr. Cathers worked extensively with the offices of three State Governors, and their Divisions of the Budget and program staff on the State's Medicaid Budget and implementing legislation and as a technical consultant and advisor to Governor George E. Pataki's Health Care and Medicaid Transition Team.

New York Laws Provisions Impacting Elder Law in 2009 and 2010

By David Goldfarb

While most elder law practitioners focused on legislative changes to the New York Power of Attorney law and the new Family Health Care Decisions Act (FHCDA), a number of other laws recently became effective which impact on elder law. This is a roundup of some of those laws.

A. Resource Test and Establishment of Long-Term Care Assessment Centers

Effective January 1, 2010, in New York, the resource test was eliminated for all non-SSI-related Medicaid and Family Health-Plus applicants and recipients.[1] The resource test continues for SSI-related applicants/recipients and for the Medicaid Buy-In for the working disabled.

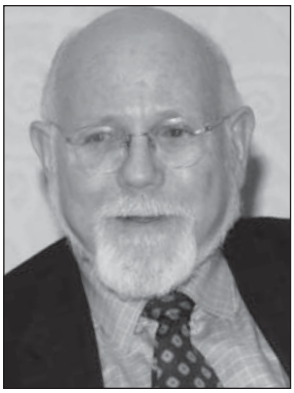
The 2009 and 2010 New York Budget bills authorize the establishment of demonstration Regional Long-Term Care Assessment Centers, one or more to serve a county in New York City and one in another region consisting of one or more contiguous counties. These Assessment Centers will be responsible for determining a person's need for, and the authorization of, community-based, long-term care services and programs. In other words, the Medicaid agency will contract out home care determinations in these areas in the place of the local CASA's or county Social Services Department. An applicant or recipient may challenge any action taken as if such action were made by a government entity, and shall be entitled to the same benefits, standards and notice and procedural due process rights, including a right to a Fair Hearing and aid continuing, as if the assessment or authorization were made by a government entity.[2]

B. Changes to Irrevocable Funeral Trust Provisions

2010 N.Y. Laws 109, § 19 (Part B), effective Jan. 1, 2011, added provisions for an exempt irrevocable funeral trust for family members.[3] An irrevocable funeral trust of any value held by a funeral director for the applicant/recipient or a family member is permitted, provided that any funds that are not used for burial will be used to repay the Medicaid agency.

C. Additional Health Care Insurance Provisions

Grievance procedure requirements applying to managed care health insurance contracts have been extended to comprehensive insurance contracts that



utilize a network of providers.[4] The provisions regarding access to specialty care that apply to managed care health insurance contracts have been extended to comprehensive insurance contracts that utilize a network of providers and require that specialty care be provided upon referral from a primary care provider.[5] No managed care policy or contract that provides coverage for hospital, medical or surgical care shall provide that services of a participating hospital will be covered as out-of-network services solely on the basis that the health care provider admitting or rendering services to the insured is not a participating provider or that services of a participating health care provider will be covered as out-of-network services solely on the basis that the services are rendered in a nonparticipating hospital.[6]

Effective January 1, 2010, in connection with concurrent and retrospective adverse determinations, an insured's health care provider also has the right to request an external appeal. In lieu of an external appeal, a health care plan and a facility (hospital or residential care facility) may agree to an alternative dispute resolution mechanism to resolve disputes.[7]

Regarding New York State health insurance continuation coverage, if a person no longer had an election right of continuation coverage in effect on February 17, 2009, the effective date of the American Recovery and Reinvestment Act of 2009, 111 Pub L. No. 5, 123 Stat. 115 § 3001(a), but would have been eligible for assistance in paying for continuation coverage under that act if her election time had been still in effect, then she still may elect continuation coverage within 60 days from when the group administrator of her health plan gives the required notice.[8]

Although the federal Health Reform Law in 2010 extended dependent coverage under a group plan through age 25, *see* 42 USC § 300gg-14, in New York such coverage had already been extended through age 29. 2009 NY Laws Ch. 240 amended the Insurance Law to require every group plan that provides coverage for dependent children to make available if requested coverage under that contract to an unmarried child through age 29.[9]

Regarding Partnership long-term care insurance policies issued in New York, participants are subject to a "spend down" based on the Medicaid income rules limitations in effect at the time.[10] Pursuant to SSL § 367-f (1)(a)(iii), added by 2009 N.Y. Laws 58, during the Medicaid Extended Coverage Period the income eligibility standard for married couples is equal to the amount of the MMNA pursuant to SSL § 366-c(2)(h), and for single individuals equal to one-half of such amount (provided this standard does not result in a loss of federal financial participation).

D. New Effective Dates for Qualified Disclaimers

Effective January 1, 2011, a renunciation is not automatically a qualified disclaimer under federal or state tax law.[11] The law expands the list of property interests that may be renounced and provides, *inter alia*, that the effective date of a renunciation of property owned jointly with the right of survivorship or as tenants by the entirety is as follows: if the property renounced is the portion received as a result of the creation of the joint tenancy or tenancy by the entirety, the effective date is the date of the creation of the renouncing party's interest; if the property renounced is the portion received as a result of the death of the other owner, the effective date is the date of death.[12]

E. Change in Evidentiary Standard for Inheritance by a Non-Marital Child

A "nonmarital" child (i.e., one born "out of wedlock") can inherit from his father if paternity has been established by clear and convincing evidence (including but not limited to the results of a genetic marker test) or evidence that the father has openly and notoriously acknowledged the child as his own.[13] This 2010 amendment also repealed the much criticized subdivision EPTL 4-1.2(a)(2)(D), which was interpreted to require that a genetic marker test had to have been administered during the decedent's lifetime.[14] These amendments modernize the statute and remove the additional evidentiary requirements that failed to take into account the advances in genetic testing, so that now if such tests establish paternity, the previously required additional evidence is not needed.[15] Under the amended statute, if genetic testing is not available, evidence that the father openly and notoriously acknowledged a child as his own will be sufficient.

F. Changes to Penal Law Clarify Definition of "Elder Abuse"

Elder abuse is broadly defined as the mistreatment or exploitation of a person who is at least 60 years of age. The age at which a person becomes "elderly" is program specific, although generally a person 65 years of age is considered elderly. Within the context of elder abuse programs and information gathering, the category of elderly often begins at 60 years of age.

The New York Penal Law uses age 60 as the threshold for defining a "vulnerable elderly person."[16] The Penal Law includes provisions that specifically address crimes against "a vulnerable elderly person" as well as an "incompetent or physically disabled person."[17]

Among the specific provisions establishing crimes against a "vulnerable elderly person" or an "incompetent or physically disabled person"[18] is a law making it a felony for a caregiver or other person to endanger the welfare, including assault or sexual abuse, of a vulnerable elderly person or incapacitated or physical disabled person.[19] A caregiver is defined as a person who is responsible for the care of a "vulnerable elderly person or an incompetent or physically disabled person" pursuant to a court order (e.g., a guardian) or a person who receives money or other valuable consideration for providing care (e.g., home health providers, family members, or others who receive compensation or consideration).[20]

A "vulnerable elderly person" is defined as "[a] person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care."[21] An "incompetent or physically disabled person" is defined as a person "unable to care for himself or herself because of physical disability, mental disease or defect."[22]

G. Changes to Medicare Part D Eligibility

Enrollees in New York State's Elderly Insurance Coverage Program (EPIC) must enroll in Medicare Part D, if eligible, at the first available enrollment period and must maintain such enrollment. This requirement is waived if such enrollment would result in significant additional financial liability by the participant.[23] EPIC coverage is available only for a 90-day drug supply and only after the participant has first exhausted the first two levels of appeal available under Medicare Part D and the appeal has been denied. During the appeal process coverage for emergency supplies is provided for.[24]

H. Additional Protections for Domestic Workers

The Domestic Worker Bill of Rights, 2010 NY Laws Chapter 481, was signed into law August 31, 2010 (effective November 29, 2010). Domestic workers include a person employed in a home or residence serving as a companion to a sick, convalescing, or elderly person. It excludes coverage for anyone employed by an entity other than a family or household. Therefore, while a

personal needs attendant employed by an agency is excluded, one employed by the elderly person or a family member would be included. The law covers minimum wage, overtime, days off, discrimination, harassment, workers' compensation and disability insurance.

In addition the Wage Theft Protection Act, 2010 NY Laws Chapter 564, provides additional enforcement tools for domestic workers. It addresses the failure by employers to pay statutorily mandated minimum wages and overtime by requiring annual notifications of wages, expanding notifications, enhancing available remedies for wage law violations and strengthening whistleblower protections. It increases the amount of wages that can be recovered as damages in a suit for non-payment to 100 percent above the lost wages. And it raises criminal penalties for failure to pay minimum wage to up to a year in prison and a $5,000 fine.

Endnotes

1. 2009 NY Laws 58, §§ 58-59-d repealed SSL § 369-ee(1)(i) and (2)(c). GIS 09 MA/027 (11/20/09); 10 OHIP/ADM-1 (01/11/10).
2. SSL § 367-w, added by 2009 NY Laws 58 § 29 and 2010 N.Y. Laws § 36-a.
3. SSL §§ 141, 209 and Gen. Bus. Law § 453.
4. 2009 N.Y. Laws 237 adding Ins. Law § 4306-c.
5. *Id.*
6. 2009 N.Y. Laws 237 adding Ins. Law §§ 3216(i)(26), 3221(k)(15), 4303(ff) and adding a new § 4406(3). 2009 N.Y. Laws 237 amending Ins. Law § 4910(b).
7. Ins. Law § 4906(b).
8. Ins. Law § 3221(m)(7), added by 2009 N.Y. Laws 7.
9. Ins. Law § 4305(c)(1)(C).
10. 11 NYCRR § 39.2.
11. EPTL 2-1.11(a), as amended by 2010 N.Y. Laws 27 § 1 (effective January 1, 2011).
12. EPTL 2-1.11(c)(1), as amended by 2010 N.Y. Laws § 1 (effective January 1, 2011).
13. EPTL 4-1.2(a)(2)(C), as amended by 2010 N.Y. Laws 64, § 1 (effective April 28, 2010).
14. 2010 N.Y. Laws 64, § 2 (effective April 28, 2010).
15. *See Matter of Santos*, 196 Misc.2d 972, 768 N.Y.S.2d 272 (Sur. Ct. Kings County 2003) (criticizing evidentiary obstacles of statute and calling for legislative reform).
16. Penal Law § 260.31(3), as amended by 2010 N.Y. Laws 14, § 1 (effective May 22, 2010).
17. *See e.g.,* Penal Law § 260.32 (caregiver assault or sexual abuse of a vulnerable elder), as amended by 2010 N.Y. Laws 14 (effective May. 22, 2010).
18. 2010 N.Y. Laws 14, §§ 1-4 (effective May 22, 2010) amended §§ 260.30 (which is now renumbered 260.31), 260.32, 260.34 by adding "an incompetent or physically disabled person" N.Y. Penal Law § 260.31(4). [Although it is unfortunate that the statute uses outdated terms, particularly "incompetent" (Article 81 of the Mental Hygiene Law replaced that term with the less derogatory and more substantively accurate term "incapacitated."), the expansion of those protected under these provisions is important.]
19. Penal Law § 260.32, 260.34, as amended by 2010 N.Y. Laws 14, § 3 (effective May 22, 2010).
20. Penal Law § 260.31(1), as amended by 2010 N.Y. Laws 14, § 2 (effective May 22, 2010).
21. Penal Law § 260.31(3), as amended by 2010 N.Y. Laws 14, § 3 (effective May 22, 2010).
22. Penal Law §260.31(4), as amended by 2010 N.Y. Laws 14, § 3 (effective May 22, 2010).
23. Elder Law § 242(3)(f).
24. 2010 N.Y. Laws amending Elder Law § 242(3)(c).

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Demystifying Services for the Developmentally Disabled

By Craig Marcott

"Why does my child need Medicaid?" and, "For what kind of services will he or she be eligible?" These are questions that I often get asked in my Special Needs Workshops. These questions go to the very essence of Special Needs Planning, as well as the need for Special Needs Trusts (SNTs).

As a Special Needs Consultant and Certified Financial Planner™ I work with parents and professionals, such as Elder Law attorneys, to make certain that the special needs child has the opportunity to live his or her life to the fullest. Special Needs Planning is, by definition, comprehensive in nature, and has at its core the concept of the preservation of government benefits and the maximization of personal resources. SNTs are the most common legal tool available to parents, grandparents, and other family members wishing to provide a legacy or gift for the individual with special needs while protecting government benefits. The purpose of this article is to provide a more detailed analysis of the benefits provided by New York State for the developmentally disabled than time allows in a seminar or workshop.

Supplemental Security Income (SSI) and Medicaid most commonly come into play when a child turns age 18 in New York. It is at this age that the Social Security Administration no longer counts the parents' income and resources for purposes of determining eligibility of the disabled individual. If the disabled child meets the income and resource limitations ($2,000 in countable resources) and meets the criteria for disability status, he or she will be eligible for SSI. In 2011, this will entitle an individual to a maximum of $761 per month or $1,115 per month for a couple.

In New York State, an individual receiving SSI is automatically entitled to receive Medicaid benefits. There are essentially two components to these benefits. One is health care, which includes prescription services. The other component is access to a host of services which are Medicaid-based, often the most significant reason for preserving Medicaid eligibility. The cost of these programs would be prohibitive for all but the wealthiest of families, and many programs will not accept private payment for those few families who could afford it.

There are many types of disabilities, each of which has its own funding source and list of available services. This article will primarily deal with services for the developmentally disabled population.

Developmental disabilities include autism, cerebral palsy, epilepsy, mental retardation and other neurological impairments. New York State services for the developmentally disabled are funded through the Office of People with Developmental Disabilities (OPWDD), formerly the Office of Mental Retardation and Developmental Disabilities (OMRDD). Services for other types of disabilities such as mental illness and traumatic brain injury (TBI) fall under different agencies and funding mechanisms.

OPWDD provides services both directly and indirectly through not-for-profit agencies such as United Cerebral Palsy, the Association for Help of Retarded Children, the Cody Center for Autism, the Epilepsy Foundation of Long Island, and many others. The OPWDD acts as both the oversight and as the funding mechanism for these agencies. There are thirteen local offices, or Developmental Disability Services Offices, referred to as DDSOs. In order to locate your local DDSO, you can contact the main office for OPWDD at (518) 473-9689 or go to their website at http://www.omr.state.ny.us/.

Services Provided by OPWDD

Services provided by OPWDD fall into one of three categories: program-based, in-home, and community-based services. Some of these services may transcend a single category. The following is an overview of some of the services provided by OPWDD:

Care at Home. This is a specialized Medicaid Waiver Program which provides services that allows families to keep developmentally disabled children who have complex health care needs living at home. This is one of the few programs designed for families who would not normally be eligible for Medicaid. The child must be under age 18 and living at home, and must be determined disabled based on SSI criteria.

Medicaid Service Coordination. Medicaid Service Coordinators (MSCs) assist families in identifying and obtaining the services they require. In most cases, you need Medicaid to obtain the service of an MSC.

Day Habilitation. Day Habilitation services are provided outside the home. Examples are skill training

in areas such as finance, safety, relationships, and community inclusion.

Residential Habilitation. Residential Habilitation is the same as Day Habilitation except provided primarily in the home.

Pre-Vocational Support. Pre-Vocational Support helps prepare individuals for employment by teaching problem solving, use of public transportation, job habits, etc.

Supported Employment. Support Employment provides a job coach to help individuals train and obtain competitive employment.

Respite. Respite provides caregiver relief. The services can be at the home or at an approved site.

Assistive Technologies. Assistive Technologies include adaptive devices and environmental modifications such as ramps for wheelchairs, doorway widening, van modification, etc. to enable the person to live at home and in the community with independence.

Consolidated Supports and Services. Consolidated Supports and Services provides funding for self-directed services for people enrolled in self-determination. An important criterion for this program is that the disabled individual has a circle of support upon which he or she can depend while living independently.

Family Support Services. Family Support Services enhances a family's ability to provide in-home care to their family members with a disability. This includes after-school, weekend and free-standing respite, recreational services, vacation respite, parent training and other services.

Residential Services. This includes Individual Residential Alternatives, sometimes referred to as group homes, Intermediate Care Facilities, Family Care, and Individualized Support Services. If you are considering a residential placement, you should contact your local DDSO to be placed on the NYS-CARES list. This is a requirement for consideration for residential placement.

The above is not meant to be a complete list of services for the developmentally disabled. It is meant, rather, to provide the reader with a sense of the services available to this population assuming they are Medicaid-eligible.

Waiver Programs

Some of the services listed are funded through the Home and Community Based (HCBS) Waiver. The HCBS Waiver is a funding mechanism that provides payment for community services through Medicaid. The Waiver was designed to "waive" existing Medicaid laws and open certain services to the community. Funding is a combination of federal, state and county funds. The individual must be eligible for Medicaid.

There are various types of waiver programs available. Examples are the Lombardi Waiver, the Nursing Home Transition and Diversion Medicaid Waiver, and the Traumatic Brain Injury (TBI) waiver, all accessed through the Department of Health. Some of the TBI services are:

1. Service coordination
2. Independent living skills training and development
3. Home and community support services
4. Environmental modifications
5. Respite care
6. Assistive technology

Should the individual have a disability which does not fall under the definition of a developmental disability, services provided through waivers should be explored.

As a result of the current fiscal crisis in New York, there are fewer dollars to fund the above programs. Some of these programs will be made available on a first come, first serve basis. This will require an additional commitment on the part of parents to plan for transition from the school to the world of adult services, employment, and post secondary education/training. Their child's transition plan should be reflected in his Individualized Educational Program (IEP) at age 15. Collaborating with their child and the school district in the development of an IEP that includes the development of appropriate goals is an essential part of good transition planning. A coordinated set of activities aligned with the child's goals will help to transition the child to a positive post-school outcome.

Conclusion

A Special Needs Trust is indispensible if parents wish to leave an inheritance for their special needs child yet preserve eligibility for government benefits and services such as those described in this article. It should also be noted that the SNT is but one component—albeit an extremely important one—in the child's overall plan. If the disabled child is to have the opportunity to achieve his greatest potential, the parents, in collaboration with their child, must identify and prioritize their goals in order to have the best chance of obtaining the government services they need to make that happen. This is why a comprehensive approach which coordinates the legal and financial components, and provides guidance for future caregivers is the cornerstone to ensuring the fullest possible life for the

special needs child. When all is said and done, the parents are the special needs child's greatest asset.

Websites for Additional Information

1. Medicaid Home-and-Community Based Waiver Programs in New York State
   http://wnylc.com/health/entry/129/#Lombardi
2. Office for People With Developmental Disabilities
   http://www.omr.state.ny.us/
3. New York State Department of Health
   http://www.health.state.ny.us/
4. Medicaid Reference Guide
   http://www.health.state.ny.us/health_care/medicaid/reference/mrg/index.htm
5. Supplemental Security Income
   www.ssa.gov
6. Self-Determination
   http://nymyway.org/index.html
7. Self-Advocacy Association of New York State
   http://sanys.org/determin.htm
8. New York Self-Determination Coalition
   http://lisdc.org/
9. Parent to Parent of New York State
   http://www.parenttoparentnys.org/

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Grandparent Visitation

By Debra L. Rubin

Domestic Relations Law section 72(1), which authorizes a Court to order grandparent visitation, was necessitated by the common-law rule that grandparents have no standing to assert a right to visit a grandchild against a custodial parent. The reasoning behind the crafting of the statute is the recognized benefit that children generally receive from sharing a relationship with a grandparent—a positive experience that cannot be duplicated in any other relationship.[1]

Domestic Relations Law section 72(1), while allowing a Court to order grandparent visitation, does not create an automatic right to such visitation by a grandparent.[2] The statute, which provides as follows, requires the Court to make a two-part inquiry prior to making a determination:

> 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 section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person 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.[3]

The Court must first determine whether the grandparent(s) making an application for visitation have standing. Standing will be found where one or both of the parents are deceased, or where "equity would see fit to intervene." If the Court concludes that standing exists, it must then determine whether ordering visitation is in the best interests of the grandchild.[4]

Whereas the death of one of a child's parents essentially affords a grandparent automatic standing to seek visitation, a grandparent of a child with two living parents has standing to seek visitation only if he or she can establish circumstances in which equity would see fit to intervene.[5] Although circumstances under which "equity would see fit to intervene" have not been specifically defined by statute, case law has guided us with respect to the primary factors to be considered by the Court: 1) the nature and extent of the grandparent-grandchild relationship; and 2) the nature and basis of the parents' objection to visitation.[6] While the equitable circumstances provision of the domestic relations statute is not intended to allow automatic standing to seek visitation, it is error to conclude that standing is permitted only in cases where there was "a change in the status of the nuclear family, or interference with a derivative right, or some abdication of parental responsibility."[7]

However, it has been repeatedly held that the Court should not readily intrude on family relationships against the wishes of a fit parent. There is a strong presumption that the decisions of a fit parent are in the best interests of the child and the Court should at least afford some special deference to the parent's decision. As is further detailed below, without such deference to a parent's decision, the constitutionality of statutes providing for grandparent visitation is subject to challenge. Nonetheless, while the problems resulting from animosity between a parent and grandparent cannot be ignored, such an acrimonious relationship is generally not sufficient cause to deny visitation to a grandparent. It is crystal clear that where grandparents must seek the intervention of the Court in order to obtain visitation rights with their grandchildren, some level of animosity must exist between them and the custodian of the children; otherwise, they could presumably resolve this issue by agreement.[8]

Constitutional challenges have been mounted to Domestic Relations Law section 72(1) based upon perceived interference with a fit parent's decision making process. However, as mentioned above, the statute can be and has been interpreted to accord deference to a parent's decision, although such deference is not specifically provided for in the language of the statute. Additionally, Domestic Relations Law section 72(1) is drafted much more narrowly than a "breathtakingly broad" Washington statute which was *not* declared to

be invalid by the United States Supreme Court in *Troxel v. Granville.*[9] Accordingly, it has been held that the more narrowly drafted New York Statute is *not* unconstitutional on its face.[10] Thus, while Court intervention is not proscribed when a fit parent refuses grandparent visitation, it is required that a Court afford some special weight to a parent's decision when determining whether or not grandparent visitation should be granted.

The Court of Appeals dealt directly with the aforesaid issues in *E.S. v .P.D.*[11] The issues presented to the Court of Appeals were whether the petitioner grandparent was properly granted visitation with her grandchild pursuant to Domestic Relations Law section 72(1), and whether said statute was constitutional in light of the decision of the United States Supreme Court in *Troxel v. Granville*. The Court of Appeals answered both questions in the affirmative.

In *E.S. v P.D.*, the parents, who were married, gave birth to a son in November 1993. In June 1997, the mother was diagnosed with cancer and the paternal grandmother was asked to move into their residence to care for her terminally ill daughter and the child. The grandmother cooked, cleaned, shopped and assisted in caring for the child. When the mother died, the father invited the maternal grandmother to stay on in order to assist with child care and household duties. During the following three and a half years, they resided together amicably and the maternal grandmother comforted the child, got him ready for school, put him to bed, did his laundry, drove him to school, doctor's appointments and activities, and arranged for play dates.

By the fall of 2001, the father and maternal grandmother began to have difficulties getting along. The maternal grandmother was apparently less strict in enforcing certain rules and the father was of the belief that she was interfering with his authority as a parent. In February of 2002, the father demanded that the maternal grandmother vacate his home. For approximately seven or eight weeks thereafter, the father forbade any contact between the maternal grandmother and the child. Starting in April of 2002, the father allowed sporadic visits and occasional telephone calls. After waiting four hours for a scheduled visit with the child in December of 2002, the grandmother, then 78 years of age, brought an application pursuant to Domestic Relations Law section 72(1) and Family Court Act section 651 seeking an order of visitation with the then nine-year-old child.

Following a lengthy hearing, the Supreme Court made an order of visitation to the maternal grandmother, stating as follows:

> Although mindful of [the father's] right to rear [the child] as he sees fit, and of his stated concern that [the grandmother] undermines his parental authority, the Court finds that he has failed to present any credible evidence warranting either the termination of the relationship between [the grandmother] and [the child] or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between [grandmother] and [the child] and that [the child's] best interest is served by granting [the grandmother] regular, unfettered visitation.[12]

On appeal, the Appellate Division, Second Department, rejected the father's argument that the Supreme Court had abused its discretion in granting visitation to the grandmother, affirmed the Supreme Court's judgment, but modified certain terms of the visitation schedule in accordance with the father's wishes, relying on *Troxel*. The Appellate Division noted:

> Contrary to the father's contention, this Court has determined that New York State's grandparent visitation statute, Domestic Relations Law § 72, is not facially invalid under [*Troxel*] even though it does not specifically require that parental decisions are to be given "special weight."…Our visitation statute, narrowly drafted to only afford a grandparent standing to sue for visitation when a child's parent has died or where 'conditions exist which equity would see fit to intervene' and additionally requiring that after standing has been conferred, that the grandparent establish why visitation is in the child's best interest, necessarily gives the parent's decision presumptive weight.[13]

In *E.S. v. P.D.*, the Court of Appeals found that the grandmother had "automatic standing" under Domestic Relations Law section 72(1), based upon the death of her daughter, the child's mother.[14] The Court further found that records before the Supreme Court and the Appellate Division supported their determinations that visitation between the grandmother and the child was in the child's best interests.[15]

The Court of Appeals further rejected the father's contention that Domestic Relations Law section 72(1) was facially unconstitutional in light of *Troxel*.[16] Notably, the Washington statute at issue in *Troxel* allowed:

> "[A]ny person" to petition for visitation rights at "any time" and

> authorize[d] [state superior courts] to grant such visitation rights whenever "visitation may serve the best interest of the child."[17]

In *Troxel*, the paternal grandparents petitioned for visitation of their grandchildren under this statute. The mother did not object to all visitations but sought to limit them. The trial court awarded visitation to the grandparents. The intermediate appeals court reversed on statutory grounds and dismissed the grandparent's petition entirely. The Washington Supreme Court then affirmed the holding of the intermediate appellate court, but on different grounds. The Court held that it was facially invalid under the Federal Constitution because it infringed on the right of parents to raise their children.

The United States Supreme Court affirmed the dismissal of the petition but declined to hold the Washington statute unconstitutional. The plurality considered it critical, however, that there were no allegations or findings of the mother's unfitness as a parent and that there was no "special weight" given to the fit parent's own determination. The implication was that if there was finding of unfitness, or if the trial court had indicated that such "special weight" was given to the parent's decision, that the award of visitation may have been upheld.

In applying the reasoning from *Troxel*, the Court of Appeals in *E.S v. P.D.* found Domestic Relations Law section 72(1) to be "facially constitutional," quoting as follows from Justice Altman:

> [The statute] can be, and has been, interpreted to accord deference to a parent's decision, although the statute itself does not specifically require such deference. Further, [section 72(1)] is drafted much more narrowly than the Washington statute [considered in *Troxel*]. If the United States Supreme Court did not declare the 'breathtakingly broad' Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face. In fact, the Court indicated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se because 'much state-court adjudication in this context occurs on a case-by-case basis.' *Troxel* does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord 'some special weight to the parent's own determination' when applying a nonparental visitation statute.[18]

The Court of Appeals further noted that other states have also chosen to read their grandparent visitation statutes so as to encompass the constitutional protections necessary to protect parental rights.

In further distinguishing *Troxel* from *E.S. v. P.D.*, the Court of Appeals noted that the Trial Court in Washington applied a presumption in favor of grandparent visitation, rather than applying the presumption that a fit parent will act in the best interests of his or her child. In contrast, the trial court in *E.S. v. P.D.* emphasized that it was "mindful" of the father's parental wishes and employed the presumption that his wishes were in the child's best interests. However, the maternal grandmother overcame that presumption by demonstrating the level of care she had provided and the relationship that she had established with the child for more than three years.

In *Dorothy M. v. Amy N. and Trevor N.,*[19] decided shortly after *E.S. v. P.D.*, the Monroe County Family Court carefully followed the guidance of the Court of Appeals in arriving at its determination so as to avoid any constitutional challenges.

After finding that the grandmother had standing based upon equitable circumstances (primarily her past nurturing relationship with the child), the Monroe County Family Court cited to *E.S. v. P.D.* in noting that "Domestic Relations Law § 72 (1) must be interpreted to accord deference to a fit parent's decision as to whether to allow visitation with a grandparent."[20] After acknowledging the special weight to be afforded to the parent's determination, the Monroe Family Court found, as did the Court of Appeals in *E.S. v. P.D.,* that the grandmother surmounted this heavy burden with evidence that she resided with the child for approximately a year and then lived across the street from him and continued to have daily positive contact with him for an additional two years.[21] Accordingly, the Family Court found a "substantial relationship" between grandmother and grandchild, and determined that it was in the best interests of the child to visit with his grandmother, despite the animosity existing between her and the child's mother, which was an outgrowth of a divorce between the grandmother and the grandfather.[22] The Family Court stated that, "[a]nimosity between the parent and grandparent is not a proper reason for denial of visitation, without more."[23]

As with any visitation determination, an application for grandparent visitation is fact sensitive, and each and every case must be considered on its own merits. Most trial courts *want* to find a basis to award visitation to a grandparent, it being a relatively com-

mon belief that a relationship between a grandparent and a grandchild has a special and distinct element, which lends something positive to a child's life. However, the courts must be, and have been, careful to balance the grandparent/grandchild relationship with the right of a fit parent to make determinations for his or her own children.

It is likely that the law will continue to evolve in this area. The absence of a specific definition for circumstances "where equity would see fit to intervene," and the lack of a specific statutory provision mandating deference to a fit parent's determination, leave ample room for statutory interpretation, and possibly further constitutional challenges.

Endnotes

1. *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 181 (1991).
2. *Wilson v. McGlinchey*, 2 N.Y.3d 375, 380 (2004) (citing *Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 526 (1976).
3. N.Y. DOM. REL. Law § 72(1) (McKinney 2010).
4. *Matter of Emanuel S.*, 78 N.Y.2d at 181.
5. *Id.*
6. *Dorothy M. v. Amy N. and Trevor N.*, 866 N.Y.S.2d 91 (Fam. Ct. 2008).
7. *Matter of Emanuel S.*, 78 N.Y.2d at 181-82.
8. *LoPresti v. LoPresti*, 40 N.Y.2d at 526.
9. 530 U.S. 57, 63 (2000).
10. *E.S. v. P.D.*, 8 N.Y.3d 150, 153 (2007).
11. *Id.*
12. *E.S. v. E.D.*, 800 N.Y.S.2d 345 (2004).
13. *E.S. v. E.D.*, 815 N.Y.S.2d 607, 609 (2d Dept. 2006).
14. 8 N.Y.3d at 157.
15. *Id.*
16. *Id.* at 158-60.
17. *Id.* at 158 (quoting *Troxel*, 530 U.S. at 60, quoting WASH. REV. CODE § 26.10.160(3)).
18. 8 N.Y.3d 150, 159-60 (2007) (citing, *Hertz v. Hertz*, 738 N.Y.S.2d 62 (2d Dept. 200); see also *Morgan v. Grzesi*, 732 N.Y.S.2d 773 (4th Dept 2001).
19. 866 N.Y.S.2d 91 (Fam. Ct. 2008).
20. *Id.* at 3.
21. *Id.* at 4.
22. *Id.*
23. *Id.* at 5.

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The Value of Daily Money Management Programs for Older Adults

By Debra Sacks

The population of older adults facing unstable and insecure financial futures is increasing dramatically. Given the expected 117% increase in the population of persons aged 65 years and older by 2030,[1] policy makers face enormous challenges. Without policy initiatives and programs to prevent economic and health distress, vulnerable populations of low-income older adults are likely to increase substantially with distressing consequences for themselves, their families, and their communities.

"Too few older adults adequately plan for their later years with preventative measures such as estate planning and advanced directives. As a result, many of them face an increased likelihood of financial distress and an increased risk of poverty."

One of the most frightening scenarios for an older person is the possibility of financial exploitation or mismanagement.[2] Too few older adults adequately plan for their later years with preventative measures such as estate planning and advanced directives. As a result, many of them face an increased likelihood of financial distress and an increased risk of poverty. The 2008-2009 recession and financial collapse will cause increased hardship for many retirees, whose health benefits already are being cut by many employers who face rising health care costs and decreased profits.[3] For adults aged 85 years and over, the risk of financial distress is compounded by the increasing risk of financial mismanagement associated with cognitive decline.

Elder law attorneys are often consulted once the situation gets too difficult for the older adult or their families to manage effectively. In many instances relatives live too far or have too many of their own commitments to assist in all the activities required to keep mom or dad safely in the community. Other times the client may be referred to the attorney where there is suspected financial abuse or mismanagement. In either instance many look to the elder law attorney to assist in safeguarding the vulnerable older adult's financial well being.

Daily money management (DMM) community-based programs can help prevent the devastating consequences of financial mismanagement and poverty. Developed by AARP and others over twenty years ago, DMM programs are designed to identify sources of financial distress among vulnerable older adults, reduce financial exploitation, address risk behaviors such as unpaid bills and undeposited checks, and prevent adverse financial outcomes such as cut off utilities, bank foreclosures, and evictions. These programs can be a great resource to elder law attorneys in assisting clients to safeguard their finances and managing their money. Several models currently exist to meet this need including:

- Service Model—DMM is a service within the agency case management function;
- AARP Model—This "stand alone" model uses volunteers to perform bill paying services;
- Collaborative Model—Case managers would refer clients to stand-alone DMM programs such as the AARP Money Management Program;
- Informal DMM Model—Family or friends assist with bill paying;
- Private Pay Model—Persons needing assistance hire a professional to provide DMM services. There are a growing number of these services being offered by professionals.

Experience to date suggests that daily money management programs are a cost effective approach to financial risk reduction among vulnerable seniors, possibly even preventing or delaying the need for institutionalization. However, there is a paucity of scientific evidence supporting this conclusion. To address this information gap, the Brookdale Center for Healthy Aging and Longevity developed an evidence-based assessment of the value of DMM by conducting an evaluation of the costs and outcomes of program interventions for clients living in the community.

A. Background—What Is Daily Money Management?

As elder law attorneys, we are acutely aware of the fact that many older and vulnerable persons need help with their finances to live safely in the community. Prior estimates revealed that 5-10% of the community-based elderly population would benefit from some form of money management assistance.[4] The older adult may physically decline over time, losing the mental and physical dexterity or mobility, or both, to deal with complicated bill paying, insurance claims, and banking. Others endure memory loss and exhibit periods of confusion and disorientation, leading to financial self-neglect and often the possibility of eviction. As these problems increase, so too does the risk of financial abuse and exploitation. The common thread in these situations is the need for assistance with finances. Whether it is to keep a client at home, to prevent a crisis such as eviction or to stop or prevent financial abuse, money management becomes an essential needed service.

The term "Daily Money Management" has evolved to encompass the full range of money management services that may be offered. DMM may consist of supportive assistance or surrogate decision-making. Supportive decision-making services are tasks such as information/education, public benefits advocacy, budgeting, bill paying, banking assistance, credit management and medical insurance billing. Surrogate decision-making services, on the other hand, occur when an agency or individual is authorized to make decisions on behalf of a client who no longer has the capacity to do so. Surrogate decision-making authority may have been given to the agency by the client prior to the client's incapacity, as when a client signs a power of attorney or voluntarily requests or agrees to the appointment of a representative payee or a guardian. It may also be given after a client becomes incapacitated by the appointment of a representative payee by the Social Security Administration or of a guardian by a court.

The need for and benefit of DMM programs are well known by those who work with the elderly. Elder law attorneys, social workers and other professionals often find themselves having backed into assisting older adults with their finances when it becomes clear that they are having difficulty with money management, but otherwise desire and are able to remain in the community. Often these professionals find themselves in the uncomfortable position of taking on these financial matters and do so quietly, without access to uniform protocols or oversight while trying to protect their clients and their clients' desire to remain at home. The ability to refer clients to established, reputable agencies that offer these services in accordance with uniform protocols and protections will enable attorneys and their clients to have financial peace of mind.

B. Research Methodology

1. Sample Population

The study methodology is interdisciplinary, drawing from gerontology, nursing, social work, and economics. Detailed primary data were collected from eight NYC agencies providing DMM services along with full case management. In-depth retrospective case record reviews were conducted for 114 community-based clients referred for DMM services during the study period 2001-2006.

"The need for and benefit of DMM programs are well known by those who work with the elderly. Elder law attorneys, social workers and other professionals often find themselves… assisting older adults with their finances when it becomes clear that they are having difficulty with money management, but otherwise desire and are able to remain in the community."

2. Client Data

Comprehensive information on client characteristics, services, and outcomes was obtained. The data categories included: general demographics, entitlements, legal directives, housing, Activities of Daily Living and Independent Activities of Daily Living, mobility, home care, social function, health, income/resources, expenses, reason for DMM referral, DMM services received, and outcomes, including institutional placement or death at home. The instrument also included open-ended memo fields for several of the categories to allow the investigators to include additional data or explanations of individual circumstances. The added variables included: eviction proceeding, isolation, receipt of 24-hour home care, receipt of grants/stipends, appointment of representative payee, delinquent bills, debt management receipts, advance directives, legal referrals, mental health referrals, family takeover of financial management, undiagnosed mental health issues, placement in a nursing home, and death at home. Summary variables, constructed for the study, are defined below:

- Housing Crisis: Letter of intent issued, rent/mortgage in arrears, hoarding problem
- Benefits Crisis: Failure to obtain public benefits
- Financial Crisis: Self-neglect, self-endangering behavior, financial exploitation by others, delinquent bills

- Health Crisis: Health status rated fair or poor
- Mental Health Crisis: Diagnosed mental illness or diminished mental capacity/dementia; undiagnosed mental illness (identified by social worker)
- Social Isolation: No visitors or does not leave home for social purposes

Data were extracted from three different time periods in the case trajectory: 1) when the case was opened; 2) when the financial problem developed; and 3) during the ensuing outcomes phase.

3. Economic Cost Data

Economic costs of DMM services were estimated using standard economic methods of resource valuation for all services received by each individual client over the trajectory of his or her care. All services provided per client were identified during the client chart review. Hours per service were based on estimates provided us through a standardized protocol reviewed by our DMM Advisory Panel. Final estimates of hours used per specific DMM service are based on our constructed weighted averages of estimates provided to us by four service providers who responded to our costing protocol. Total costs are estimated as a product of average hours(/days) and average hourly(/daily) rates.

We use the DMM survey data to estimate average hours of home care use and National Nursing Home Survey[5] to estimate average length of stay (in days) in nursing homes. Cost estimates for hourly rates of home care providers are obtained from the Occupational Employment Statistics (May 2007)[6] and nursing home costs are estimated from per-diem charges for individuals with both general health crisis and physical health crisis, from the NNHS (2004) survey. All costs are adjusted to 2007 prices, using the Producer Price Index.[7]

C. Results

1. Sample Characteristics

Of 114 referrals, 93 clients accepted DMM services. Sixty-three clients received DMM services until institutionalization or death; 30 clients left the program and were lost to follow-up. The main reasons for leaving the program were: moved out of state, family took over finances, guardian appointment, or client refusal. Overall, women comprised 70% of the sample and two-thirds of clients were 80 years of age and over. Most clients (75%) had a high school education or less. Ninety percent of clients had annual incomes of less than $20,000. Most DMM referrals were for clients living alone (single, widowed or divorced). The final study results are based on the complete sample of 63 clients who remained with the DMM program from initiation through either death or nursing home placement.

2. Crisis Intervention

Approximately 99% of DMM users endured a financial crisis, 85% were in poor health, and 29% were socially isolated. Most individuals faced multiple difficult crises. The largest proportion (88%) faced at least two of the following three crises at the same time: 1) financial; 2) health (physical or mental); and 3) isolation. Disturbingly, 26% of individuals were facing all three of these crises simultaneously (financial, health and social isolation). *See* Figure 1.

Among individuals in financial crisis, 5% also had a housing crisis, 22% also had a benefits crisis, and 25% had at least two financial crises at once. Among those with health crises, 72% had a general health crisis, 81% had a mental health crisis, and over one-half (53%) had both mental and physical health crises.

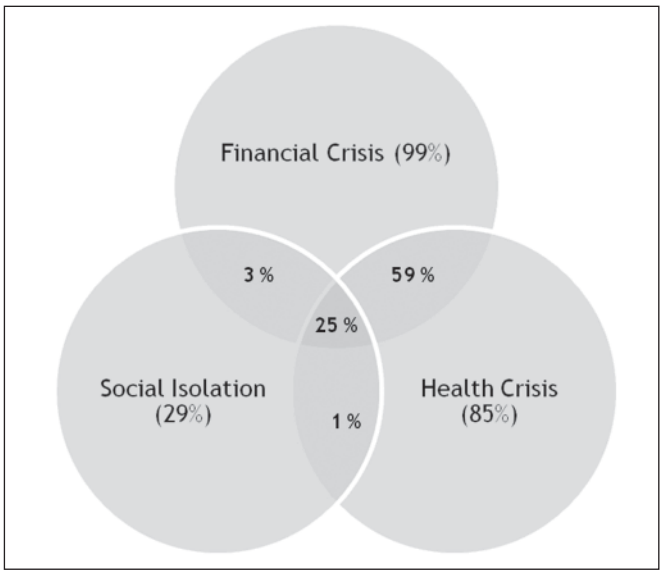

Figure 1: Distribution of Financial, Health and Social Isolation Crises among DMM Program Participants

3. DMM Services

The most common DMM services were bill paying followed by budgeting and checkbook balancing. Agencies also managed debt, assisted with banking, applied for grants and stipends, applied for increased home care and entitlements (benefits), made referrals to mental health, legal and protective services, and facilitated nursing home placements when appropriate. The Table below presents a summary of services received by individuals in response to economic, social, and health crises.

Table 1:
Distribution of Services Delivered to DMM Program Participants, by Crisis

Crisis		Number of individuals	% of total cases*
Basic DMM Services			
	Organize Finances	48	51.6
	Budgeting	58	62.4
	Bill Paying	86	92.5
Additional Crisis-Specific Services			
For Individuals with Housing Crisis (Total 5)			
	Referred to PSA	2	40.0
	Debt Management	5	100.0
	Referred for Legal Help	5	100.0
For Individuals with Benefits Crisis (Total 20)			
	Apply for Entitlements	20	100.0
	Benefit Improvement	14	70.0
For Individuals with Financial Crisis (Total 92)			
	Balancing Checkbook	51	54.4
	Assist with Banking	27	29.4
	File Income Tax	1	1.1
	Safeguard Valuables	1	1.1
	Enable Home Health Aide (HHA) to Access Money	31	33.7
	Referral to District Attorney (DA)	1	1.1
	Debt Management	14	15.2
	Grant Stipend Received	28	30.4
	Agency Applied to Become Rep. Payee	12	13.0
	Family Took Over Care	10	10.9
For Individuals with General Health Crisis (Total 57)			
	Enable HHA to Access Money	25	43.9
	Apply for Entitlements	16	28.1
	Nursing Home Placements	21	36.8
	Home Care Increased to 24/7	5	8.8
For Individuals with Mental Health Crisis (Total 64)			
	Enable HHA to Access Money	21	32.8
	Referred to PSA	5	7.8
	Referred to Mental Health Service	3	4.7
For Individuals in Social Isolation (Total 27)			
	Referred to Mental Health Service	3	11.1

* Total cases with a particular crisis, non-missing cases only

4. Economic Costs

Data availability restricted the study design from including a control group. Thus, our economic analysis compares our two groups of individuals, those who were able to die at home and those who were eventually placed in a nursing home, to a hypothetical group placed immediately in a nursing home, following the manifestation of crises detailed above. The results confirm the cost-effectiveness of DMM programs, as shown below:

Case I—Died at Home	Avg. Cost Per Individual	Avg. Cost Per Month
Total home-care cost	$108,810	$3,023
Total DMM cost	$8,656	$240
Total cost	$117,466	$3,263

Case II—Nursing Home Placement without Postponement	Avg. Cost Per Individual	Avg. Cost Per Month
Total nursing home care cost	$178,444	$4,957

Average monthly costs of providing DMM services within the context of Case Management are $240 per individual, a low marginal cost. The total cost of services, including home care and all DMM/Case Management services, is lower in Case I than in Case II. On average, individuals who initiated DMM services and then were able to die at home with full DMM/Case Management services in place had substantially lower lifetime costs compared with similar hypothetical individuals placed immediately in a nursing home ($117,466 vs. $178,444).

D. Discussion

These findings are important and challenge current health economic paradigms where nursing home placement is thought to be more cost effective than community-based care, because of economies of scale. Despite the increased home care necessary for DMM clients to stay in their homes, it is much more cost effective to support individuals who need DMM services in their homes, rather than refer these frail individuals to a nursing home. These are conservative estimates, as DMM/Case Management services also may have averted emergency room use or reduced acute hospitalization stays or both, outcomes not accounted for in this study.

1. Addressing Study Limitations: PSA Comparison Group

Because the study design could not include a control group, we sought to compare the costs of our study DMM clients with individuals receiving care through the publicly funded Protective Services for Adults (PSA) Program. With 53% of the DMM clients in this study having both a general and mental health crisis and 26% living in social isolation, these individuals closely reflect the characteristics of the PSA client. Services provided by the PSA programs are analogous to those available through the DMM programs studied.

In comparing DMM agency costs[8] with PSA[9] costs, we took into account start-up costs during the first year and separated those from continuing costs in following years. Due to high start-up costs ($731), only minimal savings of $595 accrue for DMM performed by agencies in the first year of service. However, in subsequent years, the annual cost saving is much more pronounced at approximately $1,327 per client. Thus, we find substantial savings per client with DMM/case management services in place, compared with individuals referred to PSA. A savings of one-third the full annual PSA cost is significant for both state and local governments. We conclude that client diversion from state-funded PSA programs to full-service case management agencies could yield considerable savings over time.

2. Additional Benefits: DMM as Possible Deterrent for Elder Financial Abuse

Losing assets accumulated over a lifetime, often through hard work and deprivation, can be devastating, with significant practical and psychological consequences.[10] Financial abuse can have as significant an impact for an elder person as a violent crime[11] or physical abuse.[12] The National Center for Elder Abuse found that financial abuse accounted nationally for about 12% of all substantiated elder abuse reports in 1993 and 1994.[13] A subsequent more comprehensive study conducted by the same entity found that 18.6% of the 115,110 substantiated elder abuse reports submitted to Protective Services for Adults programs nationwide in 1996—which included reports of self-neglect—were reports of financial or material exploitation.[14] Excluding reports of self-neglect, this exploitation appeared in 30.2% of the substantiated reports. This represented the third largest category of reports, less than neglect (48.7%) and emotional or psychological abuse (35.41%), but more than physical abuse (25.6%). New York State is one of a minority of states that does not require mandatory reporting of elder abuse of any kind.

However, a study of PSA reports conducted in upstate New York between 1992 and 1997 led to state intervention, finding financial exploitation was present in 38.4% of the cases.[15]

The most common characteristics associated with victims of financial abuse are being white, female, and over the age of 80.[16] This is a population very similar to the population in our study. Many of the cohort of women over the age of 80 have little experience in managing finances. A lack of familiarity with financial matters increases the risk of being victimized.[17] In addition, elders residing alone, specifically in their own home, are also more likely to be victimized.[18] Other research has found that poor health status, the loss of a life partner, and social isolation are characteristics shared by many victims.[19] Having family members who are unemployed or who have substance abuse problems has also been identified as placing an older person at greater risk of financial abuse.[20] Among general health impairments, vision and hearing loss, as well as cognitive impairment, are additional characteristics associated with being a victim of financial abuse.

In this DMM study, 12 individuals (12.9%) were identified as victims of financial exploitation among the total sample of 93 individuals who were referred for and received DMM services. It should be noted that the intervention of the DMM provider agency either stopped or lessened the impact of the abuse in 6 cases. For example, in two of the family abuse cases, the children of the elderly victims wiped out their parents' checking accounts and ran up thousands of dollars in credit card debt. The victims were left with no money to pay bills, including rent. The DMM agency was able to successfully negotiate with the landlords and housing court regarding back rent due and applied for grants to pay these costs, thus avoiding eviction. Referrals to legal services were also made to negotiate the credit card debt which, in some cases, was eventually written off.

Making DMM services widely available in communities may have a preventive effect on the occurrence of financial abuse among the frail elderly living in those communities. For example, it is likely that the initiation of DMM services among individuals in our sample prevented new or additional financial abuse from occurring. The effect of DMM programs on the prevention of financial abuse should be the subject of further study.

3. DMM and Quality of Life

Providing DMM services to frail older adults not only keeps them safer in the community, but also helps to postpone and possibly prevent placement in nursing homes, thereby enhancing the quality of life in the client's later years. Keeping people out of institutions is in the spirit of compliance with the provisions of the 1999 *Olmstead* decision of the Supreme Court. It mandates that states provide more community support services to empower people to live independently and to access services in the most integrated setting appropriate for their overall needs.[21] Thus communities need to further develop existing DMM program models while integrating them in to the long term care plan for persons at home.

Conclusion

Our research shows that Daily Money Management programs are an effective and cost efficient way to keep older adults safely in their homes and communities while safeguarding client finances and assets from self neglect, fraud and abuse. Increasing the availability of these services while ensuring safe and effective practices should be at the forefront of our policy agenda.

New York State has a unique opportunity to develop and fund programs such as Daily Money Management. Under the Commission on Health Care Facilities in the 21st Century (the Berger Commission) recommendations, NYS set a goal of reducing nursing home beds as a way to contain health care costs and decrease institutionalizations. These recommendations have been approved by the Governor and are binding as a matter of law.[22] New York State has already taken steps to advance community-based services as an alternative to nursing homes and adding DMM to the mix of services will be an important step in increasing the length and stability of staying in the community.

Furthermore, in 2004 New York State passed the Nursing Facility Transition and Diversion Law. This law authorized the New York State Health Commissioner to apply for nursing facility transition and diversion Medicaid waivers to test the feasibility of providing home- and community-based services to individuals who would otherwise be in a nursing facility. This law provided for the reimbursement of several home- and community-based services that were not previously included in the range of Medicaid services.[23] By including DMM services in the range of home- and community-based services that are reimbursable under Medicaid we can continue to create a system where older adults are able to safely remain in their communities.

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For more information on this research and on daily money management, please visit our website at www.brookdale.org.

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   Year one = $731 (one time start-up cost) + $2,641 = $3,373. Subsequent annual costs are $220 per month totaling $2,641.44.
9. According to Lynn Saberski, Director of PSA for NYC Human Resources Administration, the annual cost per PSA case in NYC in 2008 was $3,968. The Financial Management Unit (FMU) cost extraction is $744 per case per year. However the FMU unit only provides representative payee services. Any other financial issues or problems a client has such as debt, loss of public benefits or eviction are handled by a caseworker. Thus to get a true picture of the cost to PSA of dealing with all financial and case management issues we use the total cost amount of $3,968 per client.
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SCPA Section 1310: Another Tool to Maximize Asset Protection

By Kristin S. Jonsson

The process of Long Term Care Planning involves reviewing current laws and regulations to provide maximum asset protection. But, even with a good plan, a family's assets may still be exposed to long term care costs in the form of Medicaid recovery after the death of the Medicaid recipient.

Section 369 of New York Social Services Law directs that so long as there is no surviving spouse, minor, or disabled child, "recoveries must be pursued…from the estate of an individual who was fifty-five years of age or older when he or she received [medical] assistance."[1] The statute then defines "estate" as "all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy."[2] A Medicaid recipient usually retains a bank account to collect social security, pension payments, and other deposits or simply to hold the resource allowance.

This bank account is often in joint name with or in trust for a child. In that case, the account passes by operation of law to the child and there is no Medicaid recovery. Similarly, if the decedent retains assets within his or her resource allowance that have a beneficiary designation, such as life insurance or a transfer on death account, these assets pass by operation of law and are not subject to Medicaid recovery. Alternatively, some decedents hold their resources in a revocable trust such that the assets pass by the terms of the trust and are not subject to recovery by Medicaid.

The problem arises when a bank account or nursing home resident account is only in the name of the decedent. These assets are subject to estate recovery under section 369 of the Social Service Law.[3] However, according to recent Monroe County Surrogate Court decisions, assets passing pursuant to SCPA 1310 are not part of an estate as defined by section 369,[4] thereby providing an additional mechanism for avoiding estate recovery.

SCPA 1310 states, in part, that the children of a decedent may collect up to $15,000 in the name of a decedent without administration.[5] The purpose of the statute is "to avoid the trouble and expense of administering wholly insignificant estates,"[6] and assist beneficiaries in collecting assets through an expedited process. "Such small estates are a plague to the courts and to lawyers, debtors and transfer agents as well."[7] Therefore, the statute allows assets to be collected by family members, no less than 30 days after the date of death, through the submission of an affidavit (1310 affidavit) that provides the following:

(i) The date of death of the decedent;

(ii) The relationship of the affiant to the decedent;

(iii) That no fiduciary has qualified or been appointed;

(iv) The names and addresses of the persons entitled to and who will receive the money paid; and

(v) That such payment and all other payments made under this section by all debtors, known to the affiant…do not in the aggregate exceed fifteen thousand dollars.[8]

Section 1310 of the SCPA also specifically permits the Department of Social Services to collect up to five thousand dollars of a decedent's assets using an affidavit. They must, however, wait six months from the date of death before collecting the assets.[9] The statute clearly gives priority to family members by imposing a 30 day waiting period on them as opposed to the 6 month waiting period imposed on the Department of Social Services.[10]

In *The Matter of the Estate of Pauline Gaiter*[11] and *The Matter of the Estate of Laverne M. Jahnke*,[12] the Monroe County Department of Human Services (DHS) brought a claim against each estate for assets that had been collected by family members using 1310 affidavits. DHS also sought to have the public administrator appointed so as to compel the family to account to the public administrator for the funds collected through the 1310 affidavits.

DHS argued that section 1310 was intended to assist creditors, such as DHS, to collect from a decedent's assets. But the court rejected that argument and concluded that DHS did not have a valid claim against these estates. The Court further concluded that because the assets were properly collected under section 1310 of the SCPA, there were no estates to administer and, therefore, no need to appoint the Public Administrator.

While practitioners previously considered joint assets, beneficiary designation assets and transfer on death assets as outside an estate, the court now confirms what section 1310 explicitly states. Assets collected pursuant to SCPA 1310 are not estate assets for purposes of Medicaid recovery under Social Services Law § 369 and are, therefore, another tool to be used by practitioners to protect assets.

Endnotes

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Appointing a Guardian in America: How Do We Get There?

By Peter J. Strauss

Many of the issues that Elder Law attorneys deal with are rooted in the struggle between autonomy and paternalism. This is particularly true with a proceeding for the appointment of a guardian for an incapacitated person. The guardianship proceeding, an exercise of the state's *parens patriae* authority to "do good," conflicts with an individual's autonomy and civil liberties. Individuals have the right to behave badly and be self-destructive, provided they have the capacity to understand the implications of their actions. As the New Jersey Supreme Court said in *Matter of M.R.*,

> Unless they endanger themselves or others, competent people ordinarily can choose what they want, even if their choices are irrational or dangerous. Traditionally, however, courts have tempered the right of self-determination of incompetent people with concerns for their best interests. The paradox with incompetent people is to preserve as much as possible their right of self-determination while discharging the judicial responsibility to protect their best interests.[1]

Change in Attitude

Historically, guardianship legislation and the courts focused on "doing good" and the state's *parens patriae* power was exercised with relatively little regard to the rights of the "alleged incapacitated person." For the most part, the "On/Off" switch approach to a person's capacity has been rejected. "Like other areas of the law where the concept of capacity is used, the required incapacity for the appointment of a guardian is no longer considered an all or nothing proposition but instead it is recognized as having varying degrees."[2] As stated in a 1990 article in *Law, Medicine & Health Care:*

> In recent years, there has been a slow but dramatic change in society's attitudes towards persons with disabilities—an evolution away from traditional paternalistic approaches which foster dependency, toward policies focused on maximizing the potential for autonomy and independence among individuals of limited capacity.[3]

In 1997, The National Conference of Commissioners on Uniform State Laws adopted a revised Uniform Guardianship and Protective Proceedings Act (UGPPA or Act), replacing the 1982 Act.[4] The commentaries to the new model act echoed this trend.

Significant developments in the areas of guardianship and conservatorship occurred in the late 1980s and early 1990s as states revised their guardianship and conservatorship statutes. The 1982 Act, with its emphasis on limited guardianship and conservatorship, was groundbreaking in its support of autonomy. This revised Act builds on this and the revisions occurring in the States, by providing that guardianship and conservatorship should be viewed as a last resort, that limited guardianships or conservatorships should be used whenever possible, and that the guardian or conservator should always consult with the ward or protected person, to the extent feasible, when making decisions.

The UGPPA seems to call for the appointment of a guardian only when there has been a functional assessment.[5] The comment to that section states:

> The definition of "incapacitated person" (see paragraph (5)) requires that the respondent have an inability to receive and evaluate information or to make or communicate decisions to the point that the person's ability to care for his or her health, safety, or self is compromised. This definition emphasizes the importance of functional assessment and recognizes that the more appropriate measure of a person's incapacity is a measurement of the person's abilities. Like other areas of the law where the concept of capacity is used, the required incapacity for the appointment of a guardian is no longer considered an all or nothing proposition but instead it is recognized as having varying degrees. This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship—only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or

> conservatorship if a lesser restrictive alternative exists. See Sections 311 and 409 for examples. These concepts are carried throughout the Act.[6]

The Least Restrictive Alternative

In 1993, New York replaced its former "committeeship" and "conservatorship" proceedings and adopted Article 81 of the Mental Hygiene Law establishing the "guardianship" proceeding, based on the principle of the "least restrictive alternative" and adopting a functional approach. "The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable."[7]

The new statute makes it clear that it is not the diagnosis that counts, but the individual's ability to function.[8] The New York approach is consistent with the goals of the UGPPA.

The trend is clear: states have moved away from a system where a guardian is appointed based solely on a medical diagnosis and the opinion of a clinician speaking as an expert witness resulting in a finding that the individual is incapacitated to a system that requires proof of functional inability. But the question remains—how do we get there? How is functional incapacity proved? What kind of evidence is permitted to determine incapacity?

Evidentiary Models

Two evidentiary models have emerged. Some states have adopted a standard of proof known as the "functional model," allowing for the appointment of a guardian by establishing the functional deficiencies of the alleged incapacitated person through non-medical testimony. In these states it is likely that the patient-physician privilege will be honored and the alleged incapacitated person's medical records will not be disclosed and used as proof of incapacity. See *Matter of Rosa B.*,[9] the leading New York case holding that the alleged incapacitated person's treating physician may not testify on the issue of capacity. The court said:

> In this proceeding, the trial court was required to follow the rules of evidence, including the assertion and waiver of the doctor-patient privilege (see CPLR 4504), since the appellant did not consent to the appointment of a guardian. Although a guardianship proceeding places the alleged incapacitated person's medical and mental condition in controversy, he or she does not waive the doctor-patient privilege unless he or she has affirmatively placed his or her medical condition in issue.…[10]

Other states allow—and in some cases require—medical testimony in determining capacity, including the alleged incapacitated person's treating physician, to be used in guardianship proceedings, an approach known as the "medical model."[11] The UGPPA seems to take a less restrictive approach. A comment states:

> The visitor must talk with the physician or other person who is known to have assessed, treated, or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. See Section 306. If the doctor refuses to talk to the visitor, the visitor may need to seek an order from the appointing court authorizing the release of the information. Comment to Section 305.

The UGPPA thus seems to allow the physician's testimony. In these states the need for the appointment of a guardian is presumed from the diagnosis and the physician's opinion that the alleged incapacitated person is, in fact, in need of a guardian.

A review of the various states' statutes indicates that some states may use a hybrid model incorporating elements of both the functional model and the medical model. See the chart prepared by the ABA Commission on Legal Problems of the Elderly.[12]

Which Model Achieves the Best Results?

If the promise of a guardianship system that accomplishes the dual goals of providing for the needs of an incapacitated person through appropriate intervention and protecting such person's civil liberties and autonomy is to be achieved, it is important to study the evidentiary models in use today and incorporate the model that is most consistent with the least restrictive alternative requirement. Does a purely functional model result in better results? Is a medical model consistent with the best interests of the alleged incapacitated person? Is there some place for medical testimony even in the context of a functional model? If so, for what purposes? Is the goal of the least restrictive alternative being met? Are there more limited guardianships today compared to pre-reform times?

These questions were discussed at a seminar held at the November 2009 NAELA Public Benefits and

Guardianship Institute in Jersey City, N.J. The panelists were myself, Carolyn Byrne, Edward E. Zetlin, and Catherine Seal. In advance of the November seminar, I prepared, with the assistance of Kim Trigoboff, my student and research assistant at the New York Law School and several other faculty members, an extensive survey which was sent to approximately 575 NAELA members. The survey was designed to elicit facts about the respondents' experience with respect to these issues and provide a textual foundation for the panel discussion. Seventy-five NAELA members responded, a response rate of 13 percent.

Survey Responses

Following are a few responses to the survey. A copy of the survey results may be obtained by sending an e-mail to peter.strauss@nyls.edu.[13]

1. Which Evidentiary Standards Are Used in Your Jurisdiction?

   12% Wholly or mostly functional
   44% Both functional and medical
   44% Wholly or mostly medical

2. Is the Evidence Model Used in Your Jurisdiction Fairly Balanced?

   Of the attorneys who represent petitioners in guardianship proceedings, 97 percent felt that the evidence model in their jurisdiction fairly balanced the rights and needs of the alleged incapacitated person, despite reliance on non-waivered medical evidence.

It appears that the "best interest" view dominates the perception of fairness in the guardianship process. This was true even for attorneys who characterize the evidentiary standard as a blend of medical and functional or mostly medical.

According to the panelists at the 2009 seminar, the use of testimony by a treating physician is a widely accepted practice, even without a waiver of the physician/patient privilege by the alleged incapacitated person. The author believes that this is another carryover from the general reliance on medical evidence, even in jurisdictions with a purportedly functional evidentiary focus, because of a belief by judges that such testimony is necessary and assists in fashioning a "best interests" remedy.

The results of the survey support the author's view that while guardianship statutes passed in the last 25 years have modernized guardianship laws, the goals of the statutes have not been fully achieved because of failure of appropriate implementation.

Endnotes

1. *Matter of M.R.*, 135 N.J. 155,159 (Sup. Ct. 1994).
2. National Conference of Commissioners on Uniform State Law, *1997 Uniform Guardianship and Protective Proceedings Act*, *in* 1 The ElderLaw Portfolio Series 7-54 (Harry S. Margolis ed., 2007) (hereinafter *UGPPA*).
3. Penelope A. Hommel, Lu-in Wang & James A. Bergman, *Trends in Guardianship Reform: Implications for the Medical and Legal Professions*, 18 L. Med. & Health Care 213 (1990).
4. In 2007, The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) was drafted by the National Conference of Commissioners on Uniform State Law. It has a much narrower scope than the UGPPA, dealing only with jurisdiction and related issues. David English, *Summary of The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007)* 1 (October 5, 2007) http://www.guardianship.org/spotlight/UAGPPJA_Summary.pdf.
5. *See UGPPA*, *supra* note 2.
6. *Id.*
7. N.Y. Mental Hyg. § 81.01 (McKinney 2010).
8. *Id.* § 81.02(b).
9. *Matter of Rosa B-S*, 767 N.Y.S.2d 33 (App. Div. 2003).
10. *Id.*
11. *See UGPPA*, *supra* note 2, at 7-53.
12. Sally Hurme & A.B.A. Commission on Law & Aging, *Capacity Definition and Initiation of Guardianship Proceedings (As of statutory revisions December 31, 2008)*, tbl., (May 2009) http://www.abanet.org/aging/legislativeupdates/pdfs/chart_capacity_initiation.pdf .
13. Mr. Strauss would like to thank Kim Trigoboff, Esq., for her outstanding assistance in the development and execution of this survey.

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Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act: Sub-Committee Report

By Robert Kruger, Anthony Lamberti and Ira Miller

This report was presented to and unanimously passed at the January 2011 Elder Law Section Executive Committee, held in conjunction with the Annual Meeting of the New York State Bar Association.

This report is prepared for the January 2011 Elder Law Section Executive Committee Meeting by the Guardianship Sub-Committee. We were asked to analyze the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (hereinafter referred to as "UAGPPJA").

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act received its final approval at the National Conference of Commissioners for Uniform State Laws (NCCUSL) at their 2007 annual meeting. The UAGPPJA deals primarily with jurisdictional, transfer and enforcement issues relating to adult guardianships and protective proceedings. There are a number of reasons why we should adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

Some of the reasons are as follows:

- Provides procedures to resolve interstate jurisdiction controversies. The UAGPPJA creates a process for determining which state will have jurisdiction to appoint a guardian or conservator if there is a conflict by designating that the individual's "home state" has primary jurisdiction, followed by a state in which the individual has a "significant connection." Under certain prescribed circumstances, another state may be chosen if it is the more appropriate forum.
- Facilitates transfers of guardianship cases among jurisdictions. The UAGPPJA specifies a procedure for transferring a guardianship or conservatorship to another state and for accepting a transfer, helping to reduce expenses and save time while protecting persons and their property from potential abuse.
- Provides for recognition and enforcement of a guardianship or protective proceeding order. The UAGPPJA helps to facilitate enforcement of guardianship and protective orders in other states by authorizing a guardian or conservator to register these orders in other states.
- Facilitates communication and cooperation between Courts of different jurisdictions. Permits communication between courts and parties of other states, records of the communications, and jurisdiction to respond to requests of assistance from courts in other states.
- Addresses emergency situations and other special cases. A court in the state where the individual is physically present can appoint a guardian in the case of an emergency. Also, if the individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for the property located there.
- Authorized guardians to exercise the powers authorized in the order and addresses international orders. This Act will provide uniformity and reduce conflicts among the states.

Additionally, the American Bar Association Commission on Law and Aging has advocated for the enactment of the "UAGPPJA" in February 2008.

The Board of Directors of NAELA unanimously endorsed the "UAGPPJA."

Our Sub-Committee endorses the enactment of the "UAGPPJA" for use in Article 81 Guardianship proceedings.

Robert Kruger, a member of the New York and New Jersey bars, is a guardian, supplemental needs trustee for disabled children and adults, court evaluator and court-appointed attorney in guardianship proceedings. He is presently co-chair of the Committee on Guardianships and Fiduciaries of the Elder Law Section, and Vice Chair of the Committee on the Elderly and Disabled of the Trusts and Estates Law Section, both NYSBA Committees, having served as sole chair for each Committee for several years.

Anthony J. Lamberti is a Co-Chair of the Committee on Guardianships of the NYSBA Elder Law Section. He also serves as the Chair of the Elder Law Committee of the Brooklyn Bar Association. Mr. Lamberti received his J.D. from Brooklyn Law School. His New York City practice is focused on Article 81 guardianship proceedings, Elder Law and Trusts and Estates.

Ira K. Miller, the founding chair of the Brooklyn Bar Association Elder Law Committee, has been active in the NYSBA Elder Law Section as a delegate, committee chair and culminating as Vice Chair of the Section. He has lectured for the Brooklyn Bar, State Bar and to members of the New York State Assembly. A Brooklyn Law School graduate, his practice is primarily devoted to Guardianship, Elder Law and Estates and Trusts.

What Is an Estate Planner to Do Without the Protections of Strict Privity?

By Anthony J. Enea

Since the New York Court of Appeals' decision in *Schneider v. Finmann,*[1] estate planners have been wringing their hands with concern as to what steps they can take to protect themselves from potential malpractice claims by the personal representative of an estate.

The Court of Appeals held in *Schneider* that "privity" (a contractual relationship) or a relationship sufficiently close to "privity" exists between the personal representative of an estate and the estate planning attorney. The Court held that the personal representative of an estate should not be prevented from raising a malpractice claim against an attorney who caused harm to the estate. With very little fanfare, the Court made a significant dent in the decades-old requirement that there be "strict privity" between the third party alleging malpractice and the attorney, absent fraud, collusion, malicious acts or a special relationship with the attorney. As if the aforestated was not sufficiently worrisome for the practitioner, the Court went on to make the troubling statement that "the attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional."[2] While the Court may have been correct in making this observation with respect to the facts presented in the case before it, the ramifications of such a general and conclusory statement may be beyond what the Court ever envisioned. Additionally, it may have been incorrect for the Court to assume that minimization of estate taxes is the "central task" in every estate plan. How many of us have had a client say something to the effect, "Let the kids worry about the taxes, I am leaving them enough"?

The decision in *Schneider* affects all attorneys that prepare Last Wills and Trusts, not just those that prepare sophisticated estate plans for the wealthy. In states that have not had a "strict privity" requirement, the numbers of malpractice claims against estate planners and Will drafters have been high. Any attorney who drafts Last Wills and Trusts will not only need to insure that there is no malpractice in the preparation and execution of the documents, but also insure that all potential estate tax issues have been thoroughly reviewed with the client. While the majority of estate planners take the necessary precautions, it doesn't hurt to periodically review one's practices, procedures and communications with the client to ensure that the best possible practices and procedures are followed.

The following are some of the steps attorneys should consider utilizing in order to avoid a potential malpractice claim by the Personal Representative of an estate:

1) obtain specific and detailed information about the client, his or her family and the client's assets. The attorney should consider sending to the client a questionnaire that is to be completed by the client. It is important to not only obtain information about the value of the client's assets, but specific information as to the title in which all of the client's assets are held. One should ascertain whether said assets have named beneficiaries or will pass by operation of law upon the death of the client. When dealing with IRAs, 401Ks, annuities and life insurance policies one should obtain information as to the owner, annuitant, insured and beneficiary. It is important to obtain information as to all of the beneficiary designations. A review of all of the clients' account statements should be considered. It is not unusual for clients to be mistaken as to title of and the beneficiaries of accounts;

2) obtain copies of all Wills, Trusts and other advance directives executed by the client. It is important to ascertain whether the proposed plan is a significant departure from the client's prior estate plan, and whether the client has decided to exclude from his or her plan individuals that may potentially contest the Last Will or Trust;

3) in those cases where there exists the potential for Federal and or New York estate taxes, it is most important that the attorney strongly consider memorializing in writing that which he or she has advised as to the potential for estate taxes, and the anticipated impact upon the clients' estate;

4) memorialize the various estate tax minimizations options you have reviewed and recommended to the client. For example, if you reviewed with the client a plan of gifting (charitable/non-charitable), Life Insurance Trusts, GRATS, Family Limited Partnerships, QPRTS or other estate planning options, delineate said op-

tions in writing to the client, and whether or not the client has opted to utilize said techniques. It is important to consider having the client(s) sign a document (memorandum/letter) wherein you have delineated all of your planning recommendations, to confirm that the client has been advised of said options and has decided not to utilize them. Such a writing could act as a potential deterrent to a claim by the estate's personal representative as it could act as a "waiver" by the client;

5) memorialize the fact that the planning you have recommended and the client has agreed to utilize will result in the client's assets being included in the client's gross taxable estate for estate tax purposes. For example, when preparing a deed with the reservation of a life estate, Irrevocable Income Only Trust or a Revocable Living Trust, the client may incorrectly assume that because the asset is no longer titled in his or her name, that it is not taxable in his or her estate for estate tax purposes. Again, consider having the client sign a letter or memorandum acknowledging that he or she was apprised of same;

6) memorialize that you have relied upon the information provided by the client to conclude that there is or is not the potential for estate taxes. The client should be instructed to advise the attorney of any significant changes in the value of their assets;

7) memorialize that you have personally reviewed all of the documents with the client(s), and that the documents were the only documents that the client agreed to have you prepare;

8) create a checklist of the steps to be followed by you, associates and staff for the execution and assembly of the Last Will and Trust documents. This should help reduce any potential errors at the time of execution and assembly of the documents. It is also advisable to create and follow consistent procedures for the review and modification of any drafts of the Last Will and Trust documents;

9) memorialize that your representation has been terminated once you have completed providing legal services to the client. This is usually confirmed in the correspondence wherein either the executed original or copies thereof are sent to the client. The relevance of officially terminating the relationship is to potentially commence the tolling of any statute of limitation for any claims of malpractice.

The issue of commencing the tolling of the statute of limitations is of particular interest to attorneys who regularly communicate with the client after the conclusion of their representation to keep the client apprised of any changes in the laws or of any other issues of interest. For said attorneys it may be advisable to include language similar to the following in their termination letter:

> I wish to confirm that we have terminated our representation. In the future you may periodically receive correspondence from us, said correspondence is for informational purposes only, and is not the continuation of our representation.

In conclusion, using all or some of these practice recommendations is not a guarantee that you will never be subjected to a claim of legal malpractice. However, taking these steps should help minimize the potential for a claim and the number of claims filed. Clearly, the Court of Appeals has made a determination as to what our "central tasks" are, and has placed the onus upon the attorney to take all of the steps humanly possible to minimize negligence and address those tasks. The decision in *Schneider* will naturally result in attorneys taking numerous steps and precautions to avoid malpractice, doing so may inevitably result in additional legal fees to the client. I hope I am mistaken; however, this seems to be eerily familiar to what has happened to the medical profession. We can only speculate as to what the Courts will next determine to be a "central task" entrusted to the attorney.

Endnotes

1. *Schneider v. Finmann*,15 N.Y.3d 306, 2010 Slip Op 5281, N. Y. 2010.
2. *Id.* at 4.

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Spousal Rollover of Retirement Accounts

By Seymour Goldberg

Many clients have accumulated a considerable amount of assets in retirement accounts such as qualified plans, 403(b) tax-sheltered annuities and governmental 457 plans. In addition many retirement accounts have been rolled over to individual retirement accounts (IRAs). Other clients have established Roth IRAs.

For a married couple with children there is a tendency to select the spouse as the primary beneficiary and the children as the contingent beneficiaries of retirement accounts and/or IRAs. In addition, if a retirement plan is subject to ERISA, then the surviving spouse must generally be the primary beneficiary of the retirement account subject to limited exceptions.

If the surviving spouse is the primary beneficiary of a retirement account and/or traditional or Roth IRA, then the surviving spouse can generally disclaim his/her interest in the retirement account and/or traditional IRA or Roth IRA. However, the author has recently reviewed the rules of a major corporation's retirement plan and found that disclaimers would not be permitted to be given any legal effect under the retirement plan rules.

Several important technical issues involving spousal rollovers follow:

Issue (1): If an IRA owner dies on or after his/her required beginning date (i.e. April 1 after attaining age 70½), must a required minimum distribution be made for the year of the IRA owner's death?

Answer: Yes.

Issue (2): Who must receive and report any unpaid required minimum distribution for the year of death of the IRA owner?

Answer: The deceased IRA owner's beneficiary.

Example

John has a traditional IRA and his wife Mary is the primary beneficiary of his IRA. John's children are the contingent beneficiaries of his IRA. Assume that John died on February 15, 2011. His birth date is December 1, 1936. At the date of his death he was age 74 but had he lived he would have attained age 75 by December 31, 2011.

Assume that John's required minimum distribution for the calendar year 2011 would have been $50,000 based on age 75 (not 74). However, John only received $10,000 from his IRA prior to the date of this death on February 15, 2011.

Under the IRS rules the unpaid required minimum distribution from John's IRA for the year of his death must be paid. The authority for this rule can be found in the IRS's final regulations at § 1.401(a)(9)-5, A-4 which provides in part as follows:

> [I]f an [IRA owner] dies on or after the required beginning date, the distribution period applicable for calculating the amount that must be distributed during the distribution calendar year that includes the [IRA owner's] had lived throughout the year. Thus, a minimum required distribution, determined as if the [IRA owner] had lived throughout that year, is required for the year of the [IRA owner's] death and that amount must be distributed to a beneficiary to the extent it has not already been distributed to the [IRA owner].

Thus, in the absence of a timely qualified disclaimer by Mary, then Mary as the beneficiary of John's IRA must receive the unpaid required minimum of $40,000 ($50,000-$10,000) from John's IRA with respect to John's year of death in 2011.

It should be noted that Mary may not roll over the unpaid required minimum to her spousal IRA rollover account.

Mary should act quickly after John's date of death and roll over John's deceased IRA account after withdrawing the unpaid $40,000 required minimum distribution attributable to the year of John's death to her spousal IRA rollover account. This can be done as a direct transfer to her spousal IRA rollover account to save time.

Obviously, Mary should immediately select designated beneficiaries of her spousal IRA rollover account that are consistent with her estate plan.

Prompt action by Mary is necessary since Mary may pass away shortly after John's death or she may become incapacitated before creating her spousal IRA

rollover account. If Mary consummates a spousal IRA rollover and selects, for example, her children as the primary beneficiary of her spousal IRA rollover account, then on her subsequent death her children may generally take advantage of the IRS life expectancy payout rules that apply to them if they satisfy certain IRS rules. These IRS rules will be discussed in a subsequent article.

From a technical point of view, the IRS determined that the beneficiary of John's IRA (under non-probate law concepts) must receive the unpaid required minimum distribution for the year of John's death, not John's estate unless John's estate is the beneficiary of John's IRA.

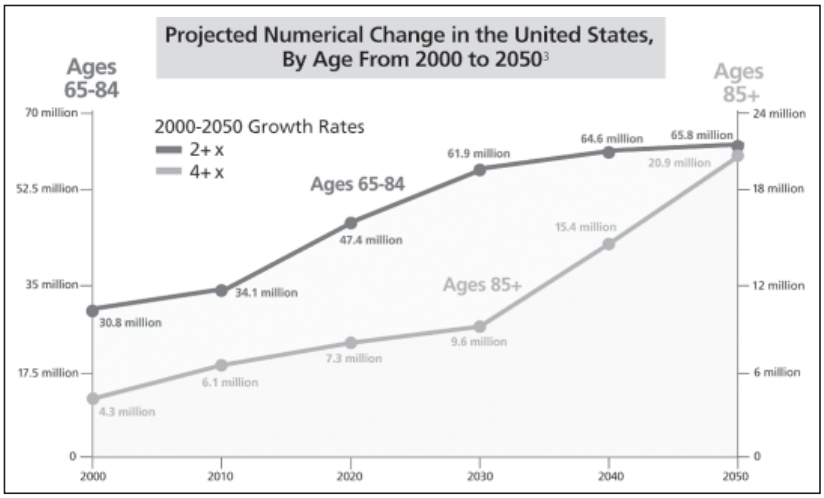
Seymour Goldberg, CPA, MBA, JD, a senior partner in the Woodbury law firm Goldberg & Goldberg, P.C., is Professor Emeritus of Law and Taxation at Long Island University. He has been quoted in major publications, including *The New York Times, Forbes, Fortune, Money Magazine, U.S. News & World Report, Business Week,* and *The Wall Street Journal,* and has been interviewed on CNN, CNBC, and WCBS. Formerly associated with the IRS, he has been a member of the Northeast Pension Liaison Group for over 20 years, and has been involved in conducting continuing education outreach programs with the IRS on the retirement distribution rules. He has authored guides for the American Bar Association, the America Institute of CPAs, JK Lasser, and other organizations. His recent books include *IRA Trusts & Retirement Distribution Trusts as Beneficiary of Retirement Assets: What the Practitioner Needs to Know* and *Inherited IRAs: Practice Aids and IRS Distribution Issues,* among others.

The Need for Longevity Planning

By Steve Shorrock

The 80 and over age group is growing five times faster than the overall population.[1] For a couple aged 65 today, there is a 50% chance for one to live to age 92 and a 25% chance one will live to age 97.[2] The graph below shows the population increases to mid-century for ages 65-84 and 85+.

Advances in the field of medicine and improvements in health conditions overall have led to people living longer. For example, cardiovascular mortality has shown a remarkable decline primarily due to bypass surgery, better diagnostics, risk mitigating drugs and lifestyle changes (most notably the decline in smoking). The possibility of spending 15, 20, 25 or more years in retirement should be realistically considered and planned for.



With a longer expected lifespan, what choices will your clients have to make and how can you assist them? I often suggest building a plan projecting life expectancy to age 100 that secures a quality retirement and:

- Provides for financial peace of mind.
- Retains independence so as not to be a burden on the family.
- Protects retirement assets from devastating medical costs.
- Provides multiple sources of income so as to not outlive retirement assets.
- Quality of life for the surviving spouse.
- Inheritance for your children.

Studies show the majority of the 30 million pre-retirees are woefully unprepared for retirement, so much that it may change the essence of retirement.[4] In this new retirement environment, one must have a clear understanding of the retirement risks, including:

- Entitlement programs such as Social Security and Medicare. The foundations of a secure retirement, are facing strains from an aging population and a tough economy. For the first time since the 1980s, Social Security will pay out more money in benefits than it collects in payroll taxes. Additionally, for the first time in history, people age 65 and over are about to outnumber children under age five.[5] Unless action is taken, Social Security will be unable to pay retirees full benefits by 2037.[6]
- Corporate reductions in retiree benefits, as many pension plans are quickly disappearing. More money must be saved in 401(k) plans, as corporations have shifted the return risk to their employees. Of concern is that more individuals than ever are using their 401(k) assets through loans and withdrawals to support current quality of life.[7]
- Low interest rates and an unstable stock market are causing many individuals to invest in money market funds providing minimal returns and often negative returns when inflation is factored in.
- Higher future taxes are projected as a growing deficit that must be paid for. As income taxes increase and personal exemptions are phased out, the ability to defer income taxes becomes more valuable.
- Longevity, as living longer requires the retirement plan to cover more years than previous generations.

With living longer, comes the associated costs that must be covered in the retirement plan, including:

- **Long-Term Care Costs**—An overlooked threat to asset and income protection is the potential for long-term care costs. The chances of needing some form of long-term care are very high. Medicare pays for up to 100 days of nursing home care. The annual cost in 2010 of a semi-private

room in a New York nursing home is $116,800 and increasing annually.[8] The national average for 10 hours of daily home care is $75,000. Regardless of the form of care, the costs of long-term care will quickly reduce most retirement assets, as seen below:

The Impact of Long-Term Care on Retirement Savings[9]

Year	Assets at Start of Year	Income Needs	LTC Expense[10]	Investment Yield	Assets at End of Year
1	$500,000	$60,000	$75,000	$20,000	$385,000
2	$385,000	$61,800	$78,800	$15,400	$259,800
3	$259,800	$63,700	$82,700	$10,400	$123,800
4	$123,800	$65,600	$86,900	$5,000	($23,700)
5	($23,700)	$67,500	$91,200	($0)	($182,400)

Income Needs are the portion of household income needs that the assets had been relied upon to provide and assumes annual inflation of 3%. **LTC Expense** is based on a typical annual cost and is subject to 3% annual inflation. **Investment Yield** is assumed at 4% annually after taxes.

- **Health Care Expenses**—The Employee Benefit Research Institute estimates that to have a 50% chance of affording health care in retirement, assuming a retirement at age 65 in 2019:
  - A man would need between $144,000 and $290,000 in savings.[11]
  - A woman, as a result of a longer life expectancy, would need between $210,000 and $406,000 in savings.[12]
  - These estimates are for the projected savings needed to pay premiums for Medigap, Medicare Part B and Part D and out-of-pocket prescription drug expenses.
- **Income Stream**—With a possibility of reduced retirement assets to pay for long-term care costs, health care expenses, living expenses and the cost of living increases, predictable income streams from diversified sources are recommended.

An insurance solution for protecting your retirement assets and income is needed. We suggest a larger asset allocation to insurance products protecting against longevity risks, including:

- **Income for Life**—Life insurance and annuities providing guaranteed income you cannot outlive
  - A new, innovative rider, found in some indexed Universal Life products is a guaranteed income stream the insured cannot outlive. Income begins 15 or more years from issue, providing tax-free income for life.
- **Health Care Strategy**—Some new, innovative life insurance and single premium products with living benefits (for chronic, critical and terminal illness) and long-term care insurance
  - For no additional premium cost or underwriting, allows for the acceleration of the death benefit to support long-term care or chronic illness expenses. It is an annual "cash" benefit that can be used for any purpose as long as the insured's doctor certifies he/she cannot perform two out of six Activities of Daily Living. The policy either pays a benefit at the death of the insured or allows the death benefit to be paid as a living benefit to support the potential costs of long-term care.
- **Market Growth**—Indexed life insurance and annuities with upside market potential and interest rate floors
  - These indexed products allow the insured to participate in the growth of the market, up to the interest rate caps, and through interest rate floors never give back previous gains or have negative returns. These products provide great upside and tax-free income.

"We've seen how a stock market crash can devastate retirement plans," wrote *Chicago Sun-Times* financial columnist Terry Savage. "But the greatest risk is not the longevity of this bear market, or even another bear market. It's the associated costs of living longer and its healthcare and lifestyle implications."[13]

Endnotes

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Death in 2010: Federal Estate Tax Election

By Robert Katz and Neil D. Katz

Robert Katz

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) made a number of changes to the estate and gift tax rules that previously applied (i.e. increased the exemption amounts, reduced the rates, etc.) It also provided that there would be no estate tax in 2010 and that on January 1, 2011 the provisions of EGTRRA would sunset and the law would revert to the 2001 levels. Very few professionals, if any, believed that Congress would allow a year in which there would be no estate tax.

In fact, they were right. As a result of the Tax Relief, Unemployment Insurance Reauthorization, and Jobs Creation Act of 2010 (the 2010 Tax Relief Act) the estate tax was retroactively reinstated as of January 1, 2010. The 2010 Tax Relief Act was signed into law on December 17, 2010.

A. Summary of the Changes

The 2010 Tax Relief Act sets the estate tax and generation skipping tax exemptions at $5 million for 2010, 2011 and 2012 with a maximum tax rate of 35%. For 2011 and 2012 the $5 million exemption and the 35% maximum rate applies to the gift tax as well.

Unless a future Congress acts, these provisions will sunset on January 1, 2013 and we will return to the 2001 levels.

B. 2010 Election

The enactment of the 2010 Tax Relief Act two weeks before the end of 2010 caused Congress to consider the large number of individuals who died during 2010 (many of them with large estates). Therefore, Congress enacted a special provision for executors of estates of individuals who died on or after January 1, 2010 and before December 17, 2010. In effect, this provision allows the executor to elect out of the estate tax and into the carry-over basis regime that would have applied had EGTRRA been in effect in 2010.

The determination of whether to elect out of the estate tax, for estates of individuals of substantial wealth (for example, George Steinbrenner) is a relatively simple decision. However, the mere fact that an estate exceeds the $5 million exemption is not the sole determining factor to be considered by an executor. By choosing the no estate tax regime, the assets of the estate will pass to the beneficiaries of the estate with carry-over basis which could cause substantial income taxes to be paid by the beneficiaries in the future.

Neil D. Katz

Among the factors that an executor should consider in deciding whether or not to elect to have no estate tax apply are:

1. The current estate tax payable vs. the present value of the future income taxes payable.
2. The character of the future income that will be recognized (capital gain vs. ordinary income).
3. How soon after death the assets may be sold.
4. The use of depreciation that would be available if an asset's basis is increased to fair market value rather than carry-over basis.
5. The additional basis adjustments available if carry-over basis is used.

C. Extension of Time

For individuals who died on or after January 1, 2010 and before the effective date of the new law, the due date for the filing of the federal estate tax return and the payment of the estate tax is extended to a date no earlier than nine months from the date of the enactment. Since the date of enactment is December 17, 2010, the filing of the estate tax return and the date for the payment of the estate tax is extended to September 19, 2011 (since September 17 is a Saturday). It is important to note that the time for filing the New York State estate tax return and the payment of the New York estate tax has not been extended.

For estates that elect to not have the estate tax apply and thus have carry-over basis applicable to the estate's assets, a report is required to be filed. The law originally required this report to be attached to the decedent's final income tax return. However, the IRS has announced that it should not be filed with that return. The IRS has also stated that it would be issuing **Publication 4895, Tax Treatment of Property Acquired From a Decedent Dying in 2010**. That publication will set forth the when to file and where to file this report.

The IRS has issued a draft Form 8939, the carry-over basis form. The draft does not include instructions nor does it deal with the election that is now required. We will have to wait to see the final form and Publication 4895, when it is issued, for further guidance.

D. Carry-over Basis

If the executor elects out of the estate tax, carry-over basis and holding period issues arise. Under the carry-over basis regime the starting point is the lesser of the basis of the asset in the hands of the decedent or the asset's fair market value on the date of death. I.R.C. § 1022 then contains several modifications to carry-over basis.

1. Every estate is entitled to a $1.3 million basis increase, other than an estate of a non-resident alien for which only a $60,000 increase is available.
2. An additional $3 million basis increase is available for property passing to the decedent's spouse directly or through a QTIP trust.
3. In addition, I.R.C. § 1022 allows an extra basis increase for any unused net operating loss under I.R.C. § 172 or capital loss under I.R.C. § 1212(b).
4. Finally, an increase is allowed for built-in losses, existing on the date of the decedent's death, relative to business or investment property. For example, if on the taxpayer's date of death he owned business property that cost $5,000 but was worth $1,000, there exists a built-in loss on this property in the amount of $4,000. This $4,000 built-in loss can be added to the date of death basis of that asset.

The code contains a limitation on the applicability of the $1.3 million and the $3 million basis increases. Neither of those amounts can increase the basis of an asset to an amount in excess of the asset's fair market value.

Certain property is ineligible for the basis increase:

1. Income in respect of a decedent property under I.R.C. § 691.
2. Property acquired by the decedent by gift within three years of death.
3. Property over which the decedent had a general power of appointment.
4. Certain foreign stock.

The election also affects the holding period of the assets inherited. If the estate is subject to estate tax then each asset inherited by a beneficiary is treated as if it has been held long-term. However, if the executor has elected out of the estate tax, each asset's holding period must be determined with reference to the decedent's holding period. The holding period of the asset after the date of the decedent's death is then added to the decedent's holding period. For example, if the decedent had purchased an asset two months before her death and the beneficiary sold the asset nine months later, any gain would be considered a short-term gain because the holding period of the asset was 11 months. Had this been a taxable estate the gain would have been a long-term gain.

Since the enactment of EGTRRA, estate planning attorneys have been waiting for Congress to modify the rules that would apply in 2010. While it took Congress 11½ months into to the year to act, there is now a clearer understanding of what we have to deal with. Advising executors of estates of decedents that died during 2010 creates a new set of challenges and requires analysis different from those we faced in any other year in recent memory.

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Recent New York Cases

By Judith B. Raskin

Medicaid: Return of Gift

A Medicaid applicant appealed from a denial after Fair Hearing where gifts were returned in the form of joint ownership of real property.[1]

In March 2006 Mrs. Peterson transferred ownership of her home to her daughter, retaining a life estate. She made additional gifts to her daughter the following year. Her daughter then purchased a new home, sold the transferred real property and retained all of the net proceeds from the sale. Mrs. Peterson entered a nursing home and applied for Medicaid in January, 2008. The following month daughter added Mrs. Peterson as joint owner of daughter's new home.

Medicaid denied the application based on Mrs. Peterson's transfer of the remainder interest in her house, her failure to receive proceeds for her life interest, and her failure to receive proper return of the gifts. At a Fair Hearing, the ALJ remanded the matter to the agency for reevaluation of the value of the house.

In an Article 78 proceeding, the Appellate Division affirmed the agency denial. The transfer of the house plus the forfeiture of life interest proceeds were uncompensated transfers. These transferred assets were not returned when Mrs. Peterson became joint owner of her daughter's house. Transferred assets are only considered returned when applied to nursing home costs or in the form of cash or liquid assets to the applicant/recipient.[2] The court found the agency denial was based on a rational interpretation of relevant statutes and the policy of the Medicaid program.

Medicaid: Court Ordered Expenses from NAMI Disallowed

Department of Social Services (DSS) appealed from an order in a guardianship proceeding directing expenses be paid from the Medicaid recipient's net available monthly income.[3]

In this Article 81 proceeding the court appointed a guardian for Deanna W. and directed the guardian to pay certain expenses including the guardian's fees. The order included a direction to the DSS to disregard these expenses when determining Diana W.'s net available monthly income (NAMI). DSS appealed, arguing that the court did not have the authority to direct DSS to eliminate these expenses from an applicant's NAMI.

The Appellate Division reversed. The court did not have the authority to reduce the income countable toward an applicant's NAMI. The agency is entitled to a reasonable interpretation of its regulations. The agency's regulations[4] list those items that can be disregarded in a NAMI calculation and the list does not include the expenses stated in the court's order.

90-Day Requirement for Fair Hearing Decision

The Medicaid applicant appealed from a decision denying her application because the Fair Hearing decision was made more than 90 days after the hearing request.[5]

A nursing home resident's Medicaid application was denied for excess resources and income. She appealed. The hearing was held 91 days after the request and the decision reversing the local agency and in favor of the applicant was rendered 190 days after the request. DSS requested a review of that decision. An amended decision issued 295 days after the request for the Fair Hearing reversed the original Fair Hearing decision upholding the denial of the application. Applicant petitioner appealed in this Article 78 proceeding solely on the grounds that the amended decision was invalid. It exceeded the 90-day limit set forth in the regulations. 18 NYCRR 358-6.4(a) states: "[D]efinitive and final administrative action must be taken promptly, but in no event more than 90 days from the date of the request of the fair hearing."[6]

The Supreme Court granted the petition. The Appellate Division, in a split decision, reversed. The applicant appealed as of right. The Court of Appeals affirmed the reversal without dissent. The 90-day regulation is not mandatory. The federal regulation on which the state regulation is based changed in 2002 to require final action "ordinarily, within 90 days." A strict enforcement of the 90-day requirement would result in applicants winning if the time limit were exceeded. This would be an extreme result. While the regulation is not mandatory, the court sees it as more than directional. Federal law requires prompt handling of Fair Hearing requests. The applicant, if the delay resulted in substantial prejudice, could seek relief. That was not the case here. The applicant was never eligible for Medicaid and in fact the Supreme Court decision in her favor would also be void if the applicant were successful in her claim, as that decision also exceeded the 90-day requirement.

Medicaid: Recovery from Tort Settlement in Estate

An estate administrator objected to DSS recovery from tort settlement proceeds that were not deemed medical expenses related to the injuries.[7]

Mr. Heard, a Medicaid recipient, fell in the nursing home. On his death, tort settlement proceeds were part of his intestate estate. DSS claimed recovery for its costs from the proceeds. The administrator and distributee objected. Citing *Ahlborn*, they argued that DSS could only recover from that portion of the recovery for medical costs from the resulting injuries. DSS cited SSL Sec. 369(2)(b)(i)(B) authorizing recoupment of costs from the estate of a person who received Medicaid when over the age of 55.[8] The Appellate Department upheld the lower court decision. DSS was granted recovery of its costs including costs not related to the injuries from the full amount of the settlement proceeds. *Alborn* dealt with a living person and does not apply to estate recovery.

Guardianship Fees Paid by Petitioner

Petitioner appealed from an order requiring him to pay fees without an explanation.[9]

Charles T. petitioned to be appointed Article 81 guardian for his brother, Theodore T. Theodore T. moved to dismiss the petition for lack of personal jurisdiction. The papers were served on him by overnight Federal Express and not as directed by the court. The Supreme Court dismissed the petition and ordered Charles T., the petitioner, to pay fees to the court-appointed counsel of $13,417.25 and the court evaluator of $6,755 with no explanation given of these fees. Charles T. appealed.

The Appellate Division remitted the matter to the Supreme Court for explanation and reconsideration of its fee award.

Endnotes

1. *Peterson v. Daines*, 909 N.Y.S.2d 611 (App. Div., 4th Dept. 2010) (appeal denied).
2. NYS Dept. of Social Services Administrative Directive 96 ADM-8.
3. *In re Deanna W. (Rosenblut)*, 908 N.Y.S.2d 692 (App. Div., 2d Dept. 2010) (reversed).
4. N.Y. Comp. Codes R. & Regs. tit. 18, § 360-4.6 (2002).
5. *Dickinson v. Daines*, 15 N.Y.3d 571 (2010) (appeal denied).
6. N.Y. Comp. Codes R. & Regs. tit. 18, § 358-6.4(a) (2003).
7. *In re Estate of Heard*, 911 N.Y.S.2d 534 (App. Div., 4th Dept. 2010) (appeal denied).
8. N.Y. Soc. Serv. Law § 369(2)(b)(i)(B) (McKinney 2008).
9. *Theodore T. v. Charles T.*, 912 N.Y.S.2d 72 (App. Div., 2d Dept. 2010).

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

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Advance Directive News: Alphabet Soup—DNRs Revisited by the FHCDA

By Ellen G. Makofsky

The Family Health Care Decisions Act (FHCDA) does more than establish the authority for a surrogate to make health care decisions for an incapacitated individual who lacks a designated health care agent or who has failed to provide written instructions for health care decision-making. The FHCDA also revises New York State's Do Not Resuscitate (DNR) law and introduces a new standard for decision-making. While the FHCDA retains most of the DNR provisions previously used in a non-hospital setting, it expands the roster of those who now are required to honor a nonhospital DNR. The FHCDA revises DNR law by defining "life-sustaining treatment" to include cardiopulmonary resuscitation (CPR).[1]

New York State Presumption for Resuscitation

New York State law provides that where there is no direction from the individual or surrogate health care decision-maker, there is a presumption for resuscitation.[2] This means medical personnel are required by law to undertake all efforts, no matter how traumatic, to revive the person experiencing a cardiac or respiratory arrest. CPR can cause much physical trauma to the body and statistics reveal that hardly anyone who receives CPR in a medical setting recovers to resume their regular lives.[3] An individual with capacity can overcome the presumption for resuscitation by refusing CPR. Those individuals who are unable to communicate or who lack capacity are unable to refuse CPR. In situations where an individual is incapacitated only a surrogate decision-maker can consent to a DNR.

DNRs in a Hospital or Residential Health Care Facility[4]

The FHCDA imposes a new standard for determining whether life-sustaining treatment or CPR may be withheld. Pursuant to the FHCDA, a surrogate decision-maker may not consent to a DNR order unless an initial decision that the patient lacks capacity is made by the attending physician and a second concurring determination is made by a physician, nurse, or social services practitioner.[5] Once a determination is made regarding lack of capacity, the FHCDA allows the issuance of a DNR order only when a physician and a concurring independent physician additionally determine that one of the following criteria is met:

1) Treatment would be an extraordinary burden to the patient *and* the patient is not expected to survive 6 months or is permanently unconscious; or

2) Provision of treatment would involve such pain, suffering or other burden that it would be reasonably deemed inhumane or extraordinarily burdensome *and* the patient has an irreversible or incurable condition.[6]

Interestingly, where a surrogate is seeking to withdraw life-sustaining treatment for a resident of a residential heath care facility, the FHCDA requires a review by the facility's ethics committee. However, the statute specifically exempts this requirement for a decision to withhold CPR by a surrogate.[7]

Nonhospital DNRs

The FHCDA creates Public Health Law Article 29-CCC, entitled "Nonhospital Orders Not to Resuscitate." The new statute contains provisions similar to its predecessor. What the new legislation does is expand the scope of nonhospital DNRs. Previous legislation only required emergency medical services and hospital emergency services personnel to honor a DNR order. The new Article 29-CCC mandates that home health care agency staff and hospice staff honor nonhospital DNR orders along with emergency medical services personnel and hospital emergency services personnel.[8]

The FHCDA is far reaching legislation. Hopefully, as the legislation is implemented it will help our clients to fulfill their health care wishes in a straightforward way.

Author's Note: *I recently spoke with David C. Leven, Esq. in regard to the Life, Death and Palliative Care column I wrote and which appeared in the Fall 2010 issue of* Elder Law Attorney. *Mr. Leven pointed out to me that pursuant to the Palliative Care Information Act, a patient's attending health care practitioner is not mandated to provide information and counseling regarding palliative care and end-of-life options to the patient, but rather is required to offer to provide the patient with such information and counseling. If the patient wishes to have it provided then the practitioner must provide such information and counseling.*

Endnotes

1. N.Y. Pub. Health Law § 2994-a(19) (McKinney 2010).
2. N.Y. Pub. Health Law § 2962(1) (McKinney 2010).
3. When evaluating actual success rates for post-CPR survival without a diminished quality of life, the statistics are disheartening. Only five percent of hospitalized patients who receive CPR recover and resume their regular lives.
4. Prior to the FHCDA legislation, in order for a surrogate to consent to the issuance of a DNR order, two physicians were required to make a determination that the patient lacked capacity. In addition, the attending physician needed to make a further determination that the patient has a terminal condition; or the patient was permanently unconscious; or resuscitation would be medically futile; or resuscitation would impose an extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient.
5. N.Y. Pub. Health Law § 2994-c(2) to (3).
6. *Id.* at § 2994-d(5)(a)(i) to (ii).
7. *Id.* at § 2994-d(5)(b).
8. *Id.* at § 2994-ee.

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Guardianship News: Sea Changes

By Robert Kruger

The author has served as Guardian or Supplemental Needs Trustee for developmentally disabled children, probably in excess of 20 years. Certainly, for the bulk of that time, I had a common sense understanding of what funds I could safely expend and, if in doubt or when the requested disbursement was sizable, I would seek approval of the Court. If the guardianship or trust estate was sizable, I would be more generous (provided I thought the expenditure defensible) than I would if the estate was small.

I struggled, as all who serve in these capacities, with parental requests/demands. Frequently, managing the families proved to be more difficult than determining right from wrong. If I served as Property Management Guardian, I would disburse funds, without seeking judicial approval, for the reasonable living expenses of the child. For parental stipends, I would seek judicial approval. If I served as Trustee, support payments and stipends often negatively impact SSI payments, and, as a consequence, more care was required before I could comfortably write a check.

Certainly, the economic situation of the family played no small part in the decision making process. Also, the more secure the family's economic situation, the easier decisions turned out to be. If the family was economically stable, SSI was often immaterial until the child reached age 18. The poorer the family, the greater the need, and the greater impact on SSI if regular payments were made to the family for the beneficiary's need.

Within the past year, in the wake of the economic downturn, in New York City at least, HRA has begun to scrutinize annual accountings more closely, with the consequent effect of challenging the propriety of expenditures from the SNT. HRA has challenged requests made to the Court for stipends to parents. We often saw this in the initial applications to appoint Guardians or create SNTs, HRA preferring the retention of aides or companions as opposed to stipends for the mother. Lately, HRA has begun to challenge post-appointment requests. It has not reached the point where opposition is predictable but, with the passage of time and with the hiring of increased staff, HRA has become more aggressive. Consequently, it is apparent that HRA will, increasingly, audit annual accountings selectively. Guardians, and particularly Trustees, should be aware that we are entering an era where greater scrutiny will come, even if the scrutiny is not yet universally oppressive.

Of greater immediate concern is the aggressive oversight imposed by Court Examiners in Kings County, in the wake of recent scandals there. The scandals resulted in the departure of seasoned and knowledgeable old pros and the appointment of new Court Examiners who bring to the job an attitude more familiar to those who have experienced adversarial audits by the IRS.

"Guardians, and particularly Trustees, should be aware that we are entering an era where greater scrutiny will come, even if the scrutiny is not yet universally oppressive."

This article is the product of one such audit. The matter is before the Court; it is far from resolved. There are two issues of continuing importance that might, if the Court Examiner's position is sustained, lead to the Appellate Division. The issue of greatest importance is this: the mother (and co-guardian) was reimbursed for expenses incurred that benefited the entire family, not solely the IP. For example, I paid a Con Edison bill of $200 to avoid a shutoff notice received at a time when the IP's father walked out of the house. Since he was the wage earner, the family, consisting of the mother, the IP, and his 6 siblings, lost their sole means of support. I also paid some food bills that month in response to this emergency.

I also paid an auto insurance bill for the automobile that was used to drive the wheelchair-bound IP to school (since the Board of Education's transportation refused to transport the child because his wheelchair was insufficiently stable). These disbursements benefited other members of the family. Certainly, the car was used for more than the trip to and from school.

The Court Examiner, in challenging these expenditures, is seeking to impose a "sole benefit" test that is replicated by HRA at times when it challenges SNT expenditures. When serving as a fiduciary for a child in a family in economic distress, sole benefit is a distinction that is unhelpful. Primary or significant benefit is a more realistic standard. There is, as yet, no case in New

York testing HRA's position on sole benefit. It is ironic that a Court Examiner, presumably an attorney with some real life experience, rather than HRA, has taken this position.

"If fiduciaries are going to be called out for legitimate disbursements, the shrinking pool of attorneys willing to serve will shrink further."

The second systematic issue involved my paying otherwise legitimate expenses incurred post-judgment but prior to the issuance of the commission. We know that years pass before a medical malpractice case is settled. Needs are not met until the money comes in. I fail to understand how reimbursement for expenses incurred pre-commission that are otherwise legitimate (in this case, e.g., a companion was hired pre-commission and paid for by the mother) can be disallowed.

If the courts sustain the Court Examiner's objections to disbursements on these grounds, judicial applications to approve disbursements will proliferate. If fiduciaries are going to be called out for legitimate disbursements, the shrinking pool of attorneys willing to serve will shrink further. Fortunately, at present, these problems are limited to one Court Examiner in Kings County. My experience may be aberrational; still I find this ongoing experience chilling.

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The "Other Benefits" and Special Needs Trusts

By Adrienne J. Arkontaky

In today's tough times, more individuals and families are looking to government benefits for assistance with housing, food and medical expenses. Although Medicaid and Supplemental Security Income ("SSI") programs are the two major programs that provide individuals with both financial assistance and health care coverage, there are several other programs that may provide additional support to individuals, families and households in need.

I believe it is important to have a basic understanding of these programs. In addition, when special needs and elder law practitioners discuss life planning options with our clients, it is essential that we understand how to best protect eligibility for *all* potential benefits. Practitioners must consider whether the establishment of a special needs trust will affect eligibility in the case of excess income or resources.

This is the first of a two-part series of articles exploring the various benefits and their relationship with special needs trusts.

Recently, a family retained our office to assist with life planning for their daughter who had mild cognitive disabilities but severe physical disabilities. There was every indication, with the proper supports, that the young woman would be able to live independently. During our initial meeting, we reviewed a "checklist" of potential programs that the family might explore to maximize "Abby's" chances of success. We maintain a resource list for families and update it on a regular basis. Once we know what programs may be available to the individual with disabilities (or senior), we address how our planning might affect (or protect) eligibility and proceed accordingly.

This article will discuss several public benefits that might offer additional supports to eligible individuals and families in need. This is not an exclusive list but these programs provide many supports unavailable under Medicaid and SSI so I believe an understanding of these programs is noteworthy.

A. Temporary Assistance ("TA")

There are two major types of Temporary Assistance programs. The first program available to provide cash assistance to eligible families is Family Assistance ("FA"). The family must include a child under the age of eighteen, who is living with a parent or a relative who is a caretaker. Single, pregnant women can also get Family Assistance even if they do not have any other children. This program is governed by the guidelines set out in the federal Temporary Assistance for Needy Families ("TANF").

Under this program, eligible adults may receive benefits up to sixty months in their lifetime. TANF benefits received in other states under this program count towards the lifetime cap. The months do not need to be consecutive but each month the benefits are received will count towards the lifetime cap. The counting of this 60-month limit began in December 1996.

Eligibility for this program is based on the family's income which must be below 200% of the federal poverty level taking into consideration the size of the family. Families must comply with federal work requirements and must cooperate with their local department of social service in locating any absent parent or legally responsible guardian who might be required to provide support.

Safety Net Assistance ("SNA") is available to individuals and families who are not deemed eligible for other assistance programs. SNA may provide cash assistance for a maximum of two years in a lifetime.

SNA benefits are generally provided to: 1) Single adults; 2) Childless couples; 3) Children living apart from any adult relative; 4) Families of persons refusing drug/alcohol screening, assessment or treatment; 5) Persons who have exceeded the 60-month limit on assistance; and 6) Aliens who are eligible for temporary assistance, but who are not eligible for federal reimbursement.

Once again, recipients of this program must also comply with federal work guidelines if they are deemed eligible to work. Once the cash benefits are exhausted, SNA may provide non-cash support in the form of a voucher. This benefit is the same as a cash benefit, except that the program tells the recipient what may be bought and where the recipient can spend the money.

An eligible individual may also ask for emergency funds if the individual has no money to buy food, medical prescriptions or other necessities, the person faces eviction or an electricity or gas shutoff or is homeless.

B. Food Stamps ("FS")

The FS program is administered by the U.S. Department of Agriculture. The federal program is known as the Supplemental Nutrition Assistance Program

("SNAP"). The FS program provides coupons and benefit cards to low-income families to buy food at authorized food stores and supermarkets.

This program is administered by state and local welfare offices. Eligibility and benefit levels are based on household size, income, expenses and other factors. Eligibility for this program is based on a household's gross monthly income before taxes and withholding taxes are subtracted. Assistance from other programs is also considered and may be counted as income.

As of January 1, 2008, most households no longer face a resource test when determining eligibility for food stamp benefits. This means that the household's assets (stocks, savings and retirement accounts, etc.) are not considered when determining eligibility. Please note that if the family applies for food stamp benefits, they still may be asked to provide information regarding such resources.

Food stamp benefits help low-income working families, seniors and those with disabilities obtain healthy food. New York State also has a Working Families Food Initiative that allows working households to apply for food stamps even if the members of the household are not related. In addition, if an individual is receiving TA, in most cases that individual may still receive food stamps. Qualified immigrants are also eligible.

Information regarding eligibility requirements and the application process may be found at www.otda.ny.gov/main/programs/temporary-assistance.

C. Senior Citizen Rent Increase Exemption ("SCRIE")

New York City has a program to protect seniors with limited income from certain types of rent increases. The program benefits seniors struggling to pay rising rents while costing landlords nothing. The landlord deducts any rent increases from his or her NYC property taxes. The tenant must be 1) the head of a household; 2) sixty-two years of age or older; 3) living in a rent-regulated apartment or in certain types of government-supervised or government-insured apartments or co-ops; 4) have limited income and specific rent or carrying charges that are a significant portion of the tenant's household income. The tenant must apply for this program.

Information regarding this program may be found at www.nyc.gov/html/hpd/html/tenants/scrie.shtml.

D. Section 8 Housing

Section 8 housing vouchers are available to eligible low-income families, the elderly, and the disabled living in New York State through the U.S. Housing and Urban Development ("HUD"). "Housing Choice Vouchers" are issued in an effort to allow those eligible to live in safe, affordable housing in the private sector. Participants in this program locate their own housing including single family houses and apartments. The owner of the property must agree to accept the voucher. The housing must meet certain standards. The program pays part of the rent directly to the landlord for an eligible family. The program acts as a rent subsidy. There are limits on the amounts paid. Eligibility for this program is limited to U.S. citizens and very specific categories of non-citizens. Eligibility is determined based on annual gross income and family size.

Information regarding this program may be found at www.hud.gov/offices/pih/programs/hcv/index.cfm and www.nyc.gov/html/hpd/html/section8/section8-intro.shtml.

E. Home Energy Assistance Program ("HEAP")

HEAP is a federally funded program that provides heating benefits to supplement a household's annual energy cost. HEAP also offers an emergency benefit for households in a heat or heat-related energy emergency. Additionally, HEAP offers a furnace repair and/or replacement benefit for households with inoperable heating equipment.

Regular HEAP benefits are based on income, the primary fuel type and the presence of a household member who is under age 6, age 60 or older or permanently disabled. HEAP benefits are offered at a maximum of one regular HEAP benefit per year. Households may be eligible for a regular HEAP benefit if: 1) household members are United States citizens or qualified aliens and 2) the household income is below the current income guidelines established by the program; or 3) the household receives food stamps, temporary assistance, or a certain level of SSI.

HEAP offers an emergency benefit to those eligible who face a heat or heat-related energy emergency and do not have the resources available to resolve the emergency. These benefits are based on income, available resources, the number of household members and the fuel type.

HEAP also offers a benefit to eligible individuals and homeowners to repair or replace furnaces, boilers and other heating components necessary to keep the home's heating source working.

Benefit amounts are based on the cost incurred to replace or repair the participant's furnace, boiler or other primary heating components. Families can apply for HEAP benefits through their local Department of Social Services.

Information regarding this program may be found at www.otda.ny.gov/main/programs/heap.

F. Family Health Plus ("FHP")

Family Health Plus is a public health insurance program for adults who are aged 19 to 64 who have income too high to qualify for Medicaid. Family Health Plus is available to single adults, couples without children, and parents who are residents of New York State and are United States citizens or fall under one of many immigration categories.

Family Health Plus provides comprehensive coverage, including prevention, primary care, hospitalization, prescriptions and other services. There are minimal co-payments for some Family Health Plus services. Health care is provided through participating managed care plans.

The amount of income an individual and family can have and still be eligible for Family Health Plus depends upon how many people are in the family.

Information regarding this program may be found at www.health.state.ny.us/nysdoh/fhplus/index.htm.

It should be noted that these programs have specific income, assets and other requirements that affect eligibility. It is important to regularly check the websites referenced for enrollment and pertinent information to access the programs.

In the second part of this series, I will explore how the establishment of a Special Needs Trust may affect these benefits and how to effectively plan for your client taking into consideration the importance of an individual's need to access the benefits.

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The Intersection Between Veterans Pension Benefits and Medicaid

By Felicia Pasculli

In previous columns, I have emphasized the importance of a client's status as a veteran, informed the elder law bar about the availability of compensation and pension benefits to veterans and/or their survivors, and cautioned elder law attorneys regarding the drafting of Medicaid Intentionally Defective Grantor Trusts (MIDGT) and Supplemental Needs Trusts for clients otherwise eligible for the Department of Veterans Affairs (VA) pension program. I would like to use this column to further explore the relationship between Medicaid eligibility and eligibility for a VA pension, reiterating part of my prior column which appeared in the Winter 2010 issue of *Elder Law Attorney*.

Both the VA and Medicaid have income and resource eligibility requirements. Countable income, called Income for Veteran's Affairs Purposes by the VA, includes the annual income of the veteran, the annual income of the veteran's spouse, and the annual income of any dependent child of the veteran.[1] Income deductions and exclusions include: welfare; proceeds of fire insurance policies or other casualty loss payments; profit from the sale of property other than in the course of business; interest received from the redemption of savings bonds; and unreimbursed medical expenses. Unreimbursed medical expenses may include payments to caregivers, including those made to children under the auspices of a personal services agreement.[2]

For eligibility purposes, Medicaid only considers income that is available to the applicant.[3] Unlike the VA, it permits "spousal refusal." Once spousal refusal is asserted, the refusing spouse's income cannot be deemed to be available to the applicant spouse.[4] There are also exempt income categories which can be found at 18 NYCRR § 360-4.6(a). If an individual applicant's income exceeds the allowable level, the applicant can transfer his or her excess income to a pooled income trust. Since 2005, the New York State Department of Health has specifically allowed the use of such trusts for the excess income of disabled individuals age 65 and over.[5]

Briefly, the VA defines resources as the "corpus of the estate"[6] and uses a national rule of thumb that allows the claimant no more than $80,000 in assets, excluding the personal residence. For eligibility of the VA pension benefits, it must be clear that a claimant has relinquished all rights of ownership, including the right to control property. Therefore, MIDGTs may be utilized during planning for eligibility of the VA pension as they are for Medicaid planning. The VA's General Counsel has argued that property and income will not be countable as belonging to the claimant unless: 1) it is actually owned by the claimant; 2) the claimant possesses such control over the property that the claimant may direct it to be used for his or her benefit; or 3) the funds have actually been allocated for the claimant's use.[7] On the other hand, New York State Medicaid counts resources as cash or other property that can be readily converted to cash, excludes the personal residence in a community case, and has a present resource cap of $13,800.

Medicaid employs a "look-back" period for the purposes of determining eligibility for nursing home care benefits.[8] However, New York does not have a look-back period when applying for community Medicaid. Similar to Community Medicaid, the VA does not employ a "look-back" period. An elder law attorney must be aware of the interplay between VA and chronic care Medicaid benefits, similar to the interplay between transfers to qualify for community Medicaid and transfers within the five-year look-back period when applying for chronic care Medicaid.

According to New York State's Medicaid Income Disregards Chart, for disabled adults and those age 65 and over, Medicaid excludes from eligibility and post-eligibility income determinations the following: 1) the portion of the VA pension that constitutes Unreimbursed Medical Expenses (UMEs); and 2) the portion of the VA pension that constitutes Housebound or Aid and Attendance enhancements. Also, for nursing home claimants on Medicaid, the reduced (limited) $90 VA pension is disregarded.[9]

Caveat—this reduction does not apply to claimants who are receiving care in New York State Veterans Homes. Pension beneficiaries who are living in a State Veterans Home are exempt from this reduction. This exemption allows the qualifying veteran to receive his or her full pension award.[10]

How do these disregards actually work? Let's look at an example where the veteran has an annual income of $36,000. On its face, his income would disqualify him for both Medicaid and a VA pension. For VA pension eligibility purposes, the Maximum Annual Pension Rate (MAPR), used by the VA for a single veteran, is $11,830. The MAPR means a claimant cannot have income exceeding that rate and be pension-eligible. Of course, as discussed above, the VA allows claimants to deduct certain unreimbursed medical expenses from the MAPR, which could then render the applicant eligible. Special financial enhancements are added to the pension for greater disability, increasing the MAPR. If the claimant is "housebound" and is "substantially confined to the home or immediate premises due to a disability which is reasonably certain will remain throughout his lifetime," he is entitled to an allowance paid over and above the MAPR service pension rate. This would raise the pension rate to $14,457.[11] Or, if the claimant is "so helpless that he requires the aid of another person to perform the personal functions required in everyday living, or is in a nursing home, or blind," he will qualify for an allowance paid over and above the basic pension or housebound allowance. This allowance is called Aid and Attendance (A&A).[12] The present A&A rate would bring the MAPR up to $19,736.

Our veteran needs assistance with at least two activities of daily living and has to hire an aide to help him at home. The aide is paid $2,000 monthly. This is a UME. If this UME is deducted from the veteran's monthly income, the balance is $1,000. Because of the veteran's medical needs and his remaining income balance, the veteran is entitled to pension with the A&A allowance, or approximately $640 per month, the difference between the MAPR of $19,736 and his UMEs. But can he qualify for community Medicaid, and if so, what happens to the VA pension?

The income eligibility level for this claimant/applicant is $787 (the claimant is over 65 and disabled). In order to qualify him for community Medicaid, the applicant must join a pooled trust or contribute his overage toward his care. But how much of his VA pension will Medicaid count?

In this veteran's case, the portion of his pension that represents unreimbursed medical expenses is the entire amount, or $640 per month. Therefore, the pension would be disregarded by the Department of Social Services in calculating any income contributions toward care. With a monthly income of $3,000, the veteran would retain the $787 plus $640. The remaining income of $1,573 may be contributed to a pooled trust to help pay for the veteran's household expenses and other assistance.

Let's now explore an example where the veteran's monthly income is $1,000 and the veteran's level of the disability is such that he medically qualifies for A&A. The difference between his annual income (of $12,000) and the A&A MAPR is then $7,736. This would mean a monthly pension of approximately $645. Because the veteran receives the monthly pension amount of $645 as a result of qualifying for the A&A enhancement, that amount will be disregarded by Medicaid.

Endnotes

1. 38 C.F.R. § 3.23(d)(4) (2008); 38 U.S.C.S. § 1521(c), (h).
2. 38 U.S.C.S. § 501(a); 38 C.F.R. § 3.272 (2008).
3. Soc. Serv. L.§ 366(2), 3; 18 NYCRR § 360-4.3, 4.6(a).
4. Soc. Serv. L. § 366(3)(a).
5. 05 OMM/INF-1.
6. 38 C.F.R. § 3.275(b) (2008).
7. GC Opinion #73-91.
8. 42 U.S.C.A. § 1396(c)(1)(B).
9. MRG pg 177; 18 NYCRR 360-4.6(a)(2)(vii).
10. 38 U.S.C. § 55039(d)(1).
11. 38 C.F.R. § 3.351.
12. 38 U.S.C. § 1502(b).

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Practice Tips: Where's the Beef?

By Vincent J. Russo

Our clients want to know: "Where's the Beef?" They want solutions to their problems, and they want these solutions found quickly and inexpensively.

In these difficult financial times for our clients, we are working harder to maintain our practices. We are under significant stress to bring in new clients, maintain our fees, collect on our services and with all of this, provide the highest quality of service as our clients demand. Practice development is typically what we will focus on first, and I believe every effort should be made to bring in new matters from new clients as well as from existing clients. This article focuses on three tips to ensure that you continue to provide the highest quality of service that you can. It is my belief that there is no other choice—now and for the future. Quality of service is at the core of your elder law, special needs and estate planning practice.

Tip #1: Take on Ideal Clients

It is important for you to identify ideal clients for your practice: these are the clients who need your help, who can be helped by your counsel, and who will appreciate your advice and are willing to pay your legal fees.

Taking on clients who are not ideal clients can lead to unhappy clients, clients who make you unhappy to work for and ultimately clients who do not pay your fees. For example, one indicator is when a prospective client informs you that he was unhappy with his former counsel and you know that former counsel provides quality work. Worse yet is the prospective client who informs you that you are the third or fourth attorney that he is hiring for the matter at hand. Can it get even worse: how about the client who wants to hire you and at the same time wants to sue his former counsel?

Tip #2: Take on New Matters That You Are Competent to Handle

Take on matters that you can handle efficiently, effectively, which will create profit for your practice and enhance your reputation in the community. One of the leading sources of referrals is word of mouth. It is important that you continue to build on your reputation in the community.

With the stress of bringing in new matters, there is a temptation to take on work that you are not experienced in. Hence, you will expend more hours than are reasonable in light of the task at hand. For example, you take on a guardianship matter but have no experience handling guardianship matters. So, the petition you prepare is not accepted in New York Supreme Guardianship Part Suffolk County (even though it might have been accepted in New York County). Now you are spending more time fixing the petition and have additional travel time to and from your New York City office to Suffolk County. Ultimately, the Court will not approve fees for the additional time expended or will deeply discount your fees. You lost money handling the matter while you could have been working on another matter in a profitable manner or you could have used the time you spent on bringing in an ideal client.

"We are under significant stress to bring in new clients, maintain our fees, collect on our services and with all of this, provide the highest quality of service as our clients demand."

In another example, a prospective client is looking for you to represent him on the sale of commercial real property. You have experience handling residential real estate matters but not commercial matters. Even if you can make your way through the transaction, the time you expend may create a fee which is twice what other real estate attorneys would charge. Now your client is unhappy and will not pay your fee. Taking on these types of matters will only result in unhappy clients who will then tarnish your reputation in the community. In my opinion, it takes ten happy clients to counterbalance one unhappy client.

Remember, there is an opportunity to refer matters to an experienced attorney which can create a relationship that leads to cross-referrals or may result in a fee participation arrangement.

Tip #3: Maintain Competent Staff

Your staff (attorneys, legal assistants and administrative personnel) is the face of your law practice. The client experience in large part centers on your staff. You cannot afford to provide legal services that are unsatisfactory to your clients.

You must review your staff. As difficult as it is to make these decisions, if they are not performing at the level you desire, you need to immediately take steps to implement a training program. One suggestion in this regard is to think about bringing in outside consultants to train your staff or send them to external training.

If they are not performing at the level you desire and you have done your best to train them, you must look at whether it is time to replace that staff person with an individual who will be able to do the job you desire. There are many competent attorneys and staff who are seeking employment at this time.

In conclusion, it is my opinion that quality of service must come first; yes, even before practice development. It is the old chicken and the egg story. You lead by making sure that every client you serve has a good experience, and that they are happy with your legal services and staff. When you identify these ideal clients, obtain their testimonials, so that you can get back to focusing on practice development. Go forth boldly.

For more details on practice management and development, I refer you to "New York Elder Law and Special Needs Practice," by Vincent J. Russo and Marvin Rachlin (Thomson West).

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Excerpts from the Elder Law Section's E-News

Winter 2011

The E-News was submitted by Deepankar Mukerji, Chair of the Communications Committee, and Howard S. Krooks, Antonia Martinez, Co-Chairs

Medicaid Income and Resource Levels for 2011 Established

The New York State Department of Health established income and resource levels for 2011, which remained unchanged for Medically Needy applicants and recipients (SSI-related). Spousal Impoverishment standards also remained the same. Complete details can be found at the following link: http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/10ma026.pdf.

In addition, effective January 1, 2011, the substantial home equity limit increases from $750,000 to $758,000. (See GIS 10 MA/025). The complete transmittal can be found at: http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/11ma001.pdf.

New York Legislative Highlights in Review

Power of Attorney Legislation

Chapter 340 of the Laws of 2010 amends legislation making technical corrections to the Power of Attorney Revision Act effective September 12, 2010. The Power of Attorney Revision Act brought many changes to drafting and proper execution of a Power of Attorney. These include requiring that a principal authorizing an agent to make gifts in excess of $500 in the aggregate must sign a gifts rider witnessed by two persons and allowing a principal to appoint a monitor to oversee the agent's activities. The amendment permits prior properly executed POAs to remain in effect whereas the original Revisions Act revoked them.

No-Fault Divorce Act

Chapter 384 of the Laws of 2010 allows for expeditious issuance of a divorce decree. It remains to be seen how this new law will affect the rate of divorce for elderly clients in a long-term care planning context.

Palliative Care and End-of-Life Counseling

Chapter 331 of the Laws of 2010 requires medical personnel to offer to provide information and counseling about palliative care and end-of-life care options to persons diagnosed with a terminal illness, allowing persons with a terminal illness to make informed decisions on whether to choose aggressive care or palliative care, which includes hospice and pain management. In the event the person is incapacitated and unable to make decisions, his or her health care agent or designated Surrogate under the New York Family Health Care Decisions Act will be provided with information and counseling on the patient's behalf.

New York Family Health Care Decisions Act

Chapter 8 of the Laws of 2010 allows family members, domestic partners and close friends, according to a hierarchical list, to make health care decisions in the absence of a Health Care Proxy. The decision maker under the FHCDA is the Public Health Law Surrogate. Under prior law, medical decisions could not be made on a person's behalf without clear and convincing evidence of the person's wishes. Very often, invasive treatment of an incapacitated patient would be administered—whether appropriate or not—due to the absence of a Health Care Proxy. The statute provides safeguards so that a medical professional or family member can object to a decision he or she disagrees with. Although the statute provides a prioritized list of relationships to designate the patient's decision maker, clients should still be encouraged to choose their health care agents using a Health Care Proxy, as the FHCDA is a default statute.

Federal Legislative Update

Obama Administration Reverses Position on Medicare End-of-Life Counseling

Three days after enacting a Medicare regulation that would have reimbursed doctors for addressing end-of-life planning with patients during their annual checkups, the Obama Administration reversed course and withdrew the regulation.

In 2010, during the nationwide debate over health care reform, when the proposal to encourage end-of-life planning touched off a political storm over so-called "death panels," Democrats dropped the provision from legislation to overhaul the health care system. On December 26, 2010, the *New York Times* reported on the front page that the Obama Administration would achieve the same goal by regulation, which was supposed to become effective on January 1, 2011. The new policy was laid out in a Medicare regulation, thus avoiding the legislative process.

If the regulation had not been reversed, Medicare would have paid doctors who advised patients on options for end-of-life care, including advance directives to forgo aggressive life sustaining treatment. The final version of the health care legislation, signed into law by President Obama in March 2010, authorized Medicare

coverage of annual physical examinations, otherwise known as "wellness visits."

According to the *Times* article, the Obama Administration said research showed the value of the end of life planning. "Advance care planning improves end of life care and patient and family satisfaction and reduces stress, anxiety and depression in surviving relatives," the administration said in the preamble to the Medicare regulation, quoting research published this year in the *British Medical Journal*.

Although the Obama Administration said that the reason behind the reversal was that the public did not have a chance to comment on the proposal, critics of the move suspected that the Administration feared the regulation would revive the specter of government "death panels" at a time when its health reform law is being challenged by Republicans.

Tax Act of 2010

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, which extends Bush-era income tax cuts and introduces new estate and gift tax provisions. Some of the most noteworthy of these are summarized below.

- Effective January 1, 2011, through December 31, 2012, the federal estate tax, gift tax, and generation skipping transfer tax are unified so that the exemption for all three will be $5 million for individuals and $10 million for married couples. The top rate for estates in excess of the exemption will be 35%.
- The exemption for married couples is portable, meaning that if one spouse dies without using the full exemption, the remaining amount can be added to the surviving spouse's exemption amount.
- The Tax Act of 2010 also allows heirs of decedents dying in 2010 the option of applying the 2011 exemptions, including the step-up in cost basis, to their inheritance, rather than modified carryover cost basis (with no estate tax).
- After 2012, the law "sunsets" bringing the federal exemption down to $1 million, with a 55% top tax rate.

Federal Health Care Reform: Tax Impacts of Federal Health Care Reform

A number of tax changes will take place over several years as a result of the federal health care legislation:

1. In 2011, in effect is a new uniform definition of "medical expenses" to be reimbursed from Health Savings Accounts, Medical Savings Accounts (MSA), and Flexible Spending Accounts (FSA), and Health Reimbursement accounts (HRAs). Over the counter medications will no longer be reimbursable and reimbursement will only be acceptable for prescription drugs and insulin. The penalty for nonqualified withdrawals is 20%. Persons 65 years and older are exempt from any penalty.
2. In 2013, there will be an increased excise tax of 2.3% on the sale of medical devices. It will be passed on to consumers. Exclusions for this new tax are eyeglasses, contact lenses, hearing aides and other consumer retail purchases.
3. In 2013, the FSA contribution maximum will be $2,500; previously the limit was the imposed by the employer. Clients should be advised to use the FSA accounts on expenses such as eyeglasses etc. or other expenses while permissible.
4. In 2013, high income earners will be taxed at higher rates. For example Medicare tax will increase by 9% on earnings in excess of $200,000 if single and $250,000 if married. Medicare tax of 3.8% will be imposed on net investment income, or modified adjustment in excess of $200,000 if single.
5. In 2013, itemized deductions will raise to 10% of the adjusted gross income.
6. In 2014, all individuals will be required to carry health coverage for themselves, their spouses and their dependents. Those who fail to carry "minimum essential coverage" will be subject to a tax penalty that will be collected by the IRS. The penalty starts at $95 and increases to $325 in 2015 and $695 in 2016.
7. In 2018, "Cadillac" health care plans will be taxed at a rate of 10% for deluxe services, which will be passed on to consumers.

Business Taxes

1. Starting this year and for the next four years, there is a credit of 35% of the insurance premium paid for small business that pay at least one-half of the cost of the health insurance. A small employer is a firm with 10 or fewer employees whose average annual compensation is less than $25,000.
2. In 2011, employers will have to report health care benefits on employees' W-2 forms.
3. In 2014, employers with 50 or more employees will be mandated to share responsibility for health care coverage or face an assessment payment.
4. In 2014, group health plans will have to permit dependents to remain covered under their parents' plan until they attain the age of 27.

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Are you fluent in another language (both reading and writing)? If so, please let us know. Your colleagues may have referrals for you. Many of our members have potential clients who speak languages other than English. These potential clients need attorneys who speak their language. If you can READ, WRITE and SPEAK another language, please let us know, so that we can include you in the database.

Please send your name, address, email, phone, and fax, as well as the languages other than English in which you are fluent, to Sharon Kovacs Gruer's assistant, Melinda, at MelindaY@SharonKovacsGruer.com.

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NYSBA

Elder Law Section

Fifth Annual *UN*Program

Hampton Inn & Suites - Poughkeepsie

APRIL 28-29, 2011

Executive Committee Dinner Meeting Prior on April 27, 2011 at 6:00 p.m.

Co-sponsored by the New York Chapter of the National Academy of Elder Law Attorneys

A UNIQUE EVENT THAT FEATURES SMALL GROUP BREAKOUTS DESIGNED TO ENCOURAGE OPEN AND FREE-FLOWING DISCUSSIONS ON ANY SUBJECT AFFECTING YOU AND YOUR PRACTICE. THIS IS UNLIKE ANY PROGRAM YOU HAVE ATTENDED.

Wednesday, April 27, 2011

5:00 p.m. - 6:00 p.m.	**Executive Committee Officers' Meeting - Cappuccino's Restaurant**
6:00 p.m. - 8:30 p.m.	**Executive Committee Dinner Meeting - Cappuccino's Restaurant**

Thursday, April 28, 2011 - The Fifth Annual *UN*Program

What is the *UN*Program and Who Should Attend?

***UN*Program:** The *UN*Program is your program. It really is all about you and the topics you wish to discuss. This is an opportunity to spend some time with other elder law attorneys. Imagine a day and a half of brainstorming, networking, exchanging ideas, gathering and sharing substantive information on all issues of Elder Law Practice.

YOU, the participant, determine the *UN*Program schedule and content. There is no "program"; there are no prepared presentations, or pre-selected speakers. The participants determine "facilitators" and topics. This is your chance to exchange ideas with your colleagues who are facing similar challenges. Topics are posted Thursday morning to start the program off. Thereafter, topics are posted based on your input and feedback.

POSSIBLE *UN*PROGRAM DISCUSSION TOPIC GROUPS MAY INCLUDE:

Estate Planning Under the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010

Effect of the New Estate Tax Law on the Elder Law Practice

How To Be Retained at an Initial Consultation

Developing a Client Maintenance Program

Best Time Management Techniques

Gauging The Productivity of Staff (or Measuring Your Value to Your Firm)

Creating Office Systems

Marketing Techniques and Ideas

Selecting Good Clients

How and When to Fire Bad Clients

Tracking Firm Profitability

Breaking Bad Habits Which Impede Productivity

Veterans' Benefits

Infant Compromise Orders and SNTs

Medicaid Liens and Recoveries

The Interplay of Medicare, EPIC, and Supplemental Health Insurance

Powers of Attorney and Statutory Gifts Rider

Income Only Trusts

Basics of Supplemental Needs Trusts

Article 17A vs. Article 81 Guardianships

Preparing Engagement Letters and Determining a Proper Fee for Services

Planning with Promissory Notes

Navigating a Fair Hearing

The Hudson Valley is home to the world renowned **Culinary Institute of America** and you will have the additional opportunity to network with your colleagues and continue the day's discussions during dinner at the Institute's acclaimed **Caterina De Medici Restaurant.**

(REGISTRATION IS LIMITED TO THE FIRST 80 REGISTRANTS.)

8:00 a.m. - 9:00 a.m.	**Registration - Please see hotel reader board.**
9:00 a.m. - 9:30 a.m.	**SESSION I - Orientation**
9:45 a.m. - 10:45 a.m.	**SESSION II**
11:00 a.m. - 12:00 p.m.	**SESSION III**
12:15 p.m. - 1:45 p.m.	**Luncheon - Boxed Lunches will be provided.**
2:00 p.m. - 3:00 p.m.	**SESSION IV**
3:15 p.m. - 4:15 p.m.	**SESSION V**
4:30 p.m. - 5:30 p.m.	**SESSION VI**
6:30 p.m.	**Dinner - Caterina De Medici, Culinary Institute of America** This dinner is included in your registration fee. Directions to the restaurant will be supplied by the NYSBA registration desk.

Friday, April 29, 2011

8:00 a.m. - 9:00 a.m.	**Registration - Please see hotel reader board.**
9:00 a.m. - 10:00 a.m.	**SESSION I**
10:15 a.m. - 11:15 a.m.	**SESSION II**
11:30 a.m. - 12:30 p.m.	**SESSION III**
12:30 p.m.	**Adjourn**

The *UN*Program format has been consistently acclaimed by elder law attorneys all over the country. Here is what some of your colleagues have to say:

"The *UN*Program is the single best educational/networking program bar none." - Howard Krooks

"Kudos to the Elder Law Section for thinking outside the box!" - JulieAnn Calareso

PROGRAM INFORMATION

This special program will not qualify for MCLE credits. It is intended to be an open, free-flowing discussion among attorneys. You will have the opportunity to meet in groups no larger than ten people, to ask questions, network, and share your thoughts with other participants.

Accommodations for Persons with Disabilities: NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Kathy Heider at 518-487-5500.

Lunch and Refreshments Sponsored by ElderCounsel

Hampton Inn & Suites
2361 South Road, Poughkeepsie
845-463-7500

The Hampton Inn & Suites is 4 miles from the Poughkeepsie Amtrak Station.
From I-84: Take Exit 13N to Rt. 9 proceed 9.5 mi, hotel will be on left.
From I-87: Exit 18 to NY 299 to Poughkeepsie, right to US-9W, merge to US-44E/NY-55E to Mid Hudson Bridge, merge to US-9S to Wappingers Falls, proceed 3.8 mi on Rt. 9, hotel will be on right.

Room rates are $119 per night, plus applicable taxes. Your overnight room includes a hot breakfast buffet each morning.

PLEASE NOTE: A LIMITED NUMBER OF ROOMS ARE BEING HELD. REGISTER QUICKLY IF YOU ARE PLANNING TO STAY AT THE HOTEL.

For More Information go to www.NYSBA.ORG/ElderUnProgram11

Editor's Note

Our authors strive for accuracy, but unfortunately sometimes we make mistakes during production. Mary Beth Morrissey's and David Leven's article in the Winter 2011 issue on "Hospice and Palliative Care in New York: Changing Landscape for Patients, Families and Providers in Health Decision Making," did not include their correction of the name of the New York State Office for People with Developmental Disabilities, formerly known as the Office for Mental Retardation and Developmental Disabilities, a name change that occurred after the enactment of the Family Health Care Decisions Act. In addition, corrected citations to New York Pub. Health Law, Art. 29-CCC, Nonhospital Orders Not To Resuscitate, in certain endnotes were omitted.

Acknowledgements

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Elizabeth Briand is a third year student at New York Law School, a member of the NAELA Student Chapter and of the NYSBA's Elder Law Student Law School task force;

Marrisa Trachtenberg is a third year student at SUNY Buffalo; and

Lauren Palmer is a third year student at Albany Law School, and a member of the NYSBA Elder Law Section Law School Task Force.

Gennady Zilberman is a third year student at Brooklyn Law School.

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