

Elder and Special Needs Law Journal



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

Inside

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- Domestic Abuse of the Elderly
- Funding Home Programs and Private Schools
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Special Education, Assistive Technology and Vocational Rehabilitation

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Message from the Chair

As I sit writing this message, the summer is drawing to a close. The leaves are starting to brown and the days are growing shorter. Although the weather is still warm, I have put my summer whites into storage and am looking forward to cool autumn days and nights. This time of the year always fills me with energy and enthusiasm. One of my favorite songs about this time of year is "September Song," written by Kurt Weill and Maxwell Anderson but memorialized most notably by both Frank Sinatra and Willie Nelson. It is a song about aging, as well as the season, and teaches us that life is short and that we must treasure every moment of it:



Oh, it's a long, long while from May to
December

But the days grow short when you
reach September
When the autumn weather turns the
leaves to flame
One hasn't got time for the waiting
game

Oh the days dwindle down to a pre-
cious few
September, November
And these few precious days I'll spend
with you
These precious days I'll spend with
you

Fitting words as I contemplate the short time that I will serve as Chair of the Elder Law Section and the goals I will try to accomplish during my term.

I am pleased to report that the summer meeting at Grand Cascades Lodge in Hamburg, New Jersey was a success thanks to the hard work of program co-chairs **Deep Mukerji** and **Donna Stefans**. Over 150 attorneys attended the program which took place over three days in a wonderful resort setting. Although the weather resulted in cancellation of the golf outing planned by golf chairs **Jeff Goldstein** and **Jeff Archer**, the sun crept out in time for a few intrepid golfers to get in a round. The tennis tournament, ably organized by chairs **Jeff Abrandt** and **Ellyn Kravitz**, was widely reported to have been exhausting yet exhilarating. The program featured lectures and panels on current issues in long term care insurance, the Marriage Equality Act and its impact upon elder law practice, practical tax topics, Medicaid managed long term care, hiring private home

care aides, strategies for optimizing social security benefits, agreements governing assisted living and nursing facility residents, unusual Medicaid eligibility issues, the Affordable Care Act and practical ethics, as well as the always popular Elder Law Update. All of that intense mental activity was relieved by dancing into the wee hours to the music of The Bernadettes, who played for one hour past their contracted time in order to accommodate the hip-shaping antics of a few stalwart, but nimble, elder law attorneys. No names will be mentioned in this article, but you can ask ex-officio photographer **David Kronenberg** to show you the evidence he has gathered for future blackmailers.

For the first time, our summer meeting included a morning meeting of the Friends of Bill W. Several people asked me afterwards what type of meeting this was and wanted to know why it was not described in more detail on the program brochure. William Griffith Wilson, also known as Bill W., was the co-founder of Alcoholics Anonymous, an international mutual aid fellowship which has over two million members who support each other to maintain sobriety. AA meetings held on cruise ships or professional conferences are often denominated as Friends of Bill W. meetings. As I mentioned in my first Chair message in the spring edition of the *Elder and Special Needs Law Journal*, I intend to highlight the availability of resources and assistance to our members who may be struggling with substance abuse, stress or mental health issues during my term as Chair. This effort will continue with a portion of the Fall meeting being devoted to resources available from NYSBA's Legal Assistance Program.

Our Executive Committee has voted to support my proposal that we change the name of the Elder Law Section to make it clear that our members also include Special Needs Planning in their practices. As could be expected whenever a large group of vocal and intelligent lawyers gather in one room, there was robust debate on exactly what the new name should be. Elder Law and Special Needs Planning? Elder and Special Needs Planning Law? Something else? It is hoped that a consensus will be developed and that a formal proposal will then be presented to the House of Delegates.

Our fall meeting took place on October 31 and November 1 at the newly refurbished Albany Hilton and focused entirely on special needs planning. Program Co-Chairs **Joe Greenman**, **Adrienne Arkontaky** and **Lisa Friedman** worked diligently on development of the program. The program offered 10 CLE credits. On Thursday, we had presentations on advanced drafting topics for supplemental needs trusts, advising the trustee of an SNT, settlements of personal injury actions and issues which arise in settlements of matrimonial actions when there is a child with a disability. Friday's

program included presentations on eligibility and access to services from OPWDD and OMH, the new Justice Center which investigates allegations of abuse and neglect of individuals with special needs, health care decision making for individuals with developmental disabilities, 504 issues in educational settings and criminal defense of individuals with disabilities.

All work and no play is no fun! Thus, our fall meeting also included a Halloween dinner at the Albany Institute of History and Art featuring Flame, a group of talented musicians from upstate New York who happen to have disabilities. The band was started in 2003 by a group of musicians affiliated with the Lexington-Fulton County Chapter of NYSARC. They have performed all over the U.S. and in Europe and have appeared at the Rock and Roll Hall of Fame, the House of Blues and have been featured in *People* magazine and on ABC TV's Good Morning America. Flame's goal is to change the world by inspiring people through their music. If you came to the Fall Meeting, I am certain that Flame inspired you to challenge misperceptions about individuals with disabilities. Check out their website: www.flametheband.com.

In September, the New York State Bar Association rolled out a substantial revamping of the Bar's website. The Elder Law Section formed a Technology Committee to examine our presence on the web and ways in which we can improve both the content and utility of our web resources.

As the legislature returns to session, we anticipate that we will once again be called upon to defend New York's seniors against renewed attempts to eliminate spousal refusal for community Medicaid. Moreover,

we will need to be diligent in monitoring implementation of New York State's new demonstration program which will require mandatory enrollment of all individuals who are dually eligible for both Medicare and Medicaid into new managed care plans. Enrollment of existing Medicaid recipients into these new plans, to be called Fully-Integrated Dual Advantage (FIDA) plans, is currently slated to begin in January 2014 in New York City, Long Island and Westchester County. I have appointed **Julie Ann Calareso** and **Matt Nolfo** to be Co-Chairs of our Annual Meeting program, which will be held at the New York Hilton Midtown on January 28. We plan to include a discussion of implementation of the FIDA transition at the meeting and will also be providing you with other exciting and informative programming.

Next spring, the Elder Law Section plans to bring back our ever-popular UnProgram. The UnProgram offers small group discussion groups regarding popular elder law topics pertaining to substantive legal topics as well as law office management. No CLE credits are offered but participants widely report that the UnProgram is one of the most enjoyable and useful programs ever attended. Dates and location will be announced shortly.

I am sure that the coming months will be filled with many challenges. I encourage all of you to join a committee, attend one of our many programs and to become involved in the work of our Section. Please feel free to contact me at fmp@walsh-amicucci.com if you have ideas you would like to share or would like to volunteer for one of our projects or committees.

**Warm Regards,
Fran Pantaleo**

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact *Elder and Special Needs Law Journal* Co-Editors:

David Ian Kronenberg, Esq.
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Adrienne J. Arkontaky, Esq.
The Cuddy Law Firm
50 Main Street, Suite 1000
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

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

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Message from the Co-Editors in Chief

As I say good-bye to the lazy, hazy days of summer, I have been reflecting on the upcoming anniversary of being appointed Co-Editors-in-Chief of the *Elder and Special Needs Law Journal* and the experience of overseeing this incredible publication.

For those of you who may not know, David and I take turns writing the message for the *Journal*. I always wonder whether folks can really tell who wrote the message. Those who know us, recognize the difference in our styles immediately. David is the quintessential taskmaster. His driving force helps to keep the *Journal* on schedule. In addition, his enthusiasm for seeking out ideas to generate more interest in this publication is inspiring to say the least. As I write this message, I can be sure David is already prodding our members to submit articles for the next edition. I want to take this opportunity to thank David for all his hard work and dedication. It is truly a pleasure to work with him and he has made this endeavor incredibly rewarding and fun!

In the words of my esteemed colleague—Now, let's get to our Fall issue...

Now, as you may remember, we announced the winners of the first *Elder and Special Needs Law Journal* Diversity Writing Competition in the summer edition of the *Journal*. Gloria R. Tressler, J.D., from Pace University of Law, and Logan M. Cook, J.D., from Albany Law School, submitted two articles included in this edition. "Status of Liberty Rights for Persons with Mental Retardation" will provide readers with much to debate and "Domestic Abuse of the Elderly: Observations, Explanations and Recommendations" is a sobering look at domestic abuse of the elderly and provides some innovative ideas to address this serious and very real problem. We congratulate both authors. Both Gloria and Logan have accepted our invitation to join fellow elder law and special needs practitioners at the Fall meeting in Albany as our guests. We welcome Gloria and Logan into our growing circle of practitioners dedicated to serving the needs of the elderly and those with disabilities.

Our section Chair, Frances Panteleo, takes the opportunity to provide some highlights from the Summer meeting and reminds us that Fall is a time of "energy and enthusiasm." I could not agree more. Many challenges are before us but with Fran at the helm, we are certainly ready to face them together.



As many of you may know, I believe that providing guidance on special education law is an area that many special needs practitioners are interested in and so we include an article on funding home programs written by Tracey Walsh. Tracey is a well-seasoned special education attorney who works zealously on behalf of children with special needs.



Robert Mascali provides us with a new column "The New York NAELA Niche." This update focuses on the proposed legislation to amend 42 U.S.C 1396p(d)(4)(A) by including that a competent adult with a disability along with a parent, grandparent, guardian or Court may establish a self-settled special needs trust. I would also like to take this opportunity to congratulate Howard Krooks, our former chair of the Elder Law Section, on his appointment as President of NAELA. He is a dedicated and compassionate advocate and I wish him much success in his new role.

We also include an overview of "Veterans' Benefits for the New York State Veteran" by Nina M. Daratsos. We thank Nina and the Veterans Committee for agreeing to submit an article for each edition of the *Journal*. A growing number of practitioners are striving to learn more about this complicated but very necessary area of practice.

Judith Raskin gives us an update on recent cases relating to very important issues that arise in guardianship proceedings along with other topics and Robert Kruger continues his "Guardianship News" column. We thank both of these regular contributors for their submissions.

And finally, Anthony Enea provides us with an article on a very important topic: "The Basics of Business Succession Planning." Family owned and operated businesses have unique needs and it is imperative that we have a general understanding of succession planning.

So, once again, our authors provide a diverse range of reading for you. We hope you find the articles interesting and thought-provoking. We welcome your comments and suggestions for future articles. Our goal for the coming year is to reach out to those of you who have not written for us and encourage you to do so.

Thank you for supporting this great publication!

Adrienne and David

Status of Liberty Rights for Persons with Mental Retardation

By Gloria R. Tressler

This article was originally written for a Mental Disability Law class at Pace Law School for the Fall 2012 term. Its format is that of a memo to a New York State senator.

TO: Senator John J. Bonacic
Judiciary Committee
New York State Senate

RE: Status of Liberty Rights for Persons with Mental Retardation in View of the Structure and Reporting Requirements of the SCPA Article 17-A Guardianship of the Person and Proposal for Reform



Issues Presented with Regard to the SCPA 17-A Guardianship

This memo has two purposes: to bring attention to some of the most important features of guardianship for people with mental retardation¹ in New York and to propose immediate changes to preserve the liberty rights of these citizens. The plenary nature of the Article 17-A

guardianship of the person impinges on the autonomy of the ward² with mental retardation. Additionally, the lack of any oversight requirement makes the Article 17-A guardianship insufficient to protect that same ward. This dichotomy of overwhelming control followed by laissez-faire or non-existent oversight needs to be corrected. This memo is a request to legislate changes in New York State's guardianship system that will put people who are born with mental retardation on the same plane as people who lose intellectual capacity later in life due to aging, mental or physical illness, or trauma. The right of liberty will be discussed in the context of how guardianship for people with mental retardation is justified, established, and monitored in the State of New York.

A framework for examination of the guardianship options in New York is provided in the following manner. First, an outline of how mental retardation is defined and determined will be presented. Second, there will be a discussion of the legislative history of New York State's development of the Surrogate's Court Procedure Act ("SCPA") Article 17-A guardianship and the Mental Hygiene Law ("MHL") Article 81 guardianship and the manner in which these are applied. Third, this memo will illustrate, through a discussion of case law, how relevant constitutional principles, specifically the Constitution's Fourteenth Amendment Due Process and Equal Protection Clauses, apply to New York's guardianship statute for people with mental retardation. Next, this memo will compare the SCPA 17-A guardianship to the MHL Article 81 guardianship with regard to tailoring and oversight. Finally, this memo will offer some

conclusions and proposals for reforming the statute regarding guardianship for people with mental retardation. The memo will specifically request that all procedures and protections of the Article 17-A guardianship be aligned with those of the Article 81 guardianship and that these two parallel New York guardianship schemes be abolished.

What Is Mental Retardation?

Here, the term "mental retardation" will be used because that is the current wording in the New York State guardianship statute. New terminology such as "intellectual disability" is appearing throughout the developmental disability and psychological literature but that is not a subject of this memo.³

The definition of "mental retardation" has changed substantially during the last century. The terminology has run from "idiocy," "feeble-mindedness," and "mental deficiency" to "sub-average intellectual functioning." Currently, the most common term is "intellectual disability"⁴ that is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills...[originating] before the age of 18."⁵

The common thread woven through the variety of definitions and norms is "functioning level." Functioning level comprises two main features: intelligence and adaptive behavior.⁶ Standardized intelligence quotient (IQ) testing is used to determine the intellectual functioning level or "intelligence" and an IQ score of seventy is now the cutoff to be considered retarded. This score is two standard deviations below the mean score of 100. The original cutoff score was only one standard deviation from the mean at eighty-five.⁷ This signifies that, with the newer criterion, fewer people will "qualify" for the label as well as the attendant services to which they may be entitled such as educational and vocational programs. Often these programs are offered only to those with intelligence quotients below seventy even if there is another significant disabling condition present such as autistic disorder. To complete the diagnosis, adaptive behavior testing is done to evaluate the person's "ability to produce and understand language (communication); home-living skills; use of community resources; health,

safety, leisure, self-care, and social skills; self-direction; functional academic skills (reading, writing, and arithmetic); and work skills.”⁸

The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), published by the American Psychiatric Association, had classified four different degrees of mental retardation: mild, moderate, severe, and profound. These categories were based on the functioning level of the individual.⁹ The newest version of this resource, DSM-5 (expected to be released in 2013), will use a new diagnostic label of “Intellectual Developmental Disorder,” and will not list mild, moderate, severe, and profound subtypes. Instead, it will list mild, moderate, and severe severity levels (a debate is ongoing about the inclusion of a profound or severe / profound level) with the focus on adaptive functioning rather than IQ test scores.¹⁰

Adaptive functioning refers to how well an individual copes with the common tasks of everyday life in three general domains (i.e., conceptual, social, and practical), and how well an individual meets the standards of personal independence and social responsibility expected for someone of a similar age, sociocultural background, and community setting in one or more aspects of daily life activities, such as communication, social participation, functioning at school or at work, or personal independence at home or in community settings. In IDD, an individual’s adaptive behavior limitations result in the need for ongoing support at school, work, or independent life. Wide ranges of skills are contained within the three domains of adaptive behavior. The conceptual domain involves skills in language, reading, writing, math, reasoning, knowledge, and memory, among others, used to solve problems. The social domain involves awareness of others’ experiences, empathy, interpersonal communication skills, friendship abilities, social judgment, and self-regulation, among others. The practical domain involves self management across life settings, including personal care, job responsibilities, money management, recreation, managing one’s behavior, and organizing school and work tasks, among others.¹¹

The prevalence of mental retardation in the general population of the United States is estimated to be 2.5 to 3%, with approximately 6 to 7.5 million individuals carrying this diagnosis.¹² Although there is no cure for mental retardation, “tailored supports...in the form of a set of strategies and services provided over a sustained

period [are intended to] enhance people’s functioning... to lead a more successful and satisfying life.”¹³

Legislative Histories of Article 17-A and Article 81 Guardianships

Until the late 1960s in New York State, an incapacitated person could be appointed a committee for his person under New York Mental Hygiene Law § 78 (MHL § 78) and a conservator for his property under New York Mental Hygiene Law § 77 (MHL § 77).¹⁴ Case law gave substance to the powers of the committee over the incapacitated person. For example, in the *In re Webber* case of a will proceeding in 1946, the Surrogate Court of Kings County, New York ruled on the power of the committee for a person who had been declared incompetent to be able to change her domicile. Even though the committee had the power to change her residence to the county in which she was hospitalized, the court denied the committee’s ability to change the ward’s domicile because such a change “would interfere with [her] restoration to [her] previous status in the event [she] should be cured of [her] affliction.”¹⁵ The court stated that domicile (except in the case of an infant) may only be changed by the intentional actions of the domiciliary or by the court in its function as *parens patriae*.¹⁶ Additionally, the dicta of this case discussed the role of the committee of the person: being responsible for “taking care of the physical needs of the incompetent, protecting his person, furnishing him with such medical and other care...as [was] required, and looking after his health and general welfare.”¹⁷ Furthermore, the “committee of the property must preserve and protect the property of the incompetent and deliver it over to him when he becomes competent or turn it over to his legal representative upon his death.”¹⁸

In 1969 the New York Legislature, by enacting Article 17-A of the Surrogate’s Court Procedure Act, created a separate guardianship solely for people with mental retardation.¹⁹ The 17-A guardianship “was designed by parents for parents to ensure that key decisions would always be made for their child.”²⁰ The 17-A guardianship was a simple replacement for the natural guardianship that a parent has for a minor child. That is, parents of children with mental retardation were afforded a way that did not entail too many bureaucratic obstacles to continue—legally—making life decisions on behalf of their children once those children reached the age of eighteen. The paperwork required for the 17-A guardianship can be done by a layperson without formal legal counsel. This guardianship has been promoted as the easier method of obtaining legal powers over a ward who has mental retardation that originates before the age of twenty-two.²¹ However, there is another method by which guardianship could be established over people with mental retardation—the MHL Article 81.

With a focus on people with “incapacity,” the New York Legislature replaced the former system of conservatorship and committee (MHL §§ 77 and 78) with the

MHL Article 81 guardianship in 1993. This new law's stated purpose was to address "diverse and complex" needs and to "afford the [incapacitated] person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life."²² There is no restrictive language that would prohibit guardianship under the Article 81 statute for people who, since their minority, have been incapacitated with mental retardation—such as those who currently seek guardianship under Article 17-A. Nevertheless, Article 81 was "directed primarily at adults who have lost or diminished capacity."²³ The Article 81 stands separate and independent from the Article 17-A—thereby producing a dual and overlapping system of guardianship. Typically, people seeking guardianship for a person with mental retardation are encouraged and expected to use the Article 17-A scheme, even though they would not be precluded from using the Article 81 guardianship.

An example of the purpose and some of the features of the Article 81 guardianship may be seen in the following case. The *In re Eggleston* case concerned the necessity of appointing a guardian for a sixty-nine-year-old man with signs of mental illness.²⁴ The lower court had dismissed the initial petition without a hearing, saying that there was no prima facie evidence of the need for guardianship. On appeal, the New York Supreme Court, Appellate Division, First Department discussed in dicta the flexibility provided by the Article 81 guardianship and the significance of requiring a hearing. The court noted that the hearing requirement for the Article 81 guardianship is an "understandable due process requirement in view of the liberty interest involved."²⁵ The court further illuminated the legislative purpose of Article 81 guardianships. The court stated

[T]he goals of article 81, enacted within the past decade...[are to] provide a more flexible scheme for aiding persons with impeded capacities than was available under the prior, more rigid, conservatorship provisions that were thereby replaced. A showing of complete incompetence is not required. Rather, the new statute contemplates evaluating whether a respondent has particular incapacities and, if so, tailoring more limited guardianship powers to fit those needs.²⁶

In its parallel existence to the Article 81 guardianship, the Article 17-A guardianship scheme has undergone its own changes through several amendments,²⁷ with each amendment moving it incrementally to resemble the Article 81 provisions. Nevertheless, even though the Article 81 guardianship may overlap with the Article 17-A guardianship in its basic protective purpose and Article 17-A has been amended to look more like Article 81, there has been no movement or intention by the Legislature to replace the "17-A guardianship" with the "81 guardianship."²⁸

Liberty Rights of People with Mental Retardation Supreme Court Cases

Some of the most well known rulings from the United States Supreme Court concern the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution to state statutes. The cases of *City of Cleburne, Tex. v. Cleburne Living Center*²⁹ and *Mathews v. Eldridge*³⁰ anchor this discussion of the constitutional issues that are raised by the Article 17-A guardianship.

In 1985, the Supreme Court ruled that the zoning ordinance of the city of Cleburne, Texas violated the Equal Protection Clause of the United States Constitution by requiring a special use permit for a group home for people with mental retardation, when it did not require the same permit for other facilities (boarding houses, hospitals).³¹ In *Cleburne*, the city required (and subsequently denied) a special use permit for a group home for people with mental retardation. The United States District Court for the Northern District of Texas upheld the ordinance, as written and applied, because the court ruled that "mental retardation was neither a suspect nor a quasi-suspect classification."³² Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the lower court's decision and ruled that mental retardation was a quasi-suspect classification; therefore, the ordinance required intermediate-level scrutiny.³³ This court reasoned that "in light of the history of unfair and often grotesque mistreatment of the retarded, discrimination against them was likely to reflect deep-seated prejudice...In addition, the mentally retarded lacked political power, and their condition was immutable."³⁴

The Supreme Court ultimately decided that there was no rational basis upon which to uphold the zoning rule and there was no legitimate government interest in allowing the City to avoid the discomfort that people in the community may have about living near those with mental retardation,³⁵ therefore invalidating the ordinance. However, the Court also held that people with mental retardation were not in a quasi-suspect classification for the purposes of judicial scrutiny—thus overruling, in part, the Court of Appeals.³⁶ Part of the Court's reasoning that suspect class status was not justified was that the "legislative response [due to] public support negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of lawmakers."³⁷ Interestingly, even though the Court ruled that people with mental retardation were not a quasi-suspect class, the Court nevertheless employed a heightened level of scrutiny and performed a thorough analysis of many factors when evaluating the City's ordinance of this case.³⁸ As the dissent made clear, "the Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."³⁹

The Supreme Court decided *Mathews v. Eldridge* in 1976. It is still considered the standard for evaluating whether due process has been violated, in terms of procedural protections, whenever “governmental decisions which deprive individuals of liberty or property interests” are at stake.⁴⁰ *Mathews* was a case concerning the administrative procedure used when Mr. Eldridge’s publicly funded disability insurance benefits were discontinued.⁴¹ Here, the focus is on the three-factor test that the Court announced in this case. The Court declared that in deciding what procedural protections are due, a court must consider

[f]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴²

New York State Cases

Over the past decade, several cases illustrated the conflicts and concerns over the protection of the liberty rights of people with mental retardation with reference to the Article 17-A guardianship. Some of these specifically referred to the Supreme Court cases *Cleburne* and *Mathews v. Eldridge*.

In a case that was a direct challenge to the constitutionality of the 17-A guardianship, the Supreme Court, Appellate Division, First Department decided the *Matter of Chantel Nicole R.* in 2006.⁴³ Chantel was a twenty-six-year-old with mental retardation. Pamela, her mother, had been declared Chantel’s guardian by a previous 17-A proceeding. Chantel’s mother was petitioning to modify the guardianship order to include powers over decisions concerning life-sustaining treatment.⁴⁴ Chantel, through her legal counsel (Mental Hygiene Legal Service), objected to this, saying “SCPA 1750-b impinges on her fundamental right to life and...without a procedure...to object.”⁴⁵ Chantel had clearly voiced her wish that her mother not be granted these powers; moreover, she argued that

[a] person of average functional ability is not required to show that a decision to pursue life-sustaining measures is based on any abstract understanding of life, death or modern medicine. [She also argued that] equal protection is violated by evaluating the validity of a mentally retarded person’s expressions of a desire to be kept alive when *at common law the expressed wishes to live of all others would be taken at face value*.⁴⁶

Chantel further argued that “the disparate treatment of mentally retarded persons and once competent persons lacks a rational basis.”⁴⁷ The court rejected the equal protection argument, declaring that the “Equal Protection Clause only prohibits the government from treating persons differently from others who are similarly situated, and mentally retarded persons are not similarly situated to those who were once competent.”⁴⁸ The court then invoked *Cleburne*, stating the “difference in treatment of discrete groups need only be rationally related to a legitimate government interest in order to pass constitutional muster.”⁴⁹ Additionally, the court stated that the “State has a legitimate interest in advancing the right of mentally retarded persons to be free from prolonged suffering.”⁵⁰ In its holding, the court denied Chantel’s request and sustained the Surrogate’s Court ruling that granted her mother the power over life-sustaining treatment decisions.⁵¹

In re Chaim A.K. was a case in which the parents of a twenty-one-year-old son who required frequent hospitalizations were requesting an Article 17-A guardianship to ensure their ability to oversee his medical care.⁵² The Surrogate Court of New York County rejected this request.⁵³ The court reasoned that, in this case, a 17-A guardianship would not be appropriate for this young man. Even though his cognitive testing had shown poor results that could qualify him as “mentally retarded,” the court’s own observation of, and conversation with, Chaim suggested “intelligence, reasoning, and communication skills.”⁵⁴ The Surrogate advocated that the family pursue an Article 81 guardianship because “the periodic reporting provisions and underlying autonomy-enhancing spirit of Article 81 keep...possibilities open to the appointing court, while 17-A, with its assumption of permanence and unchangeability, does not.”⁵⁵ This court also touched upon the 17-A’s potential constitutional issues by suggesting that “the wide range of functional capacity found among persons with diagnoses of mental retardation [and] the powers granted to provide protection to a 17-A ward may also need to vary, at least to meet the constitutionally mandated standard of least restrictive means.”⁵⁶

In 2002, the County Court of Tompkins County ruled in *In re Guardianship of B* that a mother, who previously had become guardian under MHL Article 81, could be authorized to consent to her adult mentally retarded daughter’s sterilization procedure.⁵⁷ Interestingly, the court held that the *daughter herself* had capacity to give informed consent to this procedure based on testimony that she had “progressed and matured since the time of the original order appointing a guardian,” and that “she understands the implications of her decision.”⁵⁸ Notably, this case points out one of the constitutional issues that arise from the dual system of guardianship in New York in its dicta. The court stated that “[t]he equal protection provisions of the federal and state constitutions would require that mentally retarded persons in a similar situation be treated the same whether they

have a guardian appointed under Article 17 A or Article 81.”⁵⁹ Further, in reference to *Cleburne*, it stated “there is no rational basis for saying the ability of a guardian for a mentally retarded person to consent to medical treatment of the ward should differ if the guardian is appointed under Article 81 rather than Article 17-A.”⁶⁰

The Surrogate’s Court of Broome County decided the *Matter of Derek* in 2006.⁶¹ The issue was whether the physician-patient privilege was applicable in a contested 17-A guardianship proceeding. The Court stated,

There is no rational reason why the respondent in a contested article 81 guardianship proceeding should be allowed to assert the physician-patient privilege while the respondent in a contested article 17-A guardianship proceeding cannot. Similarly, there is no rational reason why a respondent who is alleged in a guardianship proceeding to be developmentally disabled should have any different right to assert the privilege from a respondent who is alleged to be mentally retarded.⁶²

The Court reasoned in this case that if a “respondent against whom a proceeding for the appointment of a guardian is brought can assert the physician-patient privilege in one type of proceeding, but not the other.... [t]hat would be unequal operation of the law violative of due process.”⁶³ It held that the “physician-patient privilege applies in contested [A]rticle 17-A guardianship proceedings just as it does in contested [A]rticle 81 proceedings.”⁶⁴

In the case of *Matter of Mark C. H.*,⁶⁵ the Surrogate expressed concerns with the constitutional issues of the Article 17-A guardianship. The court stated that “due process guarantees are implicated when a protected interest is at stake. Guardianship directly infringes on liberty and property issues; as Congress noted...despite the seemingly benevolent nature of the guardianship system.”⁶⁶ In strongly worded dicta, Surrogate Glenn stated,

Utilizing the “what process is due” analysis of *Mathews v. Eldridge*...it is clear that a court granting guardianship of the mentally retarded...must require periodic reporting and review—or “monitoring”—by 17-A guardians of the person...[that] is inherent...in the Fourteenth Amendment guarantee of due process of law.⁶⁷

Comparison of Article 17-A with Article 81

Guardianships of the person under either Article 17-A or Article 81 offer the power to affect all parts of the life of the “ward” or “alleged incapacitated person” (“AIP”).⁶⁸ The areas over which a guardian may be granted powers are a.) personal care or assistance, b.)

social environment and social aspects of life, c.) travel, d.) driving, e.) access and release of confidential records, f.) education, g.) application for government and private benefits, h.) consent to routine or major medical or dental treatment, and i.) choosing where to live.⁶⁹

The first major difference between these two guardianship schemes is demonstrated by the plenary grant of power authorized by the Article 17-A guardianship of the person. This is a grant of power over all aspects of ward’s life.⁷⁰ However, even though the 17-A guardianship is predicated on the idea that the person with mental retardation never had capacity to make important life decisions, there are occasions when it fails to provide enough power to the guardian. For example, in the case of *Matter of John J.H.*, wealthy parents of a young man with autism applied for permission to sell their son’s artwork and donate the proceeds to charity.⁷¹ The Surrogate denied the parents’ request, noting that the “SCPA article 17-A is a blunt instrument which allows for none of the tailoring that characterizes our adult guardianship statute.”⁷² The Surrogate indicated that the ability to make gifts on behalf of John could only be granted under the Article 81 guardianship scheme by showing “in the absence of capacity and consent, a competent, reasonable individual in the position of the incapacitated person would be likely to perform the act or acts under the same circumstances and the incapacitated person has not previously manifested a contrary intention.”⁷³

The Article 81 guardianship grants powers to the guardian based on a searching examination of the strengths, needs, and preferences of the alleged incapacitated person by requiring a hearing that may include witnesses and evidence.⁷⁴ In contrast, at the discretion of the court, the 17-A guardianship can be established without a full hearing and the petition itself only asks for general disclosure about the functioning level of the proposed ward.⁷⁵ Undeniably, the New York Legislature made protecting the autonomy of the incapacitated person a key component of the Article 81 procedure.⁷⁶ The Legislature noted that “the needs of persons with incapacities are as diverse and complex as they are unique to the individual” and thus allowed for a “tailoring” of powers that are granted to the guardian and retained by the ward.⁷⁷ This type of protection is notably lacking with the 17-A.

Some ability to modify a 17-A guardianship order was provided by the addition of SCPA § 1755 in 1989. This statutory provision allows the ward (if over eighteen) or any person to ask the court for a modification of the guardianship order. The court “shall so modify the...order if in its judgment the interests of the guardian are adverse to those of the [ward] or if the interests of justice will be best served.”⁷⁸ An example of the application of this statutory provision is provided by the facts of the case of *Matter of Mark C. H.* that came before the Surrogate’s Court of New York County. In that case, Mark was an adopted son who was diagnosed with autism and profound mental retardation.⁷⁹ When Mark’s

adoptive mother passed away, she left him a \$3 million estate in trust. She had also elicited a “death bed promise” from her attorney to look after Mark that elicited the attorney’s petitioning for a 17-A guardianship.⁸⁰ However, this petition was not made until two years after Mark’s mother passed away. During that time no one had visited Mark and no funds had been spent on his behalf.⁸¹ The Surrogate’s dicta indicated her desire to ensure the proper use of resources for the ward by his guardian. She noted that “under the present statutory scheme [appointing a 17-A guardian] is the end of the court’s involvement; ...[the court] will never again have an opportunity to ascertain either the ward’s continuing need, or whether her best interests are being served.”⁸² Therefore, the Surrogate ordered reporting requirements by the guardian and ruled that “article 17-A should be read to include a requirement of yearly reporting...and a review by the court.”⁸³

It should also be noted that another provision—SCPA § 1758—offers *post*-appointment powers to the court.⁸⁴ Since the court retains jurisdiction over the ward after guardianship is granted, the court may “take of its own motion...such steps and proceedings relating to [the ward’s] guardian...as may be deemed necessary or proper for the [ward’s] welfare.”⁸⁵

The second major area of distinction between the 17-A and the 81 guardianship schemes is in reporting and oversight. The Article 17-A guardianship of the person does not require any reporting to the court; therefore, there is no judicial oversight of the guardian and ward once the 17-A has been ordered, even though the court “retains general jurisdiction over the mentally retarded or developmentally disabled person.”⁸⁶ The Article 81 guardianship’s requirement of an annual report contrasts with Article 17-A’s silence on reporting.⁸⁷ These Article 81 reports are to include several types of information about the AIP, such as the person’s current functioning level and condition,⁸⁸ suitability of current residential setting,⁸⁹ current plans for medical, dental, and mental health treatment,⁹⁰ and current social condition.⁹¹ Without such reporting required for the Article 17-A, how does the Surrogate Court—which retains general jurisdiction over the ward—have any knowledge of the quality of the ward’s life once the guardianship order is signed?

An example of the importance of a reporting requirement and oversight by the court can be seen in the facts of *In re Stevens*.⁹² The best interests of a profoundly mentally retarded daughter were of great concern to the Surrogate in this case that involved a biological mother and stepfather who were petitioning for a 17-A guardianship.⁹³ Because of the advanced age of the parents and the severe disabilities of their daughter, the Surrogate granted guardianship only to the mother and denied the stepfather’s application to be the standby guardian. In dicta, the Surrogate wanted, upon the eventual death of the mother, to compel potential guardianship candidates to come forward and be evaluated by

the court *at that time*.⁹⁴ In addition, the court would then get an opportunity to re-evaluate the situation of the ward.⁹⁵ As stated by the Surrogate,

SCPA Article 17-A provides for no continuing oversight of guardians of the person once they have been appointed. In the event of [the mother’s] death or incapacity, even many years in the future, the court would have no assurance that [the ward’s] best interests could be served by the guardianship of her stepfather. Accordingly, the request for co-guardianship is denied, without any finding that [the stepfather] is, in any way, unsuitable or undeserving.⁹⁶

Case law supports Article 17-A as a relatively simple and inexpensive way to establish guardianship because it can be done without an attorney. A petitioner for guardianship has access to either electronic “do it yourself” forms from the New York State Unified Court System’s website or hard copy forms from the clerks of the Surrogate’s Court.⁹⁷ This simplified procedure was noted in the case of *Matter of Forcella*, in which the New York Supreme Court ruled that it was not appropriate to appoint an Article 81 guardianship for a six-year-old with severe disabilities when the parents were seeking to make financial investments and to receive some compensation for caregiving duties with their child’s money.⁹⁸ The court in this case indicated that the interests of the child would be better served through an Article 17-A guardianship until he reached the age of eighteen. At that time, an assessment could be made on whether the young man still required the Article 17-A guardianship or would qualify for the Article 81 guardianship.⁹⁹ A footnote in *Forcella* includes the court’s observation that there are “some procedural and cost advantages to a proceeding under SCPA article 17-A as compared to Mental Hygiene Law article 81.”¹⁰⁰ This footnote also quotes a publication by the New York State Developmental Disabilities Planning Council that “Article 17-A is usually the quicker and less expensive route to the appointment of a guardian.”¹⁰¹

Analysis of the Article 17-A Guardianship

Liberty, as defined by the Supreme Court of the United States, is

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children...and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁰²

When plenary guardianships, such as the Article 17-A guardianship of the person, remove independence and autonomy for making one's life decisions, both the process and the result should be examined. The above study of cases and review of statutes outline two critical areas that are problematic for the Article 17-A guardianship scheme: the lack of tailoring and the lack of reporting and oversight.

The plenary—all or none—nature of the 17-A reflects the belief that all people with mental retardation are of the same intellectual and adaptive functioning level and have no independent thought or reasoning. As stated above in the *Chaim* case, “the wide range of functional capacity found among persons with diagnoses of mental retardation [and] the powers granted to provide protection to a 17-A ward may also need to vary, at least to meet the constitutionally mandated standard of least restrictive means.”¹⁰³ In practice, least restrictive means may be translated to “retaining the greatest amount of liberty” to the disabled person.

Perhaps because the Article 17-A guardianship was intended to be an extension of parental authority after the ward became an adult,¹⁰⁴ this may explain why there were no accommodations for tailoring of guardianship as there are under the Article 81 guardianships.¹⁰⁵ One might assume that a “parent” does not need to be limited in his power to make decisions for his child, even once that child is a legal adult. However, as the respondent in *Chantel* eloquently said when faced with the possibility of her mother getting authorization to make end-of-life decisions for her, “equal protection is violated by evaluating the validity of a mentally retarded person's expressions of a desire to be kept alive when at common law the expressed wishes to live of all others would be taken at face value.”¹⁰⁶

Moreover, the lack of any oversight requirement makes the 17-A guardianship insufficient to protect the well-being of the wards created under its auspices. The drafters of Article 17-A may have overlooked reporting requirements because (parents being the initial intended guardians under this scheme)¹⁰⁷ there was no perceived need for a parent to report on a child's condition. In essence, the Legislature took all decision-making liberty away from people that it deemed were most vulnerable and then shuffled them out the courtroom doors with no oversight protections in place. As the Surrogate pointed out in the dicta of the *Mark C. H.* case “it is clear that a court granting guardianship of the mentally retarded... must require periodic reporting and review—or “monitoring”—by 17-A guardians of the person...[that] is inherent...in the Fourteenth Amendment guarantee of due process of law.”¹⁰⁸

The dual system of guardianship laws of New York perpetuates the notion that people who were functionally competent at one time and then became functionally incompetent to make important life decisions are somehow *not similarly situated* to people who were never

considered functionally competent to make these decisions.¹⁰⁹ To make a finer point, at the moment in time that a person with advanced dementia needs the appointment of a guardian of the person, is not this person with dementia *situated exactly the same*, not just similarly, to the person who was born with mental retardation? Simply because a person may have had the opportunity earlier in life to express his wishes about important life decisions does not negate the fact that he has entered a stage of his life where he can no longer express such things. Yes, it is helpful to know what a person thought about issues such as end-of-life care, but certainly not all life decisions remain static—unchanged by his experiences or evolving views throughout his time on earth. In either situation—the person with mental retardation since birth or the person who acquired mental incapacity later in life—there may be no reliable way of ascertaining the astuteness of thinking processes or the accuracy of communications in order to determine the incompetent person's wishes. As stated in dicta from the *Derek* case “[i]n all three cases, mentally retarded, developmentally disabled, or incapacitated person, the ultimate finding to be made by the court is that the respondent is unable to manage his or her personal or property affairs because of a lack of capacity.”¹¹⁰

Given the current status of medicine and technology, persons with advanced dementia (who would be eligible for an Article 81 guardianship) and persons with mental retardation (who usually become wards under the Article 17-A scheme) may all be considered to have “immutable” characteristics that should make them a “suspect class” for constitutional purposes. Both populations have a long history of abuse and neglect even in modern society.¹¹¹ Both populations are voiceless on their own. Both populations tend to be housed away from the mainstream of society. As stated by the dissent in *Cleburne*, “ignorance, irrational fears, and stereotyping [have long] plagued [the mentally retarded].”¹¹² Any statutes that take liberty away from such people must be afforded a higher degree of scrutiny. This is especially true when the liberties taken away are linked to fundamental life choices such as where, how, and with whom one lives or what types of medical interventions will be taken.

Somehow, perhaps unconsciously, the New York 17-A guardianship law reflects deeply held views that people with mental retardation do not automatically deserve the full protection of personal liberties.¹¹³ They are treated as if they are part of a homogeneous group that always needs the judgment of someone else (i.e., a plenary guardian) to make personal decisions over important life events. As a society, we have allowed ourselves to believe that we are being helpful and fulfilling a parental role by permitting the appointment of others as plenary guardians for people with mental retardation. This could be true were it not for the fact that people with mental retardation are not a homogeneous group with identical abilities, ideas, and ambitions.

This analysis shows that the SCPA Article 17-A guardianship violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States by failing to protect the liberty rights of people with mental retardation to the same extent that the MHL Article 81 guardianship does. The theory of this memo is that whether a person is born or develops incapacity before the age of twenty-two, or becomes incapacitated after the age of twenty-two, should not dictate the extent of protections of liberty rights. These two groups are similarly situated at the point in time that they require a guardian of the person and therefore both groups deserve heightened scrutiny of guardianship statutes that affect them.

The SCPA Article 17-A guardianship has due process failings as well. Substantively, the 17-A has no guardian reporting requirements and no court review requirements, thus leaving the ward vulnerable to neglect and abuse.¹¹⁴ Removing the liberties from a person with mental retardation by the plenary guardianship of the person without a hearing and without a searching examination of the functioning capacities of the proposed ward violates procedural due process.¹¹⁵ There should be a more searching investigation into the specific areas of liberty that the person may be able to retain, just as New York's Mental Hygiene Law § 81.08 directs the Article 81 guardianship petitioner to specify the "particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated."¹¹⁶ It should also be noted that even though the Legislature has added SCPA § 1758¹¹⁷ to allow for the court to retain jurisdiction over the ward and SCPA § 1755¹¹⁸ to allow for modification of the guardianship order, the only way these changes are effective is if the court somehow becomes aware of the need for further oversight or modifications. In other words, unless, at the outset, the court is required to insist on meaningful reporting, and to follow it with careful review on a regular basis, the court would not be in a position to realize that the ward's situation, condition, or needs have changed. Therefore, SCPA §§ 1755 and 1758 do not add meaningfully to the 17-A procedure unless a court has prior warning or information to use these statutes to add provisions to an individual's guardianship order. Some courts have tried to solve the difficulties of the 17-A by reading requirements into the statute and ordering certain modifications, such as the reporting requirements added by the Surrogate in *Mark C. H.*¹¹⁹ This ad hoc tailoring, though welcome in the particular circumstance of an individual case, is not sufficient to protect the majority of people with MR who have become wards of the court under 17-A. Furthermore, there will be many judges who are not comfortable writing in their own "legislation," so to speak, because as one Surrogate states, "[a judge's reading into a statute in order to do justice] is inconsistent with general principles of statutory construction as well as the constitutional separation of powers."¹²⁰

The Article 81 guardianship takes an entirely different approach. Article 81 offers a least restrictive alternative within its guardianship scheme along with an oversight plan. The Legislature designed the Article 81 guardianship to provide more flexibility, or tailoring, than the previous "committee" (Article 78) over the person and to provide more protection than the traditional "conservatorship" (Article 77) over the person's property.¹²¹ As an example, a disabled person may retain the rights to make his own decisions concerning travel and education while his guardian is granted the powers to make decisions concerning financial matters and medical care.

A *Mathews v. Eldridge* analysis may be applied to the idea of making all New York State guardianships of the person follow the same procedure as the Article 81 does now. The private interest of the person with mental retardation is in maintaining as much liberty as possible and in avoiding the danger of the state's erroneous removal of those rights. The state interest is in its desire to "advance the right of mentally retarded persons to be free from prolonged suffering."¹²² The burden or cost to the state would be the additional time and expense to hold hearings and to provide trained examiner review of the annual guardian reports. Applying these factors, it should be apparent that the risk of loss of personal liberty greatly outweighs the state's interest or the cost burden.

Proposal for Legislative Reform

The difference between the Article 17-A and Article 81 guardianships with regard to the extent of the option to tailor, i.e., to select powers to grant the guardian and retain for the ward, is paramount in protecting liberty rights. The plenary nature of the Article 17-A guardianship is a lead blanket smothering the liberty rights of people with mental retardation. It disregards the possibility for any independent thought or decision-making ability by the ward. This legislation is not narrowly tailored to suit the protection needs of people with an immutable characteristic such as mental retardation. The State has no rational reason for continuing the Article 17-A scheme. Its treatment of people with mental retardation is overly broad in that it assumes all of these people are equally impaired. It is simultaneously too narrow in that it ignores the variety of abilities and capacities that people with mental retardation have. People with mental retardation are similarly situated to people who have lost intellectual capacity later in life. Using the words of Justice Marshall from the *Cleburne* case, "When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down."¹²³

The lack of meaningful reporting and review requirements with the Article 17-A guardianship is a sure threat to the physical and mental security of the wards. Certainly, the New York Legislature did not intend to put people with mental retardation in harm's way. Nevertheless, once a 17-A guardianship of the person has

been ordered, there is no further contact with the judicial system in New York. Without doubt, it should be at the top of our collective consciousness—as citizens of a country that holds the *individual* in such high esteem—that people who have been incapacitated since birth have an equal claim to liberty with people who have become incapacitated later in life. Alternatively, people with mental retardation should have the same level of protection of their liberty rights whether they become wards under Article 17-A or Article 81.

The proposal is a simple one. Do away with Article 17-A guardianship of the person. Establish one guardianship process in New York that looks at the individual and not at a label that is based on the source of incapacity or the IQ score. Guardianships of the person are threats to the personal liberty of *individuals* with mental retardation. As such, the guardianship statutes for *individuals* with mental retardation should be drawn as narrowly as possible and should reflect the important and compelling state interest of protecting the liberties of these citizens.

I thank you for your time and consideration of this important matter and look forward to hearing from you regarding your review of this proposal and potential legislative changes.

Endnotes

1. Throughout this article, for ease of discussion and writing purposes, references to people with mental retardation, including those whose diagnosis of developmental disability includes a mental retardation component, may be referred to as “people with MR.” Accordingly, the condition of mental retardation may be referred to simply as “MR.” This does not imply any equivalence between these diagnoses nor does it imply any uniformity among people with mental retardation or people with developmental disabilities. Indeed, a major point of this paper is to see each person individually.
2. “Ward” is a legal term of art referring to the person with mental retardation who is the subject of the Article 17-A guardianship.
3. *What Is an Intellectual Disability?* American Association on Intellectual and Developmental Disabilities (AAIDD), http://www.aaidd.org/content_104.cfm (last visited October 20, 2012). (Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior, and it originates before the age of 18.)
4. Jack Hourcade, ERIC Clearinghouse on Disabilities and Gifted Education (ERIC EC), The Council for Exceptional Children, ERIC EC Digest #E637, November 2002 (last visited October 21, 2012).
5. *What Is an Intellectual Disability?* *supra* note 3.
6. Jack Hourcade, *supra* note 4.
7. *Id.*
8. <http://medical-dictionary.thefreedictionary.com/mentally+retarded> (last visited October 20, 2012).
9. *Id.*
10. APA DSM-5, A 00 Intellectual Developmental Disorder, <http://www.dsm5.org/proposedrevision/pages/proposedrevision.aspx?rid=384#> (last visited October 21, 2012).
11. *Id.*
12. <http://medical-dictionary.thefreedictionary.com/mentally+retarded> (last visited October 20, 2012).
13. *FAQ on Intellectual Disability*, http://www.aaidd.org/content_104.cfm (last visited October 20, 2012).

14. Bill or revision notes § 4 (a)–(b) N.Y. Ment. Hyg. Law § 81.01 (McKinney 2012).
15. *In re Webber*, 64 N.Y.S.2d 281, 288 (Sur. Ct. Kings County 1946). In this case, the incapacitated person owned a home and held a legal domicile in Kings County. When she became a long-term patient in a hospital in Westchester County, her committees of property and person agreed to sell her house. Since Ms. Webber did not have capacity to intentionally change her domicile and a court had not adjudicated a change, her domicile remained in the county in which she became incompetent.
16. *Id.* at 285.
17. *Id.*
18. *Id.* at 284.
19. N.Y. Surr. Ct. Pro. § 1750 (McKinney 2012).
20. N.Y. Spons. Memo., 2003 Ch. 232.
21. N.Y. Surr. Ct. Pro. § 1750-a (McKinney 2012). In 1989, the scope of the Article 17-A was expanded to include developmental disability that originates before the age of twenty-two. Additionally, traumatic head (brain) injury was included with no limitation on the age at which this originates.
22. N.Y. Ment. Hyg. Law § 81.01 (McKinney 2012).
23. *In re Chaim A. K.*, 885 N.Y.S.2d 582, 587 (Sur. Ct. New York County 2009).
24. *In re Eggleston*, 757 N.Y.S.2d 24, 27 (App. Div. 1st Dep’t 2003).
25. *Id.*
26. *Id.*
27. Rose Mary Bailly, *Supplementary Practice Commentaries 2010*, N.Y. Ment. Hyg. Law § 81.01 (McKinney 2012).
28. *Id.*
29. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).
30. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court ruled that the Due Process Clause of the Fifth Amendment does not require an evidentiary hearing prior to termination of Social Security benefits.
31. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).
32. *Id.* at 437.
33. *Id.*
34. *Id.* at 438 (internal quotations omitted).
35. *Id.* at 448.
36. *Id.* at 442.
37. *Id.* at 445.
38. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985).
39. *Id.* at 458.
40. *Mathews*, 424 U.S. at 332 (internal quotations omitted).
41. *Id.* at 325.
42. *Id.* at 335.
43. *Matter of Chantel Nicole R.*, 821 N.Y.S.2d 194 (App. Div. 1st Dep’t 2006).
44. *Id.* at 195-96.
45. *Id.* at 196.
46. *Id.* (internal quotations omitted; emphasis added).
47. *Id.*
48. *Id.* at 198.
49. *Id.*
50. *Id.*
51. *Id.* at 200.
52. *In re Chaim A. K.*, 885 N.Y.S.2d 582 (Sur. Ct. New York County 2009).
53. *Id.* at 591.
54. *Id.* at 584.
55. *Id.* at 591.
56. *Id.* at 588.

57. *In re Guardianship of B.*, 738 N.Y.S.2d 528 (County Ct. Tompkins County 2002). A mother who was a guardian under the Article 81 statute petitioned to modify the guardianship order so that she could authorize a sterilization procedure for her 26-year-old daughter who was mentally retarded. In this case, the ward herself indicated her understanding of the significance of a tubal ligation and was capable of giving her own consent. The court allowed B. to give her own consent and also allowed her mother to get a modified guardianship.
58. *Id.* at 533.
59. *Id.* at 532.
60. *Id.* It should be noted that at the time of this case, the Health Care Decisions Act for Persons with Mental Retardation had not yet been passed. This Act allowed the optional authority to a guardian for any and all of the ward's health care decisions under SPCA § 1750-b.
61. *Matter of Derek*, 821 N.Y.S.2d 387 (Sur. Ct. Broome County 2006). This was a rare contested 17-A guardianship petition. A son, who has traumatic brain injury, paraplegia, and mental health issues after he had been assaulted, was contesting his parents' petition to become his guardians on the basis of him being declared developmentally disabled. The court decided that the physician-patient privilege should be upheld in Article 17-A guardianship proceedings just as in Article 81 proceedings.
62. *Id.* at 389.
63. *Id.* at 390.
64. *Id.*
65. *Matter of Mark C. H.*, 906 N.Y.S.2d 419 (Sur. Ct. New York County 2010).
66. *Id.* at 426.
67. *Id.* at 435.
68. "AIP" or "alleged incapacitated person" is a legal term of art referring to the person who is the subject of the Article 81 guardianship.
69. N.Y. Ment. Hyg. Law § 81.22(a) (McKinney 2012).
70. N.Y. Surr. Ct. Pro. § 1750-b (McKinney 2012). The provision to allow authority to make "any and all health care decisions" was added in 2002 as part of the Health Care Decisions Act for Persons with Mental Retardation. To authorize this power to the guardian, the examining physician or certified psychologist must indicate that the respondent to the guardianship petition is not capable of making these decisions (see Forms GMD-2A and GMD-2B).
71. *Matter of John J. H.*, 896 N.Y.S.2d 662 (Sur. Ct. New York County 2010). The court ruled that, due to the limitations of the 17-A guardianship scheme, it could not grant the power to guardians, whose son had autism and mental retardation, to sell his artwork and donate the proceeds to charity. It should be noted that John's family was quite wealthy and there were sufficient funds allocated for his future; therefore, the act of selling his artwork and donating the proceeds would not have deprived John of any needed source of monetary support.
72. *Id.* at 663.
73. *Id.* at 663-64. (Internal quotations omitted; quoting N.Y. Ment. Hyg. Law § 81.21 (McKinney 2012)).
74. N.Y. Ment. Hyg. Law § 81.11 (McKinney 2012).
75. N.Y. Surr. Ct. Pro. § 1754 (McKinney 2012).
76. N.Y. Ment. Hyg. Law § 81.01 (McKinney 2012).
77. *Id.*
78. N.Y. Surr. Ct. Pro. § 1755 (McKinney 2012).
79. *Matter of Mark C. H.*, 906 N.Y.S.2d 419, 420 (Sur. Ct. N.Y. County 2010).
80. *Id.* at footnote 1.
81. *Id.* at 420.
82. *Id.* at 428.
83. *Id.* at 435.
84. N.Y. Surr. Ct. Pro. § 1758 (McKinney 2012).
85. *Id.*
86. *Id.*
87. N.Y. Ment. Hyg. Law § 81.31 (McKinney 2012).
88. N.Y. Ment. Hyg. Law § 81.31(b)(5) (McKinney 2012).
89. N.Y. Ment. Hyg. Law § 81.31(b)(6)(i) (McKinney 2012).
90. N.Y. Ment. Hyg. Law § 81.31(b)(6)(iii) (McKinney 2012).
91. N.Y. Ment. Hyg. Law § 81.31(b)(6)(iv) (McKinney 2012).
92. *In re Stevens*, 851 N.Y.S.2d 66 (Sur. Ct. New York County 2007).
93. *Id.* at *5.
94. *Id.* at *6.
95. *Id.* at *6.
96. *Id.* at *5.
97. <http://www.courts.state.ny.us/courthelp/diy/guardianship17A.html> (last visited November 20, 2012).
98. *Matter of Forcella*, 726 N.Y.S.2d 243 (Sup. Ct. Suffolk County 2001).
99. *Id.* at 246.
100. *Id.*
101. *Id.*
102. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). A teacher in a Nebraska school was charged with the offense of teaching a foreign language, thereby violating a state statute. Because the statute only interfered with teaching a modern language and all other matters were not limited, the Supreme Court ruled that there was no "adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities." This case stands for the larger argument of the liberty of parents to raise their children as they see fit.
103. *In re Chaim A. K.*, 885 N.Y.S.2d at 588.
104. N.Y. Spons. Memo., 2003 Ch. 232.
105. N.Y. Ment. Hyg. Law § 81.22(a) (McKinney 2012).
106. *Matter of Chantel Nicole R.*, 821 N.Y.S.2d at 196.
107. N.Y. Spons. Memo., 2003 Ch. 232.
108. *Matter of Mark C. H.*, 906 N.Y.S.2d at 435.
109. *Matter of John J. H.*, 896 N.Y.S.2d at 665.
110. *Matter of Derek*, 821 N.Y.S.2d at 389.
111. *City of Cleburne, Tex.*, 473 U.S. at 461-62.
112. *Id.* at 464.
113. Paraphrased from conversation with Linda Fentiman, October 5, 2012.
114. *Matter of Mark C. H.*, 906 N.Y.S.2d at 430.
115. *In re Chaim A. K.*, 885 N.Y.S.2d at 588-89.
116. N.Y. Mental Hyg. Law § 81.08 (McKinney 2012).
117. N.Y. Surr. Ct. Pro. § 1758 (McKinney 2012).
118. *Id.* at § 1755.
119. *Matter of Mark C. H.*, 906 N.Y.S.2d at 430.
120. *Matter of John J. H.*, 896 N.Y.S.2d at 666.
121. N.Y. Ment. Hyg. Law § 81.01 (McKinney 2012).
122. *Matter of Chantel Nicole R.*, 821 N.Y.S.2d at 198.
123. *Cleburne*, 473 U.S. at 477.

Gloria Tressler has served in various capacities on several boards of non-profit organizations for people with developmental disabilities including president of the Oakland County (Michigan) Chapter of the Autism Society of America. She is a member of the NYSBA Elder Law Section and Special Needs Planning Committee and the WWBA Education Committee.

Domestic Abuse of the Elderly: Observations, Explanations and Recommendations

By Logan M. Cook

When one thinks of crimes commonly perpetrated against the elderly, elder abuse in its many forms immediately comes to mind, whereas domestic violence among the elderly usually does not. However, domestic violence among older adults is more common than one would think. This article explores the joint problems of elder abuse and late life domestic violence, including the prevalence of the problem, barriers to seeking help, available resources and their limitations, and what our justice system and communities can do to help.



A. Elder Abuse, Domestic Violence in Later Life Defined

Elder abuse and domestic violence in later life are inextricably linked. “Some experts view late life domestic violence as a sub-set of the larger elder abuse problem. Elder abuse, broadly defined, includes physical, sexual and emotional abuse, financial exploitation, neglect and self-neglect, and abandonment.”¹ According to the Wisconsin Coalition Against Domestic Violence, “domestic violence in later life occurs when an older person has been subjected to a pattern of coercive control and abuse by a family member or someone with whom they have an intimate, ongoing relationship.”² The National Committee for the Prevention of Elder Abuse (NCPEA) offers two other definitions. “Domestic violence grown old is when domestic violence started earlier in life and persists into old age, whereas ‘late onset domestic violence’ begins in old age.”³ Late onset domestic violence may occur because of a strained relationship or emotional abuse that got worse as the partners aged, and is likely linked to retirement, disability, the changing roles of family members, or sexual changes.⁴ “And yet, while elder abuse incorporates some of the features of domestic violence occurring with younger people, it is especially characterized by increased physical vulnerability due to age, changing mental abilities due to the increased incidence of dementia, undue influence, and financial abuse or exploitation.”⁵ The NCPEA also points out that some older people enter into an abusive relationship late in life.⁶

B. Prevalence of the Problem

The prevalence of domestic violence in later life has not been researched extensively. Perhaps this is because “it was not until the late 1970s that the problem was ‘discovered’ by the research community.”⁷ Until then, although it most definitely was in existence, elder abuse had not been defined as a public issue. Beginning in the 1990s, studies were undertaken to ascertain just how large of a problem elder abuse really was. “In 1990, the Subcommittee on Health and Long-term Care of the House of Representatives Select Committee on Aging estimated that one and one-half million elderly Americans are abused each year (an increase from one million in 1980).”⁸ With domestic violence specifically, “reports of domestic abuse against the elderly increased from 117,000 in 1986 to 241,000 in 1994.”⁹ This does not include all of the incidents of domestic abuse that went unreported. The House of Representatives Select Committee on Aging estimates that only one out of every eight cases of abuse is reported.¹⁰ A 2000 study found that only 26.7% of women reported physical assault by an intimate partner to the police. When asked to indicate all the reasons why they did not report (more than one response was permitted), 99.7% of respondents said that the police couldn’t do anything, 61.3% said police would not believe them, 34.8% wanted to protect the attacker, the relationship or children, and 32% did not want police or court involvement.¹¹

C. Victims of Violence

Women are the primary victims of domestic violence in later life.¹² Research indicates women are the victims in 90 to 95% of all domestic violence cases, and women are also the victims in approximately two-thirds of the reported elder abuse cases.¹³ “Although any elderly person may be the victim of abuse or neglect, the most likely victims are women of age seventy-five or older because they are more likely to be dependent on the abuser for care and protection.”¹⁴ Even when controlling for their larger proportion in the elder population, a National Elder Abuse Incidence Study (NEAIS) found that females were abused at a higher rate than males.¹⁵ Other than gender, common characteristics of victims are that they usually “have a past history of victimization, limited interpersonal coping skills, and excessive denial.”¹⁶ Victims are also commonly found to be “vulnerable, socially isolated, physically or cognitively impaired, and dependent on the abuser.”¹⁷ Finally, provocative behavior can lead to abuse. “Some elderly persons can be overly demand-

ing, ungrateful, and generally unpleasant. Their behavior can aggravate a stressed and burdened caregiver.”¹⁸

D. The Perpetrators

Similarities among perpetrators of domestic violence exist as well. The National Elder Abuse Incidence Study found that in 90% of elder abuse cases, the victim knew the perpetrator. Two-thirds of these known perpetrators were adult children or spouses.¹⁹ Characteristics common among perpetrators include “being dependent on the victim; having feelings of powerlessness, jealousy, or the fear of being abandoned; being selfish and entitled; having a substance use disorder or history of personal victimization; having limited intimate coping skills; and having poor self-esteem with accompanying depression.”²⁰ Another explanation for the abuse is that “[i]n some situations violence may be a manifestation of a mental or physical illness (e.g., Alzheimer’s disease) or an inappropriate combination of medications.”²¹

E. Types of Abuse

The term domestic violence entails many forms of abuse, all designed to exert power and control over the victim. Accordingly, victims may experience some or all of the varying forms of abuse—physical abuse, emotional abuse, financial abuse and neglect. Physical abuse “can include assault—putting the elderly in fear of violence—at one end of the spectrum, all the way to murder and mayhem at the other.”²² Developed at Beth Israel Hospital in 1986, the Elder Assessment Instrument defines physical abuse as “the infliction of physical pain or injury, physical coercion, or confinement against one’s will (e.g., being slapped, bruised, sexually molested, cut, burned, physically restrained).”²³ Abusers may also destroy the victim’s belongings and threaten to hurt pets or loved ones. The most obvious manifestations of physical abuse are bruises, welts, burns and fractures, but other indicators are venereal disease and difficulty walking or sitting. Sexual abuse exists under the umbrella of physical abuse, and includes forcible rape, molestation and unwanted touching. “Adults are not necessarily less susceptible to sex crimes as they age. Sexual abuse is motivated not by sexual desire, but by a desire to exert power and control over others and to humiliate and belittle the victim.”²⁴

Psychological or emotional abuse is the intentional “infliction of mental anguish.”²⁵ This form of abuse is intended to humiliate, intimidate and degrade the victim, and is often achieved through the use of verbal insults and isolation from family and friends. Abusers often yell at their victims, treat them like children, and threaten them with divorce, placement in a nursing home or suicide. Manifestations of psychological abuse include fear, depression, confusion, anger, ambivalence, hopelessness and insomnia.²⁶ Harassment should also

be discussed within the context of emotional abuse. Abusers frequently harass victims by stalking, threatening, and monitoring victims’ everyday movements, including their interactions with others (e.g., “checking up”). They may also deny the victim access to the outside world, including the telephone and mail.²⁷

Some abusers use money as a means to control their victims. Financial abuse or neglect refers to “the misuse or theft of money, property or material possessions or inattention to an older person’s possessions or funds.”²⁸ Oftentimes, abusers establish control of the victims’ finances, leaving the victims to depend on the abuser to pay their bills and take care of their basic needs. Abusers may interfere with their victims’ job or prevent them from working altogether; they may establish joint bank accounts with the victims, and may cash the victims’ Social Security or pension checks. Signs that financial abuse is occurring include complaints of hunger or lack of food, unexplained inability to pay bills, overinvolvement of a family member in financial affairs and unexplained withdrawals from bank accounts.²⁹ Other indicators to look for include recent changes in wills, bank accounts and power of attorney documents.

Neglect, defined as “consistently disregarding or ignoring the older person’s concerns,” can be broken down into two categories: active and passive.³⁰ “Active neglect is the refusal or failure to fulfill a caretaking obligation, including a conscious and intentional attempt to inflict physical or emotional distress on an elderly person (e.g., deliberate abandonment or deliberate denial of food or health related services).” Passive neglect is “the refusal or failure to fulfill a caretaking obligation, in the absence of a conscious and intentional attempt to inflict physical or emotional distress on an elderly person (e.g., abandonment or denial of food or other health-related services because of inadequate knowledge, laziness, infirmity, or disputing the value of prescribed services).”³¹ Manifestations of neglect include lack of personal care, signs of inadequate heating, lack of food and water, unclean clothes and bedding, lack of needed medication, and lack of eyeglasses, hearing aids, and false teeth.³²

F. Why Does the Abuse Occur?

Why does this abuse occur? Various reasons for elder abuse have been cited, including strain on caregivers, patterns of family violence, and drug and alcohol abuse. While elder abuse is often pictured as the tragic result of the combination of a stressed caregiver and a dependent victim, recent evidence indicates that neither caregiver stress nor victim’s dependence are essential factors leading to elder abuse. Elder abuse is often domestic violence which has graduated into old age.³³ Other reasons include the fact that “some family members or caregivers...hurt older people to exert power and control over the victim. These abusers harm

elderly people to get their needs met, believing they are entitled to use any means necessary to achieve their goal. As is true for abuse of younger battered women, abusers feel justified, thinking they have a moral right to control their victim.”³⁴ In some cases, abusive husbands or partners believe that women are responsible for taking care of them and responding to their every wish or desire.³⁵ In still other cases, abuse from adult children may be retaliation for ill treatment during childhood, or the manifestation of mental illness or drug and alcohol abuse. When it is adult children who are the abusers, “the situations that come to the attention of social service agencies and law enforcement generally involve an adult child who has a substance abuse problem or mental health issues. The parents become an economic resource, with the potential for violent interaction when they do not comply with the child’s demands. Add unresolved family conflicts or further addiction issues and the risk of abuse increases.”³⁶

G. Barriers to Seeking Help

As unique as each victim is, so too are the barriers they face in seeking help. The obstacles victims face in seeking help may be physical, emotional, financial or social in nature. “Older victims of abuse encounter many obstacles to living free from abuse...Terminating an abusive relationship is complex and difficult. Change of this magnitude often comes slowly and over time, especially for the elderly, who by virtue of aging, may already be experiencing many losses.”³⁷

With domestic violence in any age group, the most dangerous time for the victim is when he or she is leaving the abuser. “It is estimated that a battered woman is 75 percent more likely to be murdered when she tries to flee or has fled, than when she stays.”³⁸ This is a time when victims are at an increased risk of further harm, which is especially complicated by the fact that many elderly victims of violence do not want police involvement, for fear of getting their abuser in trouble. “An unwillingness to prosecute could follow from a competent older adult’s assessment that the present situation does not represent sufficient danger to his or her safety or will not escalate beyond the initial incident reported to the police. Or it may demonstrate an older person’s fear of retribution by the abuser, a sense of loyalty, or a need to protect the child abuser that overrides the older person’s survival instincts....In addition, elder abuse victims, like domestic violence victims in general, are often reluctant to report or press charges against their abusers when they are family members.”³⁹

Physical and emotional barriers may be discussed together. In her article “Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay,” Sara Buel details the reasons why an abuse victim may convince herself to stay in an abusive relationship. These reasons include not having an appropriate advocate, fear of retaliation,

financial abuse, isolation, medical problems, religious convictions, and the misguided belief of having no other options.

Not having an appropriate advocate is often an insurmountable obstacle to leaving an abusive situation. “When the victim lacks a tenacious advocate, she often feels intimidated, discouraged, and, ultimately, hopeless about being able to navigate the complex legal and social service systems needed to escape the batterer.”⁴⁰ A victim without an advocate often lacks the impetus to leave the current situation. It is imperative that there be someone to motivate the victim to leave, as well as alleviate his or her fears and provide the victim with the information and support system needed in a perilous situation.

Fear of retaliation is a legitimate barrier to leaving. “The acute trauma to which battered women are exposed induces a terror justified by the abuser’s behavior. The batterer has already shown his willingness to carry out threats; thus, the wise victim takes seriously the batterer’s promises of harming the victim... if the victim seeks help or attempts to flee.”⁴¹ The victim is in the unenviable situation of knowing exactly what the abuser is capable of doing, and thus can predict what form the retaliation will take. The thought of this often stops the victim from leaving and chancing further violence.

Financial abuse is also a common obstacle to leaving. In fact, “[f]inancial exploitation may be the most common type of abuse of vulnerable adults, even those with very low incomes. Even the standard Social Security protections of representative payees and direct deposit do not prevent persons with authority over vulnerable adults from draining their financial resources.”⁴² In many cases, the batterer controls estate planning and has access to all financial records, as well as makes all money decisions.⁴³ This is particularly troublesome for elderly victims who are already at an increased risk for financial abuse to begin with. The abuser may control all finances, including paying all bills, cashing all checks, and not allowing the victim access to any money at all. The abused may not even know how to manage his or her own finances. Also, living on a fixed income, elderly victims sometimes fear that leaving their abuser is not financially feasible, and will cause them to become impoverished.

The economic reality for many older women is a choice between continued violence or assured poverty. Some older abused women have no formal education or economic resources. Some may be unable to find gainful employment. Employed battered women may not earn enough to support themselves. Others may have no access to resources obtained during the relation-

ship. Some women may not be eligible for Social Security for their years of working at home nor be eligible for public benefits due to an appearance of resources.”⁴⁴

Additionally, “[o]lder persons may have less ability to recover from financial exploitation because of fixed incomes or short remaining life spans.”⁴⁵ They may depend on the abuser for food, clothing and shelter, or the converse may be true. In such case, the victim often does not want to leave the abuser for fear that the abuser will not be able to survive without them. Sympathy for the abuser is common.

Isolation also serves as an obstacle to leaving an abusive situation. “Victim isolation is typical... [i]solating the victim increases the likelihood that she will stay, for without safety plans and reality checks, it will be more difficult for her to assess her level of danger.”⁴⁶ Reality checks are provided by friends and family members, who are often the very people that the abuser seeks to isolate the victim from. Also, with age comes the chance that many of the victim’s friends and family have passed away. “Isolation is a potent tactic used against victims of all ages, but it can be particularly devastating to older victims. An older victim, who has been systematically and purposefully isolated for decades, finds that the sheer length of time that she has been without contact with others makes it that much harder for her to find assistance.”⁴⁷

Many of the elderly have medical problems, which puts them at a disadvantage when trying to get away from abuse. Medical problems may mean that the victim must remain with the batterer to obtain medical services. If the abuser’s insurance covers the family or he is the victim’s primary caretaker, the victim knows that without adequate care, her *life* also is imperiled.⁴⁸ Medical problems which require the victim to rely on the abuser for care often lead to a hopeless situation from which the victim can see no way out. The victims often have no one else to take care of them and that is the reason the abusive situation continues. Other times, it is the victim who provides care for the abuser. In this case, the victims stay because they do not know how the abuser will fare without them around. “Some women feel obligated to stay and take care of abusers with serious health problems.”⁴⁹

Religious and societal beliefs are still other reasons why abuse victims stay. In a study conducted by the Center on Aging of Florida International University for the National Institute of Justice (NIJ), religion was frequently mentioned by study participants as a barrier to leaving. “Although many stated that they had talked with clergy about their abusive relationships, for the most part, these women said that they had not received help that was particularly useful to them, if they had received any help at all. In some cases consultation

with clergy created a significant barrier to leaving the relationship and possibly all help-seeking activity.”⁵⁰ Victims are often encouraged by their spiritual leaders to remain in abusive relationships and avoid divorce. Divorce is seen as a religious taboo, which could lead the victim to believe that she would be shunned by her church community should she decide to divorce her abuser. Coupled with generational notions about the institution of marriage, religious beliefs often keep the victim from leaving. Elderly victims of domestic violence tend to hold traditional beliefs about marriage. They believe that even in the face of physical abuse they must stay.⁵¹ “Culturally, divorce is often not seen as a viable option and even when considered by the elder victim, family members often discourage it.”⁵² Also, older women may stay in an abusive relationship out of a sense of “responsibility for maintaining a happy family.” Ending the relationship may mean failing in (the victim’s) primary role.⁵³

Another commonly held belief among the elder generation is that family matters should remain within the family. “Most elder victims hold tenaciously to the belief that family problems are a private matter.”⁵⁴ In the aforementioned NIJ study, “repeatedly respondents observed that people of their generation did not like to air ‘dirty laundry.’”⁵⁵ Instead, that generation would prefer to handle things themselves, rather than have law enforcement involved in what they perceive to be a family matter. Many victims want a resolution to the problem without consequences for the abuser. “Most elder victims simply want the abuse to end, their families to remain intact, and to feel safe at home for their remaining years.”⁵⁶

Additionally, many victims have no knowledge of their options. “Victims with no knowledge of the options and resources logically assume that none exist. Few communities use posters, brochures, radio and television public service announcements, and other public education campaigns to apprise victims of available resources. It is no wonder that many victims are surprised to learn that help may be available.”⁵⁷ This obstacle also relates to isolation and lack of an advocate. If the abused do not have an advocate, they likely have no one to apprise them of the available resources. Similarly, when a victim is isolated, often the only contact she has is with her abuser. She does not benefit from participation in her community and communication with friends and family that could lead to her awareness of programs that could help her. Even if not isolated, the places that the elderly tend to frequent, such as churches, doctor’s offices and senior centers do not usually have information posted about help for victims of domestic violence or elder abuse. This stems from the fact that it is an often overlooked problem.

Still other barriers exist. The Center for Families, Children and the Courts states that:

older clients struggle with barriers that are both similar to those faced by younger victims and also different as a result of age and disability. For example, elder people are not typically used to seeking help; do not identify as domestic violence victims (or as elder abuse victims); are sensitized to putting other people's needs above their own; may have multiple health issues, including difficulty with mobility; may adhere to the strict rules of their religion that bar divorce; may need in-home supportive services that cannot be delivered in a domestic violence shelter; and may be male and not have access to many services.⁵⁸

Unique to elder victims is the fear of being placed in a nursing home, which is a frightening prospect to some. Some elders "are dependent on the batterer for care, and are more afraid of being placed in a nursing home than of remaining with a perpetrator whose abusive patterns they can more readily predict."⁵⁹ "Those abused often fear placement in unfamiliar surroundings and greater abandonment than they have already been subjected to, and they are often fearful even for their lives."⁶⁰

Another reason victims stay in abusive relationships is that they have had one (or more) prior unsuccessful attempts at leaving. It is important to "keep in mind that victims of domestic violence in later life may have tried to get help before without success. There could be any number of reasons: Maybe a shelter was unavailable or not appropriate for the victim's needs. Perhaps their abuser was not arrested or a restraining order was not enforced. It could be that the laws did not apply to the situation."⁶¹ Whatever the reason may be, the fact that the prior attempt was unsuccessful is disconcerting and will undoubtedly act as a deterrent to leaving again.

Lastly, family members may serve as obstacles to leaving. Although some victims are encouraged by their children to leave abusive relationships, still other children have begged the victim to stay in the relationship for their sake. Some children "create barriers by encouraging women to stay, believing that if they leave, the children may need to take some responsibility for their abusive fathers... Some may side with the batterers, believing the role as a wife and mother is to keep families together and do as they are told. Others may blame their mothers for provoking their fathers or collude with their fathers and use the same abusive tactics against their mothers."⁶²

H. Available Resources

As elder abuse has not been given the attention that other social problems such as child abuse have been given, the available resources and support systems are lacking. However, the consensus among scholars, advocates, and law enforcement and social services professionals is that the solution to establishing and operating successful elder abuse programs and services lies in taking a multidisciplinary approach.

Addressing the issue of domestic abuse among the vulnerable or elderly requires coordinating efforts across disciplinary lines...The overlap between domestic violence and domestic elder abuse is significant. Yet, far less attention has been paid to the older population of both victims and perpetrators of abuse. With an increased awareness and understanding of the dynamics underlying domestic elder abuse, practitioners, family members, social service personnel and other advocates can continue to improve the lot for the elderly experiencing or perpetrating domestic abuse in our communities and in our lives.⁶³

Programs specifically for victims of domestic violence and programs specifically for victims of elder abuse are uniquely situated to serve victims of elder domestic violence.

Domestic violence programs are likely to have skills and procedures in place to help many older victims of abuse. On the other hand, the elder abuse network / adult protective services systems have legal responsibility and authorities to protect vulnerable elders / adults. They have special skills for assisting victims with diminished decisional capacity or those who are unable to protect themselves from further abuse. They also have access to a number of supportive services for older victims.⁶⁴

The main agency entrusted with the task of handling elder abuse cases is Adult Protective Services, or APS. Adult protective service agencies were designed as "a system of preventive, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation."⁶⁵ In New York State, the services that APS provides include investigation and assessment of the adult's needs and risk for harm and

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Scenes from the Elder Law Section

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counseling for the victimized adult and their family. Adult Protective Services also provides advocacy and case management services, including arranging for medical and mental health assessments; applying for benefits and assuring coordinated delivery services; finding alternative living arrangements, including providing emergency room and board for up to thirty days; financial management services, including serving as representative payee; crisis intervention services, such as securing access orders, involuntary protective service orders and orders of protection; and long-term legal intervention, such as pursuing guardianship.⁶⁶

Referrals to APS can be made by contacting local county departments of social services. Pursuant to New York State Social Service Law, inquiry must be made into the facts of the referral within a reasonable time. This is usually within three days of the report, or twenty-four hours in the case of an emergency.⁶⁷ If the victim refuses help, which he or she has a right to do, APS cannot do much in the case of a competent adult except to “offer their services and try to convince the adult to accept help.”⁶⁸ “If an allegation of abuse is substantiated and the victim is capable of giving informed consent, APS can arrange for a wide variety of services including, but not limited to, medical, social, economic, legal, housing, home health, protective, and other emergency or supportive services.”⁶⁹ Specifically in cases of domestic abuse of the elderly, APS workers should be trained to recognize the symptoms of that particular form of abuse in the elder population. Knowing what to look for will be beneficial in identifying those who would benefit from their help. Also helpful is knowing what to look for in abusers. Since abusers tend to be manipulative, APS workers should be wary of those who do not let the alleged victim out of their sight and do not let the alleged victim speak for themselves. As the customary go-to agency for reports of elder abuse, Adult Protective Services can best serve victims of domestic violence in later life by coordinating with other agencies such as domestic violence shelters to provide optimum support. “Best practice dictates that domestic violence programs work with adult protective services and elder abuse staff collaboratively to provide services for older abused victims and individuals with disabilities. Sharing assets and resources ensures a coordinated, community response to family violence and prevents the squandering of resources and fragmentation... Recognition of the shared population is indeed a critical first step to enhanced safety and improved coordination.”⁷⁰

Domestic violence programs and shelters are another resource for older victims of domestic violence. “Domestic violence programs may be particularly appropriate for older persons who do not fit the intake criteria for adult protective services, but who need

help in addressing violence and abuse in their lives.”⁷¹ In addition to shelter services, domestic violence programs offer support, counseling, legal advocacy, safety planning and crisis intervention. They may also provide assistance in locating alternate housing, obtaining transportation, job training and applying for government benefits.

Unfortunately, domestic violence shelters do have shortcomings. Designed with young women in mind, many are ill-equipped to handle the older victim of violence. “Remedies such as transitional housing which are usually geared toward younger women and their children often don’t accommodate older people and may further isolate and leave elderly victims with no place to go if they do decide to leave an abusive situation.”⁷² Shelters do not commonly have the resources or staff necessary to assist a victim with medical needs, nor do they have programming designed with the older woman in mind. “Domestic violence and sexual assault service providers do not commonly experience working with older victims, and with funding cuts and waiting lists for services, it is difficult for these programs to focus significant attention on older victims, some of the most vulnerable victims of violence against women.”⁷³ Additionally, other community resources that may be geared toward the elderly are also not usually designed with the elder abuse victim in mind. Most of the caregivers or professionals encountered by elderly victims are not trained to recognize the dynamics of domestic violence and therefore their response is often insufficient or misguided.⁷⁴

Although many programs are geared toward younger women, still others accommodate victims of all ages. Safe Horizon, the largest victims’ services agency in the United States, offers help in the form of shelter services, counseling, support groups and legal assistance.⁷⁵ National organizations such as the Salvation Army and Catholic Charities offer domestic violence and crime victims’ services, and AARP offers information about elder abuse and ways to get help. Other state and national resources on late life violence include the National Domestic Violence Hotline, the National Center on Elder Abuse, the American Bar Association Commission on Law and Aging, and the National Coalition Against Domestic Violence.⁷⁶

In New York, the New York State Coalition Against Domestic Violence (NYSCADV) exists to “provide training, support, technical assistance and advocacy to local direct service domestic violence agencies.”⁷⁷ The mission of the New York State Office for the Prevention of Domestic Violence is “to improve New York State’s response to and prevention of domestic violence with the goal of enhancing the safety of all New Yorkers in their intimate and family relationships.”⁷⁸ Although NYSCADV does not provide direct services to victims, it does provide guidance and helpful resources.

Other available resources exist in the legal realm. Victims may choose to report their abuser to the police and have them criminally charged, go the family court route and pursue an order of protection, or both. Within the criminal court system in New York State exist specialized domestic violence courts. These specially designed courts promote swift, certain, and consistent responses to domestic violence; intensive monitoring to ensure offender compliance to orders of protection and a swift response to violators; judicial supervision of cases from arraignment through post-disposition when sentences include probation; judicial education on domestic violence issues; and court partnership with prosecutors, defense, probation, parole and other stakeholders.⁷⁹ Orders of protection may be sought in criminal court as well as family court.

Throughout the criminal case, specially trained victims' advocates assist victims of domestic violence. These advocates help victims through the course of their judicial proceedings, informing them of their rights as crime victims, setting them up with victims' assistance programs, and helping them obtain compensation through the New York State Crime Victims Compensation Program.⁸⁰ The victim advocate also serves as a primary contact for victims, creates safety plans, and coordinates housing, counseling, as well as other social services.⁸¹

Victims may also choose to pursue a case in Family Court, provided that the victim and offender are individuals related by blood or marriage, individuals who were formerly married, individuals who are unrelated but have a child together, or individuals who are or were in an intimate relationship.⁸² The manner in which an order of protection is obtained is through the filing of a family offense petition. If a family offense is found to have been committed, the court can order restitution for damaged property, medical expenses resulting from the abuse, and require the abuser to attend a batterer's intervention program and/or drug and alcohol counseling.⁸³

In the case of financial abuse, such as abuse of power of attorney, victims may choose to seek remedies in civil court. "Despite certain language in power of attorney documents, a wide range of legal remedies exist for addressing power of attorney financial exploitation. Remedies may include an action in tort for either damages (holding the agent liable) or return of property. Remedies may also include such actions as conversion, fraud or misrepresentation, breach of contract, or an action for accounting."⁸⁴ Due to the nature of financial abuse, victims may also need to execute new wills, powers of attorney and trust documents. Finally, a petition for guardianship may need to be filed in the case of an abuse victim whose competency is at issue, to both protect the victim from future abuse and look out for the victim's best interest in regard to any decisions

the victim cannot competently perform by himself or herself.

Although certainly not an exhaustive list, the resources discussed above—adult protective services, domestic violence shelters and programs, national and state agencies, and the court systems—are all valuable resources to the elderly victim of abuse.

I. What Our Justice System and Communities Can Do

In addition to providing orders of protection, there are many other ways our judicial system and communities can help elderly victims of domestic violence. With respect to our justice system, changes can and should be made. Suggestions include mandatory reporting for elder abuse crimes in all states, separate classification of crimes against the elderly (including domestic violence and related crimes), and the creation of specific courts for crimes against the elderly. Although mandatory reporting for elder abuse exists in most states, it is notably absent in New York. Passage of separate offenses for crimes against the elderly should also happen in the near future. To date, New York has amended its penal laws in at least one instance to include the crime of endangering the welfare of a vulnerable elderly person.⁸⁵ To affect real change, New York and other states should create or modify existing laws to allow for harsher penalties for offenders who perpetrate crimes against the elderly.

New York could also expand upon the creation of their specialized domestic violence courts by creating a subdivision in which elder abuse and domestic violence in later life are handled separately. These are issues that would surely benefit from the increased attention of one judge, specially educated on domestic violence, who sees the case all the way through from beginning to end and who effectively monitors the offender while ensuring the victims receive the assistance they need. We could also benefit from the use of case tracking systems, which may shed some light on the problem of elder abuse.

In addition, the introduction of an elderly hearsay exception should be considered for state evidence rules, as parents are often reluctant to attest to the abuse perpetrated against them at the hands of their children.

In the absence of independent, corroborating evidence or testimony, the only witnesses to these events are the parties themselves. An elderly hearsay exception must be adopted, as previously existed under Florida statutes. Such an exception would allow trustworthy, out-of-court statements to be admissible. A court hearing would be

held to determine whether there were sufficient safeguards to ensure the reliability of the statement before it was presented to a jury for consideration. This would provide a tool for prosecutors to protect such elderly parents from the commission of continued violence against them by their adult children.⁸⁶

Although most domestic abuse programs take a victim-centered approach, help for the abuser is often vital to a victim's compliance in accepting help. "Domestic violence advocates often resist the option of providing services to the batterer, on the grounds that finite resources should be targeted to the victim. In cases of elder abuse and neglect, however, it often is necessary to assist the abuser to ensure that the victim will accept services."⁸⁷

Our justice systems and communities should also heed promising practices that are happening throughout the United States.

Across the country there is increased recognition of victims of abuse in later life. Many communities are working collaboratively to improve safety and services for older victims. Some examples of promising practices include: Multi/Inter-disciplinary teams made up of professionals from a variety of fields that review specific elder abuse cases, local or statewide councils that focus on elder abuse, emergency shelters for older people, training for justice, health care and faith communities on the signs of abuse and interventions, task forces to train law enforcement, APS, civil attorneys, bankers and others about financial exploitation, and fatality review teams for elders...that meet to investigate the circumstances of a suspicious death to consider changes in the system's response to prevent future homicides or deaths.⁸⁸

Increased awareness of late life domestic violence and elder abuse can be achieved through several methods. As mentioned above, training on these issues should be given to various professionals who interact with the elderly, but the community at large should be educated as well. This can be done through the use of public service announcements, flyers, and television and radio advertisements. It should be taught in schools as part of the regular curriculum on domestic violence. In addition, elders themselves should be educated to empower and enlighten them on the subject, which will hopefully lead to increased knowledge of the services and options that are available.

J. Conclusion

What remains is that we are still learning about elder abuse and late life domestic violence, and as we learn, we will inevitably come up with better responses and design programs that will more effectively deal with these problems than those that currently exist. Although they will undoubtedly remain a problem for years to come, the solution to both elder and domestic abuse lies in increased education and awareness, support and empowerment of victims, and the expansion of existing resources.

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Logan M. Cook is a May 2013 graduate of Albany Law School, where she earned her J.D. with a concentration in Family and Elder Law. She is a member of the Chemung County Bar Association and the League of Women Voters. Logan can be reached at LoganMarieCook@gmail.com.

Funding Home Programs and Private Schools—Possible, Yes! Easy? Not Exactly

By Tracey Spencer Walsh

The needs of children with disabilities vary. Some children, particularly children with an autism spectrum diagnosis, require intensive and what can often be costly educational therapies and interventions. In the world of special education sometimes there is no appropriate program available within the school district, and an appropriate education can only be met in a private school that is specially designed to meet the unique needs of the child. At other times, there may be no school available to meet the child's unique learning needs, public or private, and a home program specifically tailored to meet the child's needs may have to be designed. Still, there are children whose needs simply cannot be met, either in a day school or home program, and the child requires a residential school. Certainly these types of decisions can be agonizing for parents, yet necessary to ensure that the child is appropriately educated.

What happens when the school district disagrees and refuses to provide or fund the educational program that is required for the child to be meaningfully educated? Parents may be left with no choice but to sue the school district because it failed to provide the child with a "free appropriate public education" (FAPE¹).

As a special education attorney representing the family, I am a parent's last resort. Truly, the last thing a parent with the stress of getting the right services for a child with a disability wants to do is hire a lawyer and enter the world of litigation. I am sensitive to that. What I also know is that by the time parents call me, they have already been jumping up and down, cajoling, pleading, and begging the school district to get the appropriate services in place for their child. Once parents know what their child needs but cannot access it, that is the time to consult with an attorney who focuses on special education law.

Under the Individuals with Disabilities Improvement Act ("IDEA") children with disabilities are entitled to a free *appropriate* public education. How is it determined what is appropriate for a child? Parents are advised to have their children evaluated privately, by a professional who is considered an expert in the area of disability suspected and recommend an educational program for the child. School districts are mandated under "Child Find"² to evaluate children in the area of disability. Often, the school district's reports do not include any recommendations by the professional who performed



the evaluation, and that is left open for discussion at the Committee on Special Education (CSE) meeting. If the parents disagree with the evaluation's findings, that is the time to have private evaluations performed (and under certain circumstances, the school district will reimburse the parents for the cost of the private and independent evaluations³). Parents may also decide to have private evaluations performed *before* the school district performs its evaluations. This can be a good idea (since many evaluative tests may not be repeated within a year) as it can help get a child the right services in place, sooner.

When parents disagree with the school district's educational program recommendations, they may choose to place their child in a private school and/or develop a home program that can meet their child's needs, and sue their school district for reimbursement for the cost of these programs.

Success in obtaining funding for private programs depends on three factors: (1) was the school district's recommended program and placement inappropriate to meet the educational needs of the child?; (2) is the parents' unilateral private program and placement "reasonably calculated" to meet the educational needs of the child?; and (3) did the parents cooperate with the school district, i.e., did the parents share all reports and evaluations, attend CSE meetings, and allow the school district to evaluate and observe the child?⁴ The sooner a parent consults with an attorney who specializes in special education law, the better chance they have to be successful in obtaining funding for their child's appropriate educational program.

Endnotes

1. See 20 U.S.C. § 1400 *et seq.*
2. The IDEA includes the Child Find mandate. Child Find requires all school districts to identify, locate and evaluate all children with disabilities, regardless of the severity of their disabilities. See 20 U.S.C. § 1412(a)(3).
3. See 34 C.F.R. § 300.502.
4. See *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. at 369-370 (1985); and *Florence County School Dist. Four v. Carter*, 510 U.S. at 12-14 (1993).

Tracey Spencer Walsh, a partner at Mayerson & Associates, focuses her practice on legal issues related to students with autism and other developmental disabilities, and is a featured speaker at national autism conferences, as well as at schools educating children with autism. She litigates education issues regularly at the administrative and federal levels.

For more information, contact Tracey Spencer Walsh by telephone at 212-265-7200, or by email at tracey@mayerslaw.com. Visit her website at www.mayerslaw.com.

The New York NAELA Niche

By Robert P. Mascali

Update on Federal Legislation

How many times have you had to try to explain to your clients the incongruity that currently prohibits a competent adult with a disability from establishing a self-settled special needs trust, while his or her parent, or even a grandparent, is given the ability to do so?¹ Or that he or she is able to establish a pooled type of trust, but not a private self-settled special (supplemental) needs trust?²

Hopefully Congress will soon rectify this glaring inequity which, to many, has become an unacceptable badge of discrimination against the disability community.

Congressmen Glenn Thompson and Frank Pallone, Jr. have now co-sponsored H.R.2123, the Special Needs Trust Fairness Act of 2013, which, if enacted, will amend 42 U.S.C. § 1396p(d)(4)(A) by including the individual with the disability, along with parent, grandparent, guardian or Court, as authorized parties to establish such a private self-settled special (supplemental) needs trust.

Many of us have heard stories and anecdotes about how this statute was originally enacted and why grandparents are authorized but not other direct family members, many of whom probably have more contact with the individual with the disability. For years many advocates have been reluctant to “rock the boat” on this issue for fear that shining a spotlight on the statute might cause an unwanted re-examination of the entire statutory scheme. Thankfully, common sense has finally prevailed and there is a growing bipartisan effort to amend the statute so that families and advocates do not need to unnecessarily expend resources to initiate a court proceeding for a guardianship or for a court order in those many instances where there is no parent or grandparent available to establish the special needs trust for the benefit of an individual with a disability.

On a similar note, Senator Kay Hagan and Congressman Jim Moran have proposed legislation that will significantly change the manner in which our veterans can plan and provide for their children with disabilities. The Disabled Military Child Protection Act (H.R. 2249/S. 1076) if enacted, will allow a veteran who has invested in a Survivor Benefit Plan (SBP) to have the plan payments paid into a special (supplemental) needs trust for the benefit of a child with a disability. Under current law a veteran who is a participant in a SBP is able to have a portion of his or her monthly retirement pay withheld to



provide a monthly payment to a spouse, child or other eligible recipient but such payments can only be made directly to the recipient.³ In those instances (currently estimated to be over 1,000) where the recipient is a child with a disability the direct payment requirement results in income for Medicaid and Supplemental Security Income purposes and a probable consequent loss of public benefit eligibility for some period of time. This requirement is significantly different from other situations where retirement benefits can be directed in such a way so that they can be paid into a special (supplemental) needs trust. The proposed legislation would allow the SBP benefit to be directed into a **self-settled** supplemental needs trust, thereby requiring a payback to the state Medicaid program at the end of the disabled individual's lifetime.

The National Academy of Elder Law Attorneys (NAELA), now headed by Howard Krooks, a former Chair of the Elder Law Section, has strongly supported both of these measures and made them legislative priorities for the coming year. Another former Section Chair, Michael Amoroso, is currently the Chair of the NAELA Public Policy Committee which has spearheaded this legislative effort. Howard can be reached at HKrooks@elderlawassociates.com and Michael can be reached at Michael@amorusolaw.com or you can visit the NAELA website at www.NAELA.org.

Endnotes

1. 42 U.S.C. § 1396p (d)(4)(A); NY SSL 366(2)(b)(2)(iii)(B).
2. 42 U.S.C. § 1396p (d)(4)(C).
3. 10 U.S.C. § 1450.

Robert P. Mascali is currently an attorney with the Pierro Law Group in Latham, NY. Previously he served as the Associate General Counsel at NYSARC, Inc. and served as Counsel to NYSARC Trust Services. Prior to that position, Mr. Mascali was appointed and served as Deputy Counsel and Managing Attorney for the New York State Office of Mental Retardation and Developmental Disabilities (now the Office for People with Developmental Disabilities). Prior to his governmental service, Mr. Mascali was a founding partner of Cohen, Jason and Mascali in Scarsdale, NY.

Mr. Mascali is a member of the New York State Bar Association and its Elder Law and Trusts and Estates Law Sections. He serves on the Executive Committee and is Co-Chair of the Special Needs Planning Committee of the Elder Law Section. In 2013, Mr. Mascali was elected as the Third District Representative for the Elder Law Section to the NYSBA House of Delegates. He is a member of the National Academy of Elder Law Attorneys (NAELA), a member of the Board of Directors of the New York Chapter, and currently serves as Secretary.

Veterans' Benefits for the New York State Veteran

By Nina M. Daratsos

This article will provide the elder law or disability law attorney with a brief overview of the benefits available to New York State veterans and how to access those benefits for estate planning purposes. It will also briefly discuss the process for becoming an "accredited" attorney in order to represent veterans and when attorney fees can be charged. The discussion is limited to benefits for the individual veteran and will not discuss benefits available to family members.



The term "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. §101(2). There are several benefits available to veterans such as health care, disability compensation, pension programs, burial and memorials to name a few. To apply for benefits for the first time, a service discharge form is usually required. Combat veterans discharged or released from active service on or after January 28, 2003 have a longer period of time to enroll for health benefits or nursing home care. They are placed in a high priority group (described further below) and are not required to divulge their income. Public Law 110-181 codified at 38 U.S.C. §1710(e)(3).

It is critical to know when the individual served, for how many days and whether any of those days were considered times of war. To know the dates of actual service, request from the client a copy of the service discharge form known as a DD-214, DD-215 or WD form (for WWII veterans). The service discharge form provides the period of service and will document the exact dates of service and type of discharge. The dates on the form should be compared with the dates of war provided in statute. Even though dates may seem historically correct for a period of war they may not coincide with the dates the VA publishes (e.g., Vietnam era is defined as February 28, 1961 to May 5, 1975, Proclamation 4373, May 7, 1975, 40 F.R. 20257). The dates of service may have an impact on the receipt of services, as explained further below. A veteran serving during a time of war in a theater of combat is referred to as a combat veteran or OEF/OIF veteran. This distinction may be important when seeking benefits such as health benefits.

To qualify for health related disability or service connected compensation benefits, a veteran must sub-

mit a claim and provide proof of conditions received during or exacerbated by military service. Veterans may seek the assistance of Veterans Service Organizations such as the American Legion or the Veterans of Foreign Wars in preparing the request for benefits. These advocates are not permitted to charge a fee for their services. In addition, there are State Offices of Veterans Affairs that can assist veterans with their claims and employment issues without charge. Any veteran wishing to file a claim must have an evaluation either by VA providers or private providers. Based on the evaluation, the package of information is submitted to the appropriate Regional Office of Veterans Affairs (Office) for consideration. The Office judges the information on merits-based criteria established by the VA. The Office will either issue a disability rating or deny the application. If the rating is not at the level appropriate to the disability or it is denied, there is an appeal right. Later in this article the role of the attorney in an appeal proceeding will be addressed.

I. Health Benefits

All veterans are potentially eligible for health care services provided by the U.S. Department of Veterans Affairs on an inpatient and outpatient basis. The health care provided must promote, preserve or restore the health of the veteran. Eligibility for health care through the VA is determined based on a two-step process. The first step has two components: the character of the veteran's discharge is determined as either "honorable discharge," "general under honorable discharge," or a "discharge under honorable conditions." The second component in the first step is the length of active military service. See the United States Department of Veterans Affairs website at <http://www.va.gov/healthbenefits/apply/veterans.asp>.

The second step considers whether the veteran meets one of the categories on the priority list for enrollment into the VA health care system. 38 U.S.C. § 1705(a) provides the priority order of enrollment. The top category, in the list of eight priority groups (with some subgroups), is veterans with service-connected disabilities rated 50% or greater;¹ the next three levels include combat veterans with varying percentages of disability ratings or status as former prisoners of war or those awarded a Purple Heart. Priority 5 includes veterans receiving VA pension benefits or veterans eligible for Medicaid programs. The veteran may or may not have a disability. The level of priority may make a veteran eligible for treatment at a Veterans Administration medical facility, receipt of nursing home care or home care services. Equipment, hearing appliances, services and supplies are also covered under the health benefit. There are conditions which are excluded from

consideration as a disability. These include alcohol and substance abuse and venereal disease, unless the conditions are connected with a diagnosis of post-traumatic stress disorder ("PTSD").

Certain veterans are exempt from the requirement of formally enrolling for health benefits. They are those who the VA has rated as having a 50% or more service-connected disability rating; less than one year has elapsed since discharge from military service for a disability that the military determined was incurred or aggravated in the line of duty, but VA has not yet rated; or the veteran is seeking care from the VA for only the service-connected disability.

Other health related benefits available to veterans include long term care services. These may occur in long term care facilities operated by the federal government, state government or a contract with a community. A State Veterans Home is one approved by the U. S. Department of Veterans Affairs. <http://www.va.gov/GERIATRICS/Guide/longtermcare/eligibility.asp#>. "State homes include facilities for domiciliary nursing home care, and/or adult day health care. Hospital care may be included when provided in conjunction with domiciliary or nursing home care." www.va.gov. Eligibility for admission to a home is determined by each state. The Department of Veterans Affairs provides funds for the construction of state Veterans homes. Effective November 30, 2004 Pub. L 108-22 prohibits Medicaid from off-setting the Veterans Administration per diem payment from the cost of nursing home care. A veteran as a resident of a state home can also retain most of the pension received. A state home may also provide care to certain family members related to the veteran (described further below).

In New York State there are 4 state Veterans homes operated by the State Department of Health. They are located in Oxford, Batavia, Montrose and St. Albans. There is also one Veterans home operated by the State University of New York on the Campus of the SUNY Stony Brook Medical Center. Admission criteria include veterans, as defined at Public Health Law (PHL) § 2632 1., a surviving spouse and mother/father of any veteran who died while on active duty (Gold Star parents). There are other qualifying criteria for family members set forth in PHL §2632.

The first order of priority for admission is veterans with spouses based on the level of severity of the disability and need for care. The second priority level is based on disability and severity of illness for veterans who meet the discharge criteria defined at PHL §2632 1 (ii) and (iii). The third priority level is based on disability and severity of illness for veterans who meet subdivision (i) in this same section of law. The fourth priority level is for un-remarried surviving spouses and then parents of a veteran who died while on active duty during a time of war who may also be in need of as-

sistance. The Veterans home will consider both the veteran and the spouse for admission. For consideration, spouses or surviving spouses must be married at least 10 years prior to the date of the application. PHL §2632 4. Knowing about the availability of Veterans homes can be of great assistance for families who may need to place a surviving spouse who did not have military service but was married to a veteran.

Veterans who may require assistance at home can qualify for home care benefits. There is a Homemaker / Home Health Aide program to provide services as an alternative to nursing home care. VA staff provides case management with public and private agencies providing the care to service-connected veterans. Other services include: hospice / palliative care, respite care, community residential care (for veterans who require limited supervision and personal care but have no family and cannot live independently), adult day care, and Geriatric Evaluation and Management (GEM), an interdisciplinary approach for the care and treatment of elderly veterans. There are descriptions and additional information for each of these at the VA website: www.va.gov/healtheligibility/coveredservices/SpecialBenefits.asp#LongTerm.

It should be noted that the receipt of health benefits from Veterans Affairs is not an entitlement for every eligible veteran. Benefits are limited by the annual appropriation set in the federal budget each year. Each category of the priority list may not be included in any given year. For a full review of the eligibility for enrollment refer to www.va.gov/healtheligibility. At times the receipt of benefits available for a veteran requires due diligence and persistence in seeking out benefits for the client.

II. Compensation and Pension

The terms compensation and pension have different meanings than their use in a "civilian" context. Compensation refers to benefits derived from a service-connected disability. See 38 U.S.C. Part II Chapter 11. Compensation will not be approved if it is determined that the disability is the result of misconduct or was not incurred in the line of duty. A service connected disability can occur where a condition is diagnosed during military service or a pre-existing condition is aggravated during military service.

A pension may be provided to veterans who do not have a service-connected disability. See 38 U.S.C. § 1521(a). A veteran is eligible for a pension if: (1) discharged from service under other than dishonorable conditions; and (2) served 90 days or more of active duty with at least 1 day during a period of wartime;² and (3) the individual is permanently and totally disabled, or is age 65 or older; and (4) the countable family income is below a yearly limit set by law. The disability

cannot, however, be due to the individual's willful misconduct.

The VA rating system determines the level of disability for compensation benefits. The level of disability is rated in 10% increments considering what effect the disability will have on the veteran's ability to earn a living. A veteran may have more than one disabling condition; each is rated individually. As an example, the veteran may have hearing loss from combat related activity with a disability rating of 20%. S/he may also have a skeletal injury at 20%, and post traumatic stress disorder at 30% (PTSD is interpretive and so the percentages are subjective by the rater compared with audiology results which are standardized). The logical conclusion would be that the veteran would have a $20\% + 20\% + 30\% = 70\%$ disability. However, that is not the case. The disability is handled through a formula as follows: the percentages are inverted so $20\% = .8$; $20\% = .8$; $30\% = .7$. The inversions are then multiplied $.8 \times .8 \times .7 = .448$ and rounded down to the next 10th percentile, or 40%; this is subtracted from 100% and the final disability rating is 60%. This formula is not readily made available and most veterans do not realize that the disability percentages provided after the "compensation and pension" evaluation is not the total for the calculation of the monthly benefit or their position on the enrollment hierarchy. The percent of disability will determine how much a veteran will receive on a monthly basis. The last published range is \$129/month for a 10% disability to \$2,816 per month for 100% disability (the rates shown are for a single veteran with no dependents). Amounts for disabilities above 20% take into account whether the veteran is married and/or has dependents. www.benefits.va.gov/compensation/resources_comp01.asp.

In New York State the eligibility review for Medicaid considers income and resources received by a veteran. On the income side, Medicaid disregards in the month of receipt for *community-based long term care services*:

- Aid and Attendance (A&A) benefits
- Unreimbursed Medical Expenses (UME) benefits
- Retroactive lump sum pension payment

For *chronic residential care*, Medicaid disregards in the month of receipt:

- Retroactive lump sum pension payment reduced by \$90 (Any amount retained into subsequent months would be counted as resources.)
- \$90 limited VA pension paid to veterans in nursing homes

There are certain exemptions for veterans residing in state-run Veterans homes. One such exemption is the Medicaid pension reduction, which allows qualifying

veterans to receive the full pension. See U.S.C. §5503(d) (1) www.health.state.ny.us/health_care/medicaid/reference/mrg.

Public Law 108-422 prohibits Medicaid from offsetting the Veterans Administration "per diem" payment from the cost of nursing home care. These payments cannot be considered a third party resource, and cannot be used to resource Medicaid's share of the cost of providing nursing home services to medical assistance recipients. The facility may retain the per diem payment. See www.health.ny.gov/health_care/medicaid/reference/mrg at page 438.

Other types of recurring VA benefits may be counted as income in the month received and a resource thereafter. (One caveat: if a VA benefit includes a dependent benefit, only the portion of the benefit for the Medicaid applicant/recipient is counted.)

On the resource side, if the veteran receives a retro lump sum payment for A&A, UME, and/or Housebound Allowances, it is an exempt resource in the month of receipt and the following month.

III. VA Travel Reimbursement

The following veterans are eligible for travel reimbursement for mileage or public transportation: those with service-connected disability of 30% or more; traveling for treatment of a service-connected condition; those receiving a VA pension; those scheduled for a compensation/pension examination; those who do not have income exceeding the maximum VA pension rate. See 38 U.S.C. §111.

IV. Life Insurance

Service-disabled veterans life insurance is available to veterans with a service-connected disability, but who are in otherwise good health. The policy provides up to \$10,000 in life insurance coverage. A waiver of premium is granted to totally disabled policyholders. There is also a \$20,000 supplemental coverage policy available to totally disabled policyholders who are under 65 years of age and apply for the supplemental coverage within one year from notice of waiver. The cost of the supplemental premium is not waived.

V. Burial and Internment Benefits

The Department of Veterans Affairs will provide a burial expense allowance for eligible veterans. The burial allowance for a veteran whose death is not service connected may be \$300 or as much as \$700 dependent upon where the veteran was receiving care prior to death. There are two components to the benefit: (1) a burial and funeral expense allowance and (2) the plot interment allowance. To be eligible for the benefit the cost of the funeral cannot be reimbursed by another government agency or other source, and the veteran was honorably discharged.

Veterans who die from a service-related disability or during active duty, or inactive duty for training, have a burial allowance not to exceed \$2,000. Additional information concerning the death burial allowance and death benefits can be found at the Veterans Administration website and VA Adjudication Manual M2-1 (the manual can be found online and downloaded).

VI. Other Benefits

There are many other benefits available to New York State veterans that may be beneficial in estate planning. Real estate tax relief is available in many locales and in varying degree for combat veterans. Veteran credits are available with pensions of municipal/state employees and teachers. There are veteran credits (5% for non-combat and 10% for combat veterans) added to one's score on civil service examinations. This can improve one's position on the hierarchical eligibility list for positions within New York State government and potentially improve the veteran's earning potential. Compensation and pension benefits are exempt from state (and federal) income taxation.

VII. Attorney Representation Veterans' Appeals

Final regulations were published by the Department of Veterans Affairs May, 2008 permitting representation of veterans by accredited attorneys for a fee. See 73 Fed Reg. 29852 (May 22, 2008). The regulations were promulgated in response to the Veterans Benefits, Health Care and Information Technology Act of 2006. The act removed prior restrictions on legal representation of veterans at the initial stage of appeal of a disability determination.

For an attorney to represent a veteran at an appeal s/he must complete an application and submit it to the Office of the General Counsel of the VA. The application is reviewed for character and competence. Once the application is approved, the attorney is then required to complete 3 credit hours of continuing education on veteran's benefit law and procedure, within the first twelve months of accreditation. The attorney must complete an additional three CLE credits within three years of the original accreditation to maintain status and then every 2 years thereafter.

An attorney representing a veteran in a disability claim may only collect a fee for services rendered after a favorable decision and the appropriate filing of the fee arrangement and other filings required by the Department. The fee limits are generally limited to 20% of the benefits due to the veteran but may be higher in particular cases. The Department withholds the fee from the benefits due and pays the attorney directly unless the VA's Office of General Counsel approves the claimant paying the attorney's fees.

For a fee arrangement to be valid it must contain the following requirements of 38 C.F.R. § 14.636(g): name of the veteran or claimant; name of any disinterested third-party payer and relationship between the payer and the claimant; the number assigned to the claim; and the exact terms and conditions in the determination of the fees. A copy of the fee agreement must be filed within 30 days of execution to the Office of General Counsel. The Veterans Office of the original jurisdiction must also receive a copy.

The VA will assess whether fees are reasonable. If the fee arrangement is considered unreasonable the attorney can respond by showing excessive hours, skill and competence required in the preparation of the appeal, the amount awarded and whether the services were contingent on the outcome. Attorneys must be careful to include in an application for fees only those services related to the appeal of a decision. Any fees related to other legal services provided to the veteran unrelated to the appeal, such as the preparation of the initial application for benefits, are not reimbursable.

VIII. Conclusion

The Veterans Affairs website is a good resource for learning what benefits are available on the federal level. The New York State Office of Veterans Affairs is also a good resource for those veterans residing in New York. An attorney may also wish to call upon the local Veterans of Foreign Wars or other veteran services organizations (found on the VA website) to assist the veteran in learning about available benefits and how to apply for them. This will also make oneself known as an attorney advocate for veterans.

Endnotes

1. The method for determining the level of disability is discussed in the Section II.
2. However, 38 C.F.R. §3.12a requires that anyone who enlists after 9/7/80 generally must serve at least 24 months or the full period for which a person was called or ordered to active duty in order to receive any benefits based on that period of service. With the advent of the Gulf War on 8/2/90 (and still not ended by Congress to this day), service men and women enlisting after September 7, 1980 are serving during a period of wartime. When they do, they generally must now serve 24 months to be eligible for a veteran's pension or any other benefit.

Nina M. Daratsos practices elder law and estate planning and is an accredited attorney with the Veterans Administration. Ms. Daratsos is a member of the American Health Lawyers Association; Schenectady County Bar Association; Health Law and Elder Law Sections of the New York State Bar Association and is the Vice Chair of the Veteran's Benefits Committee of the Elder Law Section. She received her J.D and LL.M from Western New England University School of Law, and has a Master's of Nursing from Boston University.

Recent New York Cases

By Judith B. Raskin

Person in Need of Guardian Seeks Guardian's Discharge

***Matter of Buffalino*, 2013 N.Y. Misc. LEXIS 885; 2013 NY Slip Op 23065 March 5, 2013**

Mental Hygiene Legal Service (MHLS) sought discharge of Mr. D's guardian who had been appointed upon Mr. D.'s consent. In response, the successor guardian moved to have Mr. D. declared incapacitated and to grant additional powers to him as guardian. He argued that Mr. D. needed a guardian to protect his assets and place him in a nursing home. Mr. D. proposed a less restrictive plan. He would use his sufficient funds to pay aides and his other expenses for 10 years at which time he would enter a nursing home.

The court held it could not continue the guardianship or expand the guardian's powers without Mr. D.'s continuing consent. There was never a hearing to determine his incapacity. A new Article 81 application would have to be submitted but Mr. D.'s plan appeared to be the less restrictive alternative.

Capacity to Consent to a Guardian

***Matter of L.J.L.*, 2013 NY Slip Op 50726(U) (Sup. Ct., Bronx County, May 6, 2013)**

The AIP in this Article 81 proceeding had a long history of alcoholism and other serious issues. Prior to the hearing the AIP agreed to consent to the appointment of a guardian for one year. She, her social worker and an attorney willing to serve as guardian proposed a plan to be followed. The court evaluator objected because the plan did not include rehab and detox (which the AIP refused to consider) and because the AIP lacked the capacity to consent to the appointment.

The court appointed the guardian for one year with the consent of the AIP. The statute does not provide a standard for determining capacity to consent to the appointment. The court generally looks at the AIP's ability to converse, her understanding of the proceeding, and her understanding of the authority given to the guardian.



Attorney in Fact Seeks Special Guardianship

***Matter of I.B.R.*, 2013 N.Y. Misc. LEXIS 2365, 2013 NY Slip Op 23183 (Sup. Ct., Dutchess County, June 5, 2013)**

Petitioner, a resident of Canada and attorney in fact for his stepfather, I.B.R., sought appointment as special article 81 guardian for the sole purpose of accessing I.B.R.'s account at Merrill Lynch. All other institutions holding I.B.R.'s accounts had accepted the petitioner's authority under the document.

The court denied the application. The General Obligations Law provides a remedy to compel Merrill Lynch to accept the document. The appointment of a guardian is the last resort. In addition, as an out of state resident the court would not have jurisdiction over the stepson to exercise enforcement provisions.

Claim of Undue Influence in Will Contest

***Matter of Lee*, 2013 NY Slip Op 04131 (App. Div. 4th Dept., June 7, 2013)**

Petitioner filed her father's 2005 will for probate. Her sister objected, claiming the petitioner unduly influenced their father in 2005 to change his 2002 will to favor petitioner and her children. She cited petitioner's control of their father's life and finances.

The Surrogate's Court after trial accepted the 2005 will and denied the objections. The objecting daughter appealed.

The Appellate Division affirmed. Undue influence must be proven by specific and substantial evidence of acts resulting in the testator's making the new will against his free will. Petitioner's control of her father's life and finances was not sufficient.

Appeal of Medicaid Denial for Transfers and Undue Hardship

***Matter of Conners II*, 2013 N.Y. App. Div. LEXIS 2386, 2013 NY Slip Op 2451**

The administrator of the estate of Paul Hettinger and the Daughters of Sarah Nursing Center, Inc., joined in this appeal of a Medicaid denial for the decedent's stay in the nursing home.

The decedent executed a non-gifting Power of Attorney in 2003 appointing his cousin in law, Sharon Williams, as agent. She was also joint owner of two of his bank accounts. In early 2006, Mr. Hettinger entered a nursing home with senile dementia. Sharon Williams signed the nursing home agreement as responsible party but stopped making payments after about two years.

Sharon Williams sold Mr. Hettinger's stock, deposited the proceeds in the joint accounts with her and then made withdrawals and other transfers from the accounts for her own personal use.

A Medicaid application was denied for transfer of assets resulting in a 33 month penalty period (later reduced to 26 months). DSS denied a subsequent application for undue hardship.

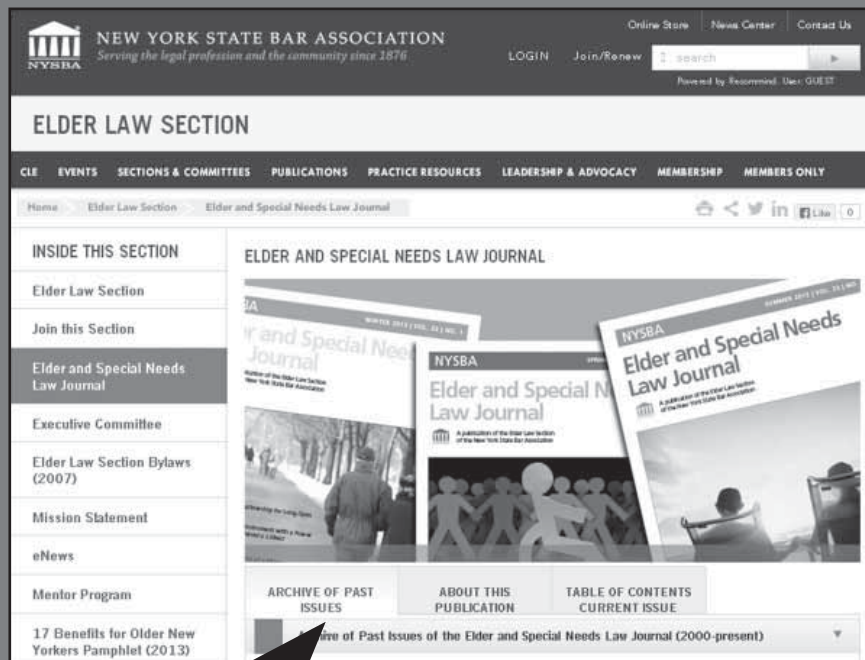
At a fair hearing, the Department of Health (DOH) upheld the denial on the issues of eligibility and undue hardship. It was possible, contrary to the petitioners' argument otherwise, that Mr. Hettinger did intentionally create a plan for the purpose of achieving Medicaid eligibility. The undue hardship claim was denied because the nursing home never discharged him.

The Appellate Division, after receipt of transfer from the Supreme Court, affirmed. Substantial evidence supported the rational decision to deny the application. If an administrative decision is rational, it cannot be overturned based on facts subject to interpretation.

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

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Guardianship News

Rashomon, or the Guardianship Process

By Robert Kruger

I am sure that matrimonial lawyers have this experience constantly: the other spouse will say something that is immediately understood, in the shorthand of the couple, as having a clear and hostile meaning. Unfortunately, for those of us who have not yet been inducted into the fraternity, the offending remark appears to be innocuous.



So it often is in guardianship. Guardianship proceedings are not static; it takes time for the leading characters to define themselves. The story evolves or, for one player, it unravels. The matter that provides the spur to this article involved a nephew (my client) instituting a guardianship for his uncle, an 80 year old psychoanalyst. The wild card in this proceeding was the petitioner's mother, who was the sister of the Incapacitated Person (IP).

The proceeding commenced in January 2013 with the IP in a coma. At the time of his transfer to a nursing home, for rehabilitation, in February, he was no longer insensate but he was far from clearheaded. Nor was he ambulatory. The nephew, during rehab, prevented his mother from visiting her brother, the IP, which appeared, in my judgment, to be overreaching. Remember: the mother was not yet defined by her behavior. The IP was discharged to his apartment in March, both ambulatory and verbal, with a touch of paranoia, with a profoundly impaired short-term memory, and no insight into his need for assistance. The nephew had found a couple to live and care for the IP through a friend of the IP and, although not "professional caregivers," they were quite effective, particularly since the IP could manage his ADLs independently.

Returning to the sister, the IP had, for at least a decade, been quite vocal about his desire to exclude his sister from his testamentary plan. Conversely, he was quite clear about his desire to include the nephew in his testamentary plan. And he had done so in 2010, when he redid his Will, which was prepared by his counsel. Given his significant testamentary interest, I thought that the nephew's hostility toward his mother had more to do with his inheritance...sort of a side-show to the central issue of his uncle's welfare.

However, after her brother returned to his apartment, the sister began to call him relentlessly, employing her husband and a friend for variety. The nephew wanted to block the calls, which seemed impractical, particularly since a variety of numbers were used to initiate the calls. The nephew was driving me crazy over his concern about his mother's harassment of IP.

The nephew interpreted the motive of the harassment as designed to persuade his uncle to change his Will in his mother's favor. Initially, the nephew's concerns appeared to be overstated but, over time, the drumbeat of her calls lent credibility to his concerns, as did the sister's opposition to the nephew's application to be guardian of the personal needs. Eventually, the Court Evaluator and counsel for the IP shared the nephew's view of his mother's motives: that the nephew constituted a barrier to her obtaining a new Will. If her son was guardian of personal needs, he was in a position to frustrate her design. That was what the craziness was all about.

As we got closer to a hearing date, she cast about for candidates to be personal needs guardian, and substitute for her son, who was the "frontrunner." She nominated relatives who had no desire to serve and who were irate about her unilateral nomination of them. The sister and her husband made uninvited visits. For example, in July 2012, the IP called the police, who escorted her from his building. For another example, the sister's husband, in April 2013, arrived and photographed all objets d'art in the apartment, many of which were quite valuable. The sister allowed her position to be dominated by her craziness, her obsessive behavior, and not about the welfare of her brother. And in doing so, in essence, she corroborated her son's interpretation of her motives.

The denouement occurred in late May, at the hearing, when the IP, much improved and quite articulate, requested permission to address the court. When he had finished, at his request, the court enjoined the sister and her husband, and their friends and allies, from visiting or calling the brother unless invited to do so by him. As you can see, no one evolved more than the IP, from comatose to eloquent.

Over that five-month period, the dynamic of the matter was transformed...from one where the nephew was perceived to be overly interested in preserving his inheritance, to one in which his mother's behavior

was the focus of all involved. It is rare to see character evolve...or be disclosed. It is a reminder not to leap to judgment too quickly. And, to the amazement of us all, the IP could speak for himself in a way that no one contemplated he could.

* * *

For those readers who can tolerate the suspense, I have the last chapter of Jerrell F., the matter where the Second Department reversed a surcharge imposed against me. The “last” chapter was a fee application by the Court Examiner who sought counsel fees on the appeal.

The IAS Part awarded her \$37,430.00 on a recovery of \$792.00....On appeal, the Second Department, this time, affirmed. The Court Examiner billed 129 hours on a 19-page brief, the equivalent of more than 21 six-hour days. The entire estate is \$100,000.00; the award is 37% of the entire estate. When I make a fee application, *Matter of Freeman* and *Matter of Potts*, do not take a sabbatical. Frankly, it is a sobering reminder that you cannot take anything for granted on appeal. I thought that if anything was reversible, the fee award was.

Robert Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997, Supp. 2004) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer’s Association. He was the Coordinator of the Article 81 Guardianship training course from 1993 through 1997 at the Kings County Bar Association and has experience as a guardian, court

evaluator, and court-appointed attorney in guardianship proceedings. Mr. Kruger is a member of the New York State Bar (1964) and the New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

Robert Kruger may be reached at rk@robertkruglaw.com or (212) 732-5556.

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The Basics of Business Succession Planning

By Anthony J. Enea

Family owned and operated businesses have very unique and distinct dynamics that can detrimentally impact the success of the business and the unity of the family if they are not addressed and properly managed. Because of this it is of critical importance that proper advance planning be implemented to deal with the possibility of a serious illness or death of the founder and/or key family members.



As the attorney, accountant or financial advisor for a family business it will be important that you urge and guide family members to engage in advance planning for the retirement, illness or death of the founder(s) and other key family members. Doing so will often require a significant degree of perseverance as well as patience. Unfortunately, it is often not the issue family members are quick to address.

Perhaps of all the elements of importance to the implementation of an effective business succession plan is communication. Sadly, families that do not regularly have business meetings to discuss the day-to-day operations and mission of the business are often the ones who are hurt the most when a founder takes ill or passes away.

The following are illustrative of the issues that need to be addressed and steps taken to implement an effective succession plan for the family business:

A. Business Governance and Structure

Determine whether or not the family business has taken the steps to maintain and honor its governance structure and policies. Are they complying with their governance structure? For example, if the family business is a corporation, have the shareholders had regular shareholder meetings? While this may appear to be a basic corporate governance event, it is often ignored by most businesses.

As part of the governance and structure of the business does each family member have specifically defined roles and responsibilities, and are those roles and responsibilities delineated in writing? One of the most common problems facing family businesses is that the key family members fail to delineate and manage their expectations as to the roles and responsibilities of other family members.

B. Shareholder and Operating Agreements

Does the family business have in place a Shareholder Agreement if it is a corporation or an Operating Agreement if it is Limited Liability Corporation or Partnership? These basic agreements, if properly drafted, often define the roles and responsibilities of the shareholders or members. They also can delineate to whom a shareholder or member can transfer and/or sell his or her interest in the family business and the terms and conditions thereof. Additionally, they often contain provisions as to what will transpire upon the death or disability of an officer or member. If properly drafted, these agreements, whether they be a Shareholder Agreement, Operating Agreement or Buy-Sell Agreement, can play an integral role in delineating the options available and agreed upon terms relevant to a family member's decision to sell or transfer his or her interest into the family business. Having delineated the terms and conditions of a transfer or sale of the interests of a family member will go a long way in preventing disputes in the event of the sudden illness or death of the founder or key family member.

It is important that the advisor develop a complete and thorough understanding of all aspects of the family business. This will go a long way in helping the advisor to implement a successful succession plan.

C. When to Start Planning for Succession

Often the founding member of a family business is the driving force and spiritual leader of the business. While others may play an important role, the founder is often the epicenter of all important decisions.

Discussing succession with a founder or a key family member of the business is often a tricky and perilous endeavor for the advisor. One of the most difficult considerations is whether the founder himself or herself has considered the issue of succession. If he or she has not given it serious consideration, he or she may perceive the issue as a threat to his or her authority and control. It is necessary that the advisor not lose sight that the family business is often not only a source of the livelihood of the founder, but most often the very reason for his or her own existence and self worth. It is their passion and a great source of their pride.

I suggest that the issue of succession planning be raised at least 7-10 years before it is anticipated that a founding member or key family members will need to retire and turn over control of the business. Raising the issue during the course of regularly held business meetings will help lay the foundation for meaningful

discussion of the issue. I have found that it is best for the advisor to be the one to raise the issue rather than other family members. The advisor needs to approach the issue of succession as an issue that is part and parcel of the day-to-day operations and mission of the family business

D. Sample Issues That Need Discussion and Agreement

- (i) When will the succession plan be completed by?
- (ii) Once succession is completed what will be the new agreed upon control and / or governance structure of the business?
- (iii) Have the new roles and responsibilities of the new controlling shareholders or members been delineated in writing?
- (iv) Has a compensation package for the retiring founder and / or key family members been agreed to?
- (v) Has the percentage of ownership interest of the remaining members-or shareholders been agreed to?
- (vi) Has the compensation of the remaining members or shareholders been agreed to?
- (vii) Has the possibility of the critical illness or death of the founder and / or key family members been properly addressed as part of the succession plan?
- (viii) Have all tax consideration (gift / estate / income / capital gains) been addressed relevant to the transfer of the founders or key family member interests?
- (ix) Has the possibility of the utilization of life insurance, disability insurance and long term care insurance been properly reviewed and considered?
- (x) Has the succession plan been incorporated into the estate and gift and tax planning of the founder and other key family members?

E. Laying the Foundation for the Future Success of the Family Business

- (i) Agreeing to and delineating a Mission Statement;

- (ii) Scheduling regular and consistent business meetings;
- (iii) Communication, Communication, Communication!;
- (iv) Regularly reviewing and updating the roles and responsibilities of the shareholders or members;
- (v) Regularly reviewing and updating the compensation and bonuses of the shareholders or members and key employees;
- (vi) Regularly reviewing and updating the expenses of the shareholders or members to be reimbursed by the family business (often a tricky subject matter); and
- (vii) Agreeing to which family members will be permitted to work in the family business.

In conclusion, planning for succession in a family business is often a difficult task that requires that the advisor develop a full and in-depth understanding of all aspects of the family business. It is also a task that requires the advisor to understand the hopes, goals and both the financial and personal aspirations of all of the parties involved. The process of gathering all of the necessary information as well as implementing the appropriate plan is one that could take many months, if not years, to properly implement. However, once implemented, the future viability and success of the business may be insured.

Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has an office in Somers, New York.

Mr. Enea is the Past Chair of the Elder Law Section of the New York State Bar Association. He is a Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA.

Mr. Enea focuses his practice on Elder Law, Wills Trusts and Estates, Business Succession Planning, Partnership and Corporate Matters. He can be reached at (914) 948-1500.



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Section Committees and Chairs

Client and Consumer Issues

Michel P. Haggerty
Law Office of Michel P. Haggerty
37 West Market Street
Rhinebeck, NY 12572-1417
haggerty@haggertylawoffices.com

Shari S.L. Hubner
Van DeWater and Van DeWater, LLP
P.O. Box 112
85 Civic Center Plaza, STE 101
Poughkeepsie, NY 12602
hubnerlaw@verizon.net

Diversity

Deepankar Mukerji
Keane & Beane, PC
445 Hamilton Ave., 15th Fl.
White Plains, NY 10601
dmukerji@kblaw.com

Pauline Yeung-Ha
Grimaldi & Yeung LLP
9201 Fourth Avenue, 6th Fl.
Brooklyn, NY 11209
pyeung@gylawny.com

Elder Abuse

Joy S. Solomon
The Hebrew Home At Riverdale
Administration Office
5901 Palisade Avenue
Riverdale, NY 10471
jsolomon@hebrewhome.org

Estates, Trusts and Tax Issues

Salvatore M. DiCostanzo
McMillan, Constabile, Maker
& Perone, LLP
2180 Boston Post Road
Larchmont, NY 10538
smd@mcmplaw.com

Robert J. Kurre
Kurre Levy Schneps LLP
1615 Northern Blvd., Ste. 103
Manhasset, NY 11030
rkurre@klsllp.com

Ethics

Judith B. Raskin
Raskin & Makofsky
600 Old Country Road, Ste. 444
Garden City, NY 11530-2009
jbr@raskinmakofsky.com

Financial Planning and Investments

William D. Pfeiffer
Girvin & Ferlazzo, PC
20 Corporate Woods Blvd
Albany, NY 12211
wdp@girvinlaw.com

Donna Stefans

Stefans Law Group P.C.
137 Woodbury Road
Woodbury, NY 11797
dstefans@sa-tax.com

Guardianship

Robert Kruger
Law Office of Robert Kruger
232 Madison Avenue, Ste. 909
New York, NY 10016
rk@robertkrugerlaw.com

Ellyn S. Kravitz
Abrams, Fensterman, Fensterman,
Eisman, Formato, Ferrara & Einiger, LLP
630 Third Avenue, 5th Fl.
New York, NY 10017
ekravitz@abramslaw.com

Health Care Issues

Miles P. Zatkowsky
Dutcher & Zatkowsky
1399 Monroe Avenue
Rochester, NY 14618
miles@dutcher-zatkowsky.com

Tammy Rose Lawlor
Miller & Milone, P.C.
100 Quentin Roosevelt Blvd., Ste. 205
Garden City, NY 11530
TLawlor@millermilone.com

Legal Education

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Fl.
White Plains, NY 10601
aenea@aol.com

T. David Stapleton Jr.
Karpinski Stapleton Galbato
& Tehan, PC
110 Genesee Street, Ste. 200
Auburn, NY 13021
tdavids@kst-law.com

Legislation

Ira Salzman
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118
salzlaw@aol.com

Amy S. O'Connor
McNamee, Lochner, Titus
& Williams, P.C.
P.O. Box 459
Albany, NY 12201-0459
oconnor@mltw.com

Liaison to Law Schools

Marianne Artusio
Touro College
Jacob D Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 10803
MarianneA@tourolaw.edu

Margaret M. Flint
John Jay Legal Services
Pace Law School
80 North Broadway
White Plains, NY 10603-3711
gflint@law.pace.edu

Peter J. Strauss
Epstein Becker & Green, P.C.
250 Park Avenue, Ste. 1200
New York, NY 10177-0077
advocator66@gmail.com

Mediation

Judith D. Grimaldi
Grimaldi & Yeung, LLP
9201 Fourth Avenue, 6th Fl.
Brooklyn, NY 11209
jgrimaldi@gylawny.com

Laurie L. Menzies
Pfalzgraf Beinbauer & Menzies LLP
455 Cayuga Road, Ste. 600
Buffalo, NY 14225
lmenzies@pbmlawyers.com

Medicaid

Melinda Bellus
Legal Services of the Hudson Valley
90 Maple Avenue
White Plains, NY 10601
mbellus@lshv.org

Beth Polner Abrahams
Law Office of Beth Polner Abrahams
One Old Country Road, Ste. 235
Carle Place, NY 11514
bpabrahamslaw@gmail.com

Membership Services

Matthew Nolfo
Matthew J. Nolfo & Associates
275 Madison Avenue, Ste. 1714
New York, NY 10016
mnolfo@estateandelderlaw.net

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Ste. 444
Garden City, NY 11530-2009
EGM@RaskinMakofsky.com

Mental Health Law

Julie Stoil Fernandez
21 Webster Place
Brooklyn, NY 11215
jsfsqlaw@gmail.com

Mentoring

Timothy E. Casserly
Burke & Casserly, P.C.
255 Washington Ave. Ext.
Albany, NY 12205
tcasserly@burkecasserly.com

Joan L. Robert
Kassoff, Robert & Lerner Law
100 Merrick Road, Ste. 508W
Rockville Centre, NY 11570
joanlenrob@aol.com

Practice Management and Technology

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Fl.
White Plains, NY 10601
aenea@aol.com

Robert J. Kurre
Kurre Levy Schneps LLP
1615 Northern Blvd., Ste. 103
Manhasset, NY 11030
rkurre@klsllp.com

Publications

David Ian Kronenberg
Goldfarb Abrandt Salzman
& Kutzin, LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118-1190
kronenberg@seniorlaw.com

Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Ste. 1280
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Real Estate and Housing

Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Rd.
Smithtown, NY 11787
jeanette.grabie@gmail.com

Neil T. Rimsky
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Fl.
White Plains, NY 10601-5105
nrinsky@cuddyfeder.com

Special Needs Planning

Joseph A. Greenman
Bond, Schoeneck & King, PLLC
1 Lincoln Center
Syracuse, NY 13202
jgreenman@bsk.com

Robert P. Mascali
The Pierro Law Group, LLC
43 British American Blvd.
Latham, NY 12110
RMascali@Pierrolaw.com

Sponsorship

Jeanette Grabie
Grabie & Grabie, LLP
162 Terry Rd.
Smithtown, NY 11787
jeanette.grabie@gmail.com

Task Force on Unauthorized Practice of Law

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Fl.
White Plains, NY 10601
aenea@aol.com

Technology

David Goldfarb
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Ste. 4310
New York, NY 10118-1100
goldfarb@seniorlaw.com

Veteran's Benefits

Antonia J. Martinez
Antonia J. Martinez, LLC
P.O. Box 883
Croton On Hudson, NY 10520
elderlawtimes@yahoo.com

Section Officers

Chair

Frances M. Pantaleo
Walsh Amicucci & Pantaleo LLP
2900 Westchester Avenue, Suite 205
Purchase, NY 10577
FMP@walsh-amicucci.com

Chair-Elect

Richard A. Weinblatt
Haley Weinblatt & Calcagni
One Suffolk Square
1601 Veterans Memorial Highway, Suite 425
Islandia, NY 11749
raw@hwclaw.com

Vice-Chair

JulieAnn Calareso
Burke & Casserly, P.C.
255 Washington Avenue Extension
Albany, NY 12205
jcalareso@burkecasserly.com

Secretary

David Goldfarb
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
goldfarb@seniorlaw.com

Treasurer

Martin Hersh
Law Offices of Martin Hersh, Esq.
PO Box 567
Liberty, NY 12754
elder.law@verizon.net

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Co-Editors in Chief

David Ian Kronenberg
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
kronenberg@seniorlaw.com

Adrienne J. Arkontaky
The Cuddy Law Firm
50 Main Street, Suite 1000
White Plains, NY 10606
aarkontaky@cuddylawfirm.com

Board of Editors

Lee A. Hoffman, Jr.
Law Offices of Lee A. Hoffman
82 Maple Avenue
New City, NY 10956
lhoffman@LeeHoffmanNYElderlaw.com

Sara Meyers
Enea Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
s.meyers@esslawfirm.com

Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
tpleat@wplawny.com

Patricia J. Shevy
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
patriciashevy@shevylaw.com

George R. Tilschner
Law Office of George R. Tilschner, PC
141 East Main Street
Huntington, NY 11743
gtilschner@preservemyestate.net

Production Editor

Britt Burner
Goldfarb Abrandt Salzman & Kutzin, LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
burner@seniorlaw.com

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NEW YORK STATE BAR ASSOCIATION
ELDER LAW SECTION
One Elk Street, Albany, New York 12207-1002

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