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Elder and Special Needs Law Journal

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

NEW YORK STATE BAR ASSOCIATION

Elder Law and Special Needs Section

SUMMER MEETING

July 21 - 23, 2016

The Logan Hotel

1 Logan Square, Philadelphia PA

Section Chair
David Goldfarb, Esq.
Goldfarb Abrandt Salzman & Kutzin LLP
New York City

Program Co-Chairs
Britt N. Burner, Esq.
Nancy Burner and Associates
New York City

David I. Kronenberg, Esq.
Goldfarb Abrandt Salzman & Kutzin LLP
New York City

Program Agenda

- **Elder Law Update: New Developments in Elder Law**
- **Elder Law Update: Guardianship**
- **Advance Health Care Directives**
- **Utilizing Supplemental Needs Trusts in Special Education Hearings**
- **Hidden Traps and Pitfalls in Employing a Home Care Worker: Advising Your Client on Doing It the Right Way**
- **Clear My Title**
- **Ethics: Issues in Representing Alleged Incapacitated Persons**
- **Ethics of Social Media**
- **Community Medicaid Update**
- **Return of Gifts and Planning After the *Weiss* Decision**

The New York State Bar Association's Meetings Department has been certified by the NYS Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. The summer meeting has been approved for up to **11.0 MCLE transitional credit hours including 6.0 in Professional Practice, 3.0 in Skills and 2.0 in Ethics for all attorneys, including those newly admitted.**

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Message from the Chair

As you make your way through the pages of this volume of the *Journal*, I thank you for your loyalty and dedication to our Section. As you read the anecdotes and recollections of our former Section Chairs, I invite you to think forward to the next 25 years of our Section. Envision what a *Journal* edition in 2041 might read like. Where will we be? What will our Section have pioneered in the next 25 years? What role will you play in it?

Since our last *Journal*, our Section has continued to advance its mission—to provide services and opportunities for involvement on issues relating to Elder Law and Special Needs Law for members of the New York State Bar Association. We have held our successful Annual Meeting in New York City in late January in conjunction with the Association's Annual Meeting; we planned a wonderful UnProgram in Poughkeepsie in mid-April. We survived another state budget cycle, and we were successful in advancing some of the Section's legislative priorities.

One legislative priority worth highlighting is proposed revisions to the Power of Attorney law. Our Section had put forth a proposal for substantive amendments to the General Obligations Law provisions pertaining to Powers of Attorneys, including simplifying the form and eliminating the gifts rider, changing the standard from "exact wording" to "substantial compliance," and creating penalties for failure by a third party to honor a properly executed power of attorney. Our colleagues in the Trusts and Estates Law Section put forth a different proposal dealing only with technical corrections. Wisely, then-President Glen Lau Kee convened a workgroup comprised of representatives of numerous NYSBA Sections, and led by **Ellen Makofsky**. The workgroup presented to the NYSBA Executive Committee a proposal incorporating both the substantive amendments and the technical corrections, and such proposal was unanimously approved. It then found its way in front of the NYSBA House of Delegates on Friday, January 30, 2016, and was unanimously approved as well. This affirmative legislative proposal was given the "green light" for the state bar to advance to lobbying to get the legislation introduced and passed. **Richard Weinblatt** and **David Goldfarb** represented our Section on the workgroup, and David participated with **Ellen Makofsky** in the presentation of the proposal to the Executive Committee and the House of Delegates. Our Section is excited to be able to further advance what we believe to be important changes to the Power of Attorney law in the legislature, and look forward to seeing much needed reform.

Our Section also took some steps to enable us to respond quickly to legislative and policy issues. The newly formed Section Cabinet, comprised of the Officers of the Section, the thirteen District Delegates from the judicial districts within the state, and our three Members-at-Large, were called into action to allow our Section to comment on regulations promulgated by the Department of Health. This Cabinet, created for the purpose of addressing regulatory and statutory issues that arise between Executive Committee meetings, enabled our Section to ensure its voice was heard before the period for public comment closed.

Similarly, our Section's voice was extended when we commented on proposed legislation to amend Article 81 of the Mental Hygiene Law. A bill had been introduced to preclude health care facilities from commencing an Article 81 proceeding for a patient or resident, and our Section responded with thoughtful comments and suggestions.

We also face additional legislative issues, some of which I hope, by the time you are reading this message, have been resolved favorably. This year, Governor Cuomo's budget yet again included a provision that would eliminate spousal refusal for community based Medicaid. While mandated under federal law to be available for chronic care Medicaid applicants, spousal refusal has been an optional addition in New York for married, community-based Medicaid applicants and their spouses, and for the twenty-sixth time, the proposed budget has included eliminating this benefit. This year's proposed budget also included reduction in the Community Spouse Resource Allowance from New York's floor of $74,820 to the federal minimum of $23,448, and also included a requirement that applicants for Managed Long Term Care be assessed to need nursing home level of care before being accepted into MLTC. Other ancillary issues were also included and, along with NYSBA's Government Relations Department and our lobbyists at Greenberg Traurig, our Legislative Committee, Officers, and a team of Section members worked diligently to address, educate and lobby on the impact that these proposals would have on our clients.

Our Annual Meeting is the annual meeting of Section members, and this year, on January 26, 2016, our Nominating Committee, chaired by Immediate Past Chair **Richard A. Weinblatt, Esq.**, put forth a slate of Executive Committee appointments including

Matthew Nolfo, Esq., as incoming Treasurer. Three Members-at-Large were also appointed: **Lisa K. Friedman, Esq.** was appointed for a one-year term; **Jeffrey G. Abrandt, Esq.**, was appointed for a two-year term; and **Beth Polner Abrahams, Esq.** was appointed for a three-year term. Four District Delegates where appointed as well: the First District will be represented by **Elizabeth Valentin, Esq.**, who was elected for her second term; the Third District will again be represented by **Robert P. Mascali, Esq.**, also elected for a second term; the Seventh District will be represented by **Richard A. Marchese, Jr., Esq.**, returning for his second term. **Jeanette Grabie, Esq.**, who has finished her time on our Section's Sponsorship Committee, is so dedicated to our Section that she has agreed to represent our Tenth District. We send a heartfelt thanks to **David R. Okrent, Esq.**, who has completed two terms as our Tenth District Delegate. Pay attention for the activities of our District Delegates within your own judicial district—pro bono opportunities, networking events, and a voice of our Section on the local level are all possible thanks to the hard work of the District Delegates!

As always, our committees are active and hard at work. Our **Special Ed Committee**, chaired by Adrienne Arkontaky, Esq., with Tracey Walsh, Esq., as Vice Chair, was actively involved in planning and hosting the Continuing Legal Education presentation of NYSBA entitled "Special Education Update 2015" and hopes to have the opportunity to present more educational events in the upcoming year.

The **Estates, Trusts and Tax Issues Committee**, under the leadership of Patricia J. Shevy, Esq., and Jeffrey A. Asher, Esq., held an educational conference call to discuss Estates, Powers and Trust Law 5-3.2 and the Revocatory Effect of Birth of a Child After Execution of Will, and what constitutes a settlement for purposes of this provision. The committee is arranging a conference call to discuss what to do with life insurance in Medicaid planning, to be presented by **Jeffrey A. Asher** and **David Okrent**.

Other committees remain active and engaged, and—for the last time, I get to plead with you—if you aren't a current member of a committee, please get involved!

And so, we return to the question posed earlier: what role will you play in the next 25 years of our Section? Statistics show that our Section's membership is aging—almost 58% of our Section members reporting their ages are over the age of 55. Of those reporting, over 68% of our members have been admitted to the Bar over 20 years. I hope all these members are able to enjoy early retirement, spend time with their families, travel the world, donate their knowledge and skills to volunteer efforts, and simply reap the rewards of their hard work. But to do so, we need our younger members to step up. We need to encourage participation in the Section, participation in the area of Elder Law, and the cultivation of new leaders in our Section. As you have enjoyed the musings of our Past Chairs, I encourage you to look forward to writing your own reflection someday, and would encourage you to see yourself as a future Past Chair. (And if this intrigues you, give me a call—I get to Chair the Nominating Committee next year, and look forward to adding some new names to the slate!)

In closing, as my tenure as Chair of the Section ends on May 31, 2016, I am grateful and honored to have served. I enjoyed being contacted by Section members with questions and ideas. I enjoyed collaborating with other Sections and with other committees. I enjoyed representing our Section at NYSBA and in the community. I thank all the members of the Executive Committee, the amazing staff at NYSBA, and each Section member who contributed to my amazing year as Chair. I look forward to continuing to advance our Section, to my continued growth in my practice of Elder Law and Special Needs Planning, and I look forward to watching what the next 25 years bring for our Section.

JulieAnn Calareso

Message from the Co-Editors in Chief

Judith Nolfo McKenna

There is so much to celebrate this spring. Our Section has 25 wonderful years under our collective belts. We were thinking about how much the Section has meant to us and to so many practitioners. We have grown into a formidable wealth of knowledge and experience and continue to welcome new members to our Section.

After attending another successful Annual Meeting this past January, we observed our Section meetings, while constantly educational and informative, also seem more like a reunion of friends than a work conference. Our sincere thanks to Liz Briand and Joan Robert for their tireless efforts in creating another amazing program.

This issue is very special to us as most of the submissions and spotlights are from our former chairs. Muriel Kessler's offering is truly a piece of history. As she so humbly stated, one spring day she had a vision. In 1990 she embraced the challenge to bring forth a new Section from what was previously the New York State Bar Special Committee on Seniors. Our Section was officially approved in April of 1991. It was a bit surprising, as we had no idea that other Sections opposed the formation of this new Section, claiming Elder Law was already a part of their Section. However, good triumphed, and the Elder Law Section was formed with an original vision to encourage teamwork and leadership.

If you need a well-deserved chuckle, peruse Marty Finn's "What Is a Financial Officer?" This little gem will make you smile; our own dear Richard Weinblatt participating in a wrestling tournament in a ring filled with melted chocolate in Hershey, Pennsylvania? No doubt he would win against any opponent.

And our self-proclaimed "antique" Chair, T. David Stapleton, penned an enjoyable and insightful piece. David, similar to many of our chairs in recent memory, is one of those leaders who succeeded because of his encouraging and inviting spirit. His piece is a humorous insight on leading our Section, and David, for the record, our vote is #4 is the false statement.

Tara Anne Pleat

Howie Krooks submission on the Compact for Long-Term Care continues to be a great achievement for our Section. The simple idea of rejecting citizen impoverishment as a necessary effect of receiving governmental assistance from long-term care. Bob Freedman and Fran Pantaleo both discuss the importance of Special Needs Planning as part of our areas of practice, and during Fran's tenure in the fall of 2013, the Executive Committee approved the amendment of our Section's name from the "Elder Law Section" to the "Elder Law and Special Needs Section." Fran also promises a new article on her experience during a three-day silent meditation retreat for attorneys. Three days with no speaking sounds like a slice of heaven right now!

Although it is difficult to believe, this is the last *Journal* edition for our wonderful current leader, JulieAnn Calareso. We are both so grateful for all her efforts with our first year as Co-Editors. JulieAnn encompasses so many of the traits of a great Chair and a great leader. She is, by far, one of the hardest working individuals we know. She is always helpful, and is willing to take on any task or assist with any assignment. We are amazed and grateful for sharing this year with her. We anticipate another excellent and exciting year with our Chair-Elect, David Goldfarb, and wish him a year filled with success.

A special thank you to all the past Chairs who assisted with this issue. If you wish to submit an article for the Fall 2016 issue, please email it to us at tpleat@wplawny.com and judy@mckennalawny.com by August 1, 2016.

Tara Anne Pleat and Judith Nolfo McKenna

25 Years of Elder Law Section Leadership

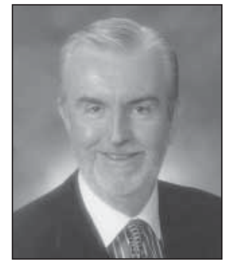
Mortimer J. Goodstein
Chair
1991-1993

Muriel S. Kessler
Chair
1993-1994

Robert Abrams
Chair
1994-1995

Robert M. Freedman
Chair
1995-1996

Vincent J. Russo
Chair
1996-1997



Walter T. Burke
Chair
1997-1998

Kathryn Grant Madigan
Chair
1998-1999

Michael E. O'Connor
Chair
1999-2000

Bernard A. Krooks
Chair
2000-2001

Louis W. Pierro
Chair
2001-2002

Cora A. Alsante
Chair
2002-2003

Joan L. Robert
Chair
2003-2004

Howard S. Krooks
Chair
2004-2005

Daniel G. Fish
Chair
2005-2006

Ellen G. Makofsky
Chair
2006-2007

Ami S. Longstreet
Chair
2007-2008

Timothy E. Casserly
Chair
2008-2009

Michael J. Amoruso
Chair
2009-2010

Sharon Kovacs Gruer
Chair
2010-2011

T. David Stapleton, Jr.
Chair
2011-2012

Anthony J. Enea
Chair
2012-2013

Frances M. Pantaleo
Chair
2013-2014

Richard A. Weinblatt
Chair
2014-2015

JulieAnn Calareso
Chair
2015-2016

Elder Law Section Co-Founder Dies at 95

Mortimer Goodstein, co-founder of the Association's Elder Law Section, died at 95 on December 11 in Palm Beach, Florida. Goodstein, an Association member since 1966, specialized in estate law and practiced for more than 50 years.

A *Phi Beta Kappa* graduate of City College of New York, Goodstein earned his law degree from Columbia Law School in 1936. He was a Colonel in the United States Army during World War II, stationed in the South Pacific.

An active member of the Association, Goodstein co-founded the Elder Law Section in 1991 with Muriel S. Kessler of New York (Kessler & Kessler) and served as Section Chair until 1993. He also was a member of the General Practice and Trusts and Estates Law Sections. He became a member of the House of Delegates in 1994.

"Mortimer was my beloved friend and colleague, a brilliant legal counsel and a class act," said Kessler. "He will be greatly missed."

As printed in the Spring 2008 Elder Law Attorney.

The Creation of the Elder Law Section

By Muriel S. Kessler

I was sitting in my office in bustling midtown Manhattan one fine spring day in 1990 when I received a telephone call from Mortimer Goodstein, Chair of NYS Bar's Special Committee on Seniors. He had read the newsletter of the State Bar's General Practice Section, *One on One*, and wanted permission to reprint and distribute to his members the message in the newsletter, which I had written as Chair of the GP Section. Flattered, I quickly consented. He then graciously invited me to attend the next meeting of his Committee. I reluctantly accepted, wondering what interest I would have in meeting a group of senior lawyers.

When I arrived at the meeting, however, I was pleasantly surprised. Instead of a bunch of oldsters, most of the attorneys present were young and vibrant. I was so impressed with the focus of the Committee and the remarkable quality of the reports concerning the problems of the elderly that I recommended to Mort that the Committee apply to the Association for Section status. I will always remember Mort's emphatic response: "This is your vision, you do it!"

The rest is history! Many months were expended in preparing the application for Section status and in canvassing statewide the members of the Association's House of Delegates, of which I was a member.

In April, 1991, the formation of the Elder Law Section was unanimously approved by the House of Delegates, despite previous opposition from several Sections claiming that Elder Law was part of their domain. Accordingly, the Elder Law Section took its place as the twenty-first Section of the largest voluntary state bar association in the country.

The creation of the Section was a full-time undertaking. Our work was set out for us. We canvassed the entire state and finally selected our outstanding officers, Executive Committee members and 12 standing Committee members from every district in the state. Each district delegate was requested to solicit members from his or her locality as part of the membership drive. The Section's mission was to serve the legal profession and the public-at-large as a clearinghouse of information on all phases of Elder Law, including economic, social, emotional financial, familial and heath care issues; to provide an array of resources to address the needs of the elderly, and to weave professional principles and ethical concerns into its programs and symposiums

The sweet smell of success was in the air. Under the able leadership and guidance of Mortimer Goodstein, the first Chair and co-founder of the Section, the Section's membership catapulted. In its first 6 months of existence, 687 attorneys enrolled.

After Mort completed his two-year term, I ascended as Chair. During my tenure, the Section made a profound impact on federal and state legislation affecting the elderly, working in tandem with Federal and State legislators, representatives of the Governor of New York, and representatives of the Department of Health and Department of Social Services.

The Section published and distributed an outstanding newsletter, *Elder Law Attorney*, with Michael Miller as Editor-in-Chief; a pocket pamphlet, 15 Benefits for Older New Yorkers, in English and Spanish and in large-type for the sight-impaired, and a booklet, Housing Options for the Independent Older New Yorker. Our educational seminars, fundamental skills programs and summer meetings were videotaped and made available for presentation by local bar associations to their membership.

The Section attributed its success, in large part, to its policy of encouraging leadership and teamwork among its members, providing them with the opportunity to actively participate in its educational programs and publications and in the direction and focus of the Section. To further implement this policy, I recommended that, commencing with my tenure, the term of each Chair should be one year, instead of two. The Section's current bylaws reflect that change.

The Section received the ultimate recognition of the State Bar when the September/October 1993 issue of the NYS Bar *Journal* was dedicated exclusively to Elder Law. The *Journal* included articles authored by Section members covering a cafeteria of significant Elder Law issues, and was distributed to all 60,000 members of the State Bar.

Since my tenure, the Section has gone from strength to strength, and has greatly enhanced its goals and objectives. I am proud of our Section's accomplishments and its foresight in embracing special needs issues and in renaming our Section the Elder Law and Special Needs Section.

And I am delighted that, on one fine Spring day twenty-five years ago, I had a vision.

Member Spotlight: Robert Abrams

Interview by Katy Carpenter

Q Where are you from?

A Brooklyn, and yes, I still talk like that!

Q Where have you traveled?

A All over. I've been lucky to travel all over Europe, to China, Mexico, Turkey and Canada.

Q Where is your favorite place?

A Wherever my family is.

Q Do you have kids?

A Yes, 2 adult daughters.

Q Between your Bachelor's Degree in Special Education and your experience working at a nursing home through law school, it seems as though your interests were always intertwined with elder law…was there something early in life that led you in this direction?

A I've always worked with people through life challenges. I enjoy doing what I can to improve the lives of others and using my services to provide an impact. It's personally fulfilling and mutually satisfying.

Q What's your favorite part about your job?

A A little history: I've been involved from the beginning as an elder law attorney when it was an emerging field. I've morphed into litigation and I particularly enjoy pre-litigation when we can produce a quick and efficient resolution for the client. While I can't undo a horrible chronic illness, I do my best to help clients get on with their lives. Whether it's reaching a resolution that avoids litigation, litigating a matter that provides our clients with the relief they desire, applying for Medicaid or Guardianship, resolving and mediating a family dispute, I try to turn a challenging situation into a positive outcome.

Q Tell me about a project or accomplishment that you consider to be the most significant in your career.

A I'll give you a few that are different. First, helping to create the Elder Law Section of the State Bar Association. Being a so-called Co-Founder was an enriching experience especially in a new area; it's been a gift. Second, along with serving as the Editor of NYSBA's Treatise on Guardianships. I've been able to participate in and litigate cases which shaped this area of law. I've successfully litigated significant cases whether it was a contested guardianship or estate proceeding. My biggest accomplishments are when I am able to help a family reach a resolution without a horrendous legal battle. Most importantly, I am very lucky to work with great colleagues and being able to enjoy working every day.

Q What did you want to be when you were 13?

A A professional athlete…and I still do!

Q So what is your sport?

A Basketball.

Q Are there hobbies you look forward to on the weekends?

A I'm too old to play basketball on the weekends but I play racquetball and do other exercise…and I've written a few books.

KC: That must keep you very busy!

RA: It does.

Q You are also an adjunct professor at Touro Law School. Do you enjoy teaching?

A I enjoy sharing my knowledge and experience with my students. In turn, my students challenge and energize me as we collectively bring the law to life.

Q Is there anything else you want people to know about you?

A It's important to know that it's a gift to help people. I'm just a normal, average guy with an opportunity to participate in interesting and important legal matters. Valuing family, friends and relationships are what it's all about. Everyone is going to die, and I take the position in life that if you do your job well and you have friends and family who you enjoy your time with, you are lucky…I strive for that every day. I am very lucky.

Katy Carpenter is a paralegal with Wilcenski & Pleat PLLC in Clifton Park, and a May 2016 graduate of Albany Law School.

Practical Tips for Special Needs Planning

By Robert M. Freedman

I have been working in Elder Law for 37 years—30 in private practice. However, now I find that I spend more and more time on Special Needs issues. Special Needs Planning grew out of Elder Law because it raises similar legal issues: planning for long term care, often for the lifetime of the disabled individual; eligibility for Medicaid and other government benefits; and management of property and person including advanced directives and guardianships. I wanted to take the opportunity in this article to give some practical tips for Special Needs Planning.

1. Make the Client Prepare a "Letter of Intent"

Don't know what a "Letter of Intent" is? Google it. Sometime in the future, someone will have to take over and manage the person and property of the beneficiary. Current caregivers, often parents, know the beneficiary. The new caregiver needs that information to act in the best interests of the beneficiary. This is crucial. Do not suggest it—tell the clients that they must do it. No other document will have a greater effect on the future care and happiness of the beneficiary. This is not a legal document. The client can draft it himself or herself. Give them a sample form. And tell them to update it regularly, at least annually.

2. Understand the Disability

I remember my first NAELA program on Special Needs issues. The presenter, Professor Lawrence Frolik, a professor at the University of Pittsburgh School of Law, spent two hours discussing the different types of disabilities. My initial thought was what a waste of time. Now, I see that it is central to appropriate planning. Understanding the beneficiary and his or her disability is a focus in my initial planning consultation and it is the first advice that I give trustees of special or supplemental needs trusts. Both the advice I give and the terms of the trusts I draft are customized to the disability of the beneficiary.

3. Special Needs Trusts a/k/a Supplemental Needs Trusts (SNT)

The SNT is the most important part of the beneficiary's lifetime financial plan. It has to be flexible enough to qualify the beneficiary for government benefits like Medicaid and OPWDD or OMH waivered programs, but still allow the trustee to use trust assets in the beneficiary's best interests, even if that reduces or eliminates government benefits. Need more drafting advice? Go to a CLE.

4. Eligibility for Government Benefits

In New York, almost all services for beneficiaries with disabilities require Medicaid eligibility and an OPWDD or OMH waiver (even if the client will fund a large SNT and the beneficiary would not otherwise need government benefits). This includes residential placements, day programs and job training. No matter how much money the client has to fund the SNT, if the beneficiary lives in New York, it has to be drafted so that the beneficiary is eligible for government benefits.

If the beneficiary does not live in New York, you need to know what the Medicaid and other benefit eligibility rules are for the State where the beneficiary resides and will receive services. Consult with local counsel.

5. Choice of Trustee

The SNT must be discretionary. The judgment of the trustee is crucial and so the selection of the trustee is crucial. The trustee of the SNT will determine what is needed and how to pay for it. You need to pick the best trustee. While no trustee will replace a parent, the trustee needs to be dedicated to caring for the beneficiary. This is the most crucial decision. There are no easy answers. If no single trustee is going to work, consider a combination—a trust company and an individual. You can consider going outside of New York to states which allow for the role of the trustee to be divided so one institution or person manages and invests the assets, while another person or committee determines distributions, and a trust company serves as the administrative trustee. We all have that drawer of unexecuted trusts because the clients cannot decide on a trustee. Your time advising clients on this issue is crucial.

6. Inter Vivos SNT

The SNT should be inter vivos, not testamentary. It can be funded from a revocable living trust, a Will, a life insurance policy or even a retirement account, but do not make it a testamentary trust. If it is testamentary, you have to go back to court for changes in trustees and for accountings. There will be a court proceeding which will probably require the appointment of a Guardian ad Litem for the beneficiary. That takes time and costs money.

7. Trust Funding—Not Too Little, Not Too Much

Do not automatically go to equal shares for all children—a beneficiary with special needs may need more or less than his or her siblings. Try and determine the optimum level of funding that is needed. In many cases, if the parents are young, life insurance is a good option if clients do not have sufficient assets to fund the SNT.

On the other hand, for wealthy clients, the child with a disability may not benefit from a large bequest. In this event, maybe the SNT should receive less than the other beneficiaries. I have had to convince a number of clients that overfunding a trust with millions of dollars for a child with Autism who has a comfortable but modest lifestyle will prevent the other children from benefiting from the estate inheritance. Consider capping the funding or allowing a sprinkle among other beneficiaries if the trust assets are over a certain amount.

8. Other Family Members

Review the estate plans of other family members who may wish to provide for the beneficiary with a disability. They should also execute an SNT, or if drafted properly, they may be able to direct funds into an SNT that you create.

9. Advanced Directives vs. Guardianship

Assess the capacity of the beneficiary to execute advanced directives. If competent, do a HIPAA Medical Privacy Release, Health Care Proxy and Power of Attorney. If not competent, is there a need for a guardian? Substituted decision making may address medical issues.

As the courts, and maybe the legislature, move toward preserving maximum independence and due process, guardianships will be more cumbersome and expensive and may result in more denials. Determine if a Guardian is really needed, especially if the parents are the ones seeking the guardianship. Parents are often concerned that they have been and need to continue to make all decisions, personal and financial, for a child who has a developmental disability, so they want to be appointed guardian. You need to make an independent assessment as to whether or not the child will qualify under 17-A or Article 81 and advise the client accordingly.

10. Beneficiaries with Mental Illness

This can be the most difficult planning if the mental illness causes oppositional or erratic behavior. The challenge is finding a trustee who will deal with a beneficiary with mental illness who may be delusional, difficult or demanding. It is very emotionally difficult for family members, especially the sibling of the beneficiary, to serve as a trustee. Few corporate trustees will want to serve as trustee even with large trusts and an individual co-trustee. Consider going to states like Delaware where a trustee can be relieved of liability on distribution issues. There are no easy or perfect solutions.

Parents want to protect their children who suffer from mental illness. They want to get treatment for them. However, the law protects the children's independence and rights. This is hard for parents to accept. Getting a Guardian appointed will be difficult since it will probably be contested and the AIP will have counsel, often MLS. And even if a Guardian is appointed, Article 81 specifically prohibits guardians from involuntarily institutionalizing a judicially determined incapacitated person in a rehabilitation or psychiatric facility. See MHL Section 81.22 (b). One of my most agonizing tasks is to tell a parent, "Your son has a right to live on the street and there is no legal remedy to prevent him from selling drugs or selling himself." Ask the client the question: if you were appointed guardian tomorrow, what would you do? Many times your answer will be that you understand why it should be done but you have to tell the client that you could not do that even if I waved a magic wand and made you your son's guardian. Not the answer they want to hear. It is a horrible situation, but there is no legal remedy.

Welcome to a frustrating but greatly rewarding special needs practice.

Elder Law—A Client-Driven Practice

By Vincent J. Russo

An elder law practice can be defined as a practice which serves the needs of the elderly and disabled. It is a client-driven practice. As the needs of the elderly change or expand, our law practices must do the same.

If this is our premise, then how do we insure that our practices are "client driven"? This article will comment on William C. Cobb's article, "Creating A Client Driven Firm,"[1] in the context of our elder law practices.

A. Hourly Billing

1. First, how do we determine the fee to charge our clients for the services that we provide? Since the 1960s, attorneys have equated their time with the value of their service. A simple approach: an attorney's hours *times* an attorney's rate equates to the attorney's value added.
2. As a practical matter, billable hours shrink as more time is demanded by clients to maintain a credible relationship. Isn't that true, don't we need to turn the clock off at times with long-standing clients in order to further the relationship? How do we capture the value of that "off the clock meeting"?
3. Attorney competition is driving the price down for services. We have seen this in many areas of practice. A good example would be real estate residential closings. How many attorneys are available in the community to handle that transaction and what has that done to the fee that can be charged for a routine residential closing?
4. Increasing client power and control thrusts demands on law firms that they are not prepared to face. Clients want to be more hands on. They want instant responses to their problems. Have you been receiving e-mails from your clients? If not, just wait.
5. On the other side, there is pressure on the attorneys to increase their billing rates to cover the increasing cost of doing business and to ensure profits to the members of the law firm (without any relationship to the factors in 2, 3 and 4 above).

B. Shift in Buying Power Forces Change

1. Slower growth in the demand for legal services is creating a client-dominated market. This may not be as critical a factor for the elder law area due to the demographics (aging baby boomers), but this is still a concern as consumers change their perception of "legal services." Will consumers see that elder law attorneys are necessary to assist them in elder care matters?
2. Firm staffing has become more challenging. Finding the right balance between attorneys and staff is a constant struggle. At the same time, attorneys and staff must be open to change how they practice in order for the law practice to remain competitive (i.e., use of new technology).
3. The number of new competitors is increasing. These competitors are not only the attorneys entering into the elder law practice in order to make a living, but more important, the increasing number of alternative providers coming into the market, such as accountants, private geriatric care managers, etc.
4. Faulty assumptions can lead to the destruction of a law practice. A law practice will not be able to continue to grow and be successful if it believes that (1) size is a definition of power, expertise and profitability; (2) leverage is key to profitability; and (3) billing rates will increase to enable continued profitability from leveraged capacity.

C. Creating the Proper Environment for Reshaping the Firm

1. Evaluate the Environment. The tough question must be asked and answered. Do you need to reshape the firm in order to be successful or to continue on a successful path? I hope that you have answered "yes," as I believe we must be constantly challenging ourselves and that change is a fundamental element of the challenge. For without change, our practices will die.
2. Culture. The first step for creating a proper environment for the future success of your firm is to identify your firm's culture. Firm culture has the power to bind the group of attorneys and staff, creating accountability to each other and to the clients. Have you communicated this culture to your staff? Does everyone buy into it? These are critical questions that must be answered.

3. Leadership. Then, there must be leadership to show the way. The leaders need to focus in on culture as it relates to strategic change.

4. Vision and Mission. The leadership must have a vision of the law firm's future and a mission for how to get there. The vision and mission must be communicated to the attorneys and staff.

5. Enablement. Then, the tools to reshape the firm need to be identified so that the attorneys and staff will have the ability to implement. It is important that everyone have an understanding of the difference between what we believe is "quality service," and what the market believes is "quality service." What criteria should be used to help us understand this difference and what investments should be made in services that are to be provided by the firm in the future?

D. Technical Competence vs. Service Quality

1. An attorney's worth or value is not based solely on the attorney's effort and technical competence, but rather on a combination of his or her technical experience and knowledge, and the attorney's usefulness in helping the client resolve his or her concerns or problems. For example, the elder law attorney obtains Medicaid eligibility for a client's mother on an expedited basis. This service is very useful to the client in protecting assets and is implemented with technical competence. On the other hand, what good is it to the client to efficiently handle the submission of the Medicaid application if it leads to a Medicaid denial? Usefulness has high value.

E. The Value Curve

1. Low Value. Clients will attribute low value if the service provided has little or low impact on the client's goals (commodity work). A legal document may be viewed as a commodity, such as a Durable Power of Attorney or Will.

2. Hired for Experience. Clients may be willing to pay a higher rate because a value has been placed on the attorney's experience or reputation in the community. The client's willingness to pay more has a higher rate of acceptance for transactional work. This is an area where the elder law practitioner has a real opportunity, in particular, services in the areas of long-term care planning, Medicaid applications, guardianships.

3. High Value. The highest value exists when there is a "nuclear event" for the client. This is an important part of an elder law practice. Elder law attorneys are often "crisis counselors" dealing with a nuclear event—catastrophic illness: protection of assets and preservation of dignity.

4. The attorney needs to view his or her services from this mind-set of the client in determining fees for service, rather than the attorney's value is the number of hours spent *times* one's hourly rate.

F. Choosing Your Practice Areas

1. Dying Swans. These are the practice areas of your firm where you have tremendous depth but the clients show little need for this service or competition has made it impossible to make a profit (for example, handling a handful of residential real estate closings versus the real estate attorney who handles a high volume of transactions at a low cost). Are you willing to take the risk of shutting down a dying practice area and moving into or enhance a practice area which is or can be profitable?

2. Core Competencies. The attorney should focus in on the practice areas that have a high demand in the market and for which the firm has built a tremendous reputation, depth of experience, expertise and accumulated knowledge. For many elder law attorneys, long-term care planning should be the targeted practice area.

3. Losers. The areas of practice that you have little credibility in the market and little depth should be shut down. For example, are you dabbling in guardianships without the experience and support staff?

4. Investment Areas. Are there areas of practice where you should be devoting your time, energy and dollars? These areas of practice are the areas which sustain your core competencies. You want to use your resources to train your attorneys and staff, expand your services to meet the growing needs of your clients and market potential clients to the firm.

G. Establish Permanent Change as Part of the Culture

1. The first step is to create a sense of urgency in your firm and to set up a core coalition. Everyone in the firm must buy into the firm culture.

2. The leaders of the firm need to create a vision for change and establish a core coalition team.

3. It is critical that there is a system set up to quantify and to communicate progress to the attorneys and staff of the law firm.

4. Every effort must be made to remove petty barriers which prevent the firm from accomplishing its goals. Rather than taking on the "world at once," identify and achieve short-term gains.

5. Lastly, anchor the change into the fabric of the firm.

Elder law attorneys have a wonderful opportunity to make a difference in the lives of the people they serve, as well as make a good living. Focusing in on elder law as "client driven" plays very well into our legal services being "client driven." Our focus is right on track. I wish you and your practice much success!

Endnote

1. William C. Cobb, *Creating A Client-Driven Firm*, Law Governance Review, Winter 1998.

This article originally appeared in the Spring 2002 issue of the *Elder Law Attorney*, published by the Elder Law Section of the New York State Bar Association.

We Were Criminals Once

By Walter T. Burke

It was still a time of relative innocence and parochial concerns for the Section. We were still doing seminars on "What is Elder Law?" focused on the state budget and worried about whether or not the state legislature would change the definition of estate.

The Section decided to do its first international summer meeting and head off to Dublin Ireland. Travel was much easier pre 9/11.

But there were strong indications that things would be dramatically changing. On 8/21/96 President Clinton had signed the Health Insurance and Portability Act. One of its provisions imposed criminal penalties on any person who "knowingly and willfully disposed of assets" for the purpose of becoming eligible for Medicaid if such action resulted in a penalty period during which the applicant would be deemed ineligible. The infamous Granny Goes to Jail law.

The officers and Section members almost immediately started making contacts trying to find out how this late night provision made it into law and, more importantly, how it could be changed. We were shocked to find out that even though the Act passed by a vote of 98 to 0 in the Senate no senator or staffer would take responsibility for inserting this provision. Almost as shocking was the fact that no one would change or amend this orphan provision. Welcome to Washington

As the results of this incredibly bad piece of legislation became known, state and national bar associations as well as senior advocacy groups and not-for-profits all fought for repeal. We were on the side of the angels.

For the next year there was a united front and a grand alliance to have this provision repealed. The Section was thinking of what was right and equitable and constitutional. Washington was thinking of money. As the outrage grew, it appeared that the rights of seniors would prevail. What we didn't know was that the desire for revenue would also prevail.

Initially the Section offered seminars and direction to concerned attorneys throughout the state about how to advise clients under the new statute. Needless to say, they were well attended. Gradually a national outrage grew and positive change appeared on the horizon.

On August 5, 1997 the Balanced Budget Act was made effective. This onerous provision was repealed by Section 4734 and Granny was saved.

Granny was safe but the Feds still wanted money. Who could be the next target that would allow for the confiscation of assets? Certainly most seniors and their families would be too confused or too afraid to do any planning on their own, so the government decided to penalize those who were helping seniors.

The Balanced Budget Act imposed criminal penalties for any "persons who for a fee assist others in disposing of assets" to qualify for Medicaid. Penalties could be a fine not to exceed $10,000 or imprisonment for not more than a year, or both.

So Elder Law attorneys were presented with a Hobson's choice of being guilty of malpractice for not telling a client what can be done legally (because Granny goes to jail was repealed) or committing a crime by giving the advice.

It is important to realize that for this period of time a serial killer or a child rapist was entitled to counsel but a senior trying to legally protect their assets was not.

While the legal community was outraged most of the general public was no longer concerned. It seemed that while everybody loves a grandmother the same affection does not carry over to lawyers. We could not count on a large public outcry to repeal this law.

Working through various state and national bar associations, a number of attorneys across the country bravely volunteered to be a test case and challenge the law. With the urging, support and encouragement of our Section the New York State Bar Association, for the first time in its over 140-year history, became a Plaintiff in a lawsuit.

A federal court in the case of *NYS Bar v. Reno* found that the Granny's Lawyer goes to jail law violated the First Amendment and was therefore unenforceable. The critically important work of counseling seniors about their rights and options was able to continue without fear of criminal prosecution.

Our Section played a critical role on the national stage in protecting the rights of seniors, and it has never stepped back.

Elder Law Coming of Age: The Way We Were

By Kathryn Grant Madigan

Eighteen years ago in the Spring of 1998 we published our first Special Edition of *Elder Law Attorney* celebrating our Section's "Coming of Age." As we now commemorate our 25th Anniversary, it is again time to reflect on our past as we prepare our members in serving the future needs of our aging and special needs clients and families.

I recently had an opportunity to stroll down that memory lane, recounting for a dynamic group of new members of the NYSBA House of Delegates, my "path to leadership" in a lunch program sponsored by the Committee on Leadership Development. What jumped out at me as I prepared for that presentation was my rather serendipitous presence as the youngest, and new, 6th District Vice President on the Association Executive Committee. At my first meeting in Albany, we were presented with an extraordinary opportunity to be the first State Bar Association to give its blessing to a proposed Section in an area of practice that was so new, any mention of Elder Law required a definition.

Thanks to the vision of then-President Justin Vigdor, the NYSBA Special Committee on Seniors was established a few years earlier. Our first Section Chair, Mortimer Goodstein, became Committee chair in 1989 and, at the urging of another future Section Chair, Muriel Kessler, led that group of senior advocates in making the case as to why the State Bar should approve Section status. Other Elder Law notables, most of whom became Section Chairs in the early days—Bob Abrams, Bob Freedman, Bob Wolff and Vincent Russo—were also members of that Special Committee.

As a T&E practitioner at the time, I had the classic "aha" moment that would ultimately transform my professional life. Many of my clients back then required more than the "traditional" estate tax planning tools at my disposal, as we increasingly confronted end of life decisions, developmental, progressive and catastrophic medical conditions, Medicare, Medicaid, elder abuse, housing options and the whole panoply of aging-related issues which evolved into what we now know as the holistic practice of Elder Law and Special Needs Planning. That small group of advocates offered the very solutions we needed to address the needs of our aging and disabled population.

Following right on their heels as the group filed out of the Peck Room at the Bar Center, I was determined to do all I could to further the cause. Another visionary NYSBA President, Angelo Cometa, also "got it" and by April 1991 the House of Delegates voted unanimously to create the Association's 22nd Section, with Mort Goodstein as the first Elder Law Section Chair.

What followed was a time of evolutionary, and even revolutionary, growth and development in elder law, including the two short years during which Walter Burke and I were privileged to serve as Section Chairs.

In 1997 Section Chair Walter Burke held our first international Summer Meeting in Dublin, Ireland. As his Chair-Elect, I chaired the meeting along with Mitchell Rabbino. We developed a cross-cultural program with bar leaders and aging experts from Ireland and the U.S., showcasing our respective health care systems for the aging and disabled. Joining us at that memorable meeting, besides my sons, Dad and sister, were Mitch's wife Skit and then-Association President Joshua Pruzansky as well as many who have become legends in elder law—Vince Russo (with wife Susan, in laws and children), Bob and Linda Abrams, Mike and Maggie O'Connor (and children), Lou Pierro, Howie Krooks, Ellen Kravitz, Ira Miller, Rita Gilbert and many other colleagues. It was at that meeting I met another future Section Chair and Association leader, Ellen Makofsky, and her husband Marv, when she asked for the opportunity to make a difference in the Section. The rest is history. Ellen not only continues to contribute as a regular columnist in our *Elder and Special Needs Law Journal*, serves as Co-Chair of the Association Committee on Women in the Law and Chair of the Power of Attorney Task Force, but was recently nominated to serve a third term as Association Secretary.

That same year Congress amended the notorious "Granny Goes to Jail Law," by penalizing Granny's advisors, rather than "Granny," in what became known as the "Granny's Lawyer Goes to Jail Law." Walter Burke sprang into action, creating a small Section Subcommittee with Vince Russo, Bob Freedman and Bernie Krooks, which I chaired, to advise the Section and ultimately the Association, how best to protect lawyers from criminal penalties for advising clients about lawful Medicaid planning. After we determined that the Association had standing to commence a lawsuit to enjoin enforcement, and that the only alternative was to have that law declared unconstitutional, President Josh Pruzansky convinced the House of Delegates to authorize historic action.

Former President Bob Witmer and his firm Nixon Hargrave (now Nixon Peabody) agreed to handle the litigation *pro bono.* In September, 1998, in a courageous decision, US District Court Judge Thomas McAvoy in Binghamton permanently enjoined enforcement. A few months later, a Stipulation by U.S. Attorney General Janet Reno officially withdrew the government's appeal of the McAvoy decision. A key member of the Nixon Hargrave *pro bono* team, who successfully argued the Motion for Declaratory Judgment before Judge Thomas McAvoy, was none other than David Schraver, our 2013-14 Association President.

As Joshua Pruzansky noted at the time, and which has significance to our Section today, is that "the total success of this lawsuit demonstrates how a single determined bar association can have a national impact on the daily lives of so many of this nation's elderly and less fortunate, as well as the right of every client to obtain counsel and every lawyer to freely render his or her best advice."

That success was not just the result of our dedicated Section and State Bar leadership; it included the *amicus curiae* role by the Ohio State Bar, NAELA, the ABA Senior Lawyers Division, the state bars of Pennsylvania, New Jersey and Wisconsin, as well as the Los Angeles and San Francisco Bar Associations, among others.

Today, as a former President of this great Association and proud former Chair of our Section, I have come full circle as Chair of the ABA Standing Committee that produces the annual Bar Leadership Institute and serves as an essential resource for all of those bar associations and others across our country and Canada.

Let me close by saying unequivocally that I am a far better person, lawyer and Elder Law practitioner as a result of that fateful day in Albany when the very seeds of our Section were first sown. For that, and all of the lifelong friends I have made along the way, I am profoundly grateful.

Statutory Power of Attorney Compensation When Professional Acts

By Michael E. O'Connor

On occasion, we, as attorneys, are requested by our clients to accept designation to be an agent under the client's Power of Attorney. The same occasionally occurs for accountants and other advisors who are not restricted from acting in such capacity. Most of us discourage such an appointment for a number of reasons. The responsibility can be substantial and the compensation for acting can be a problem. It can also be very time consuming carrying out the duties of an agent and the skill level called for in many situations is not that of an experienced attorney. We find a way not to act when possible, but sometimes it cannot be avoided. The purpose here is to briefly address some of the issues with compensation of an agent under a Power of Attorney, particularly when the agent is not a family member and is being expected to act on a professional basis.

General Obligations Law (GOL) Section 5-1506 provides a restriction prohibiting compensation for an agent unless there is an express statement made by the principal allowing compensation. The first step in providing for compensation is for the principal to initial that authorization on the document. This would allow for "reasonable compensation," but what constitutes reasonable is a question left open. It is possible for some definition of the reasonable compensation to be included in the modifications section of the statutory form. What might be a reasonable compensation if we are trying to define it?

Reasonable might be defined as the regular hourly rate charged by the attorney in the practice of law. The reasonableness of such an amount could very well be disputed. Since the compensation must be reasonable, a proceeding may be commenced to determine what compensation should be allowed by the court under that umbrella. If the services provided by the agent is to write checks, keep track of deposits made and oversee, and duties of that sort, then an argument could be made that the hourly rate of an attorney is far higher than the reasonable value of those services. The risk will always be present for the agent who is a professional that the compensation, long after it has been paid, will be put into question and will be ordered to be returned.

Some will attempt to have a more appropriate level of compensation. For example, for routine financial management, perhaps the hourly rate of a Paralegal would be appropriate. Some attorneys will utilize some fraction of the regular attorney rate, such as one-half. The problem with all of these approaches is that they leave the question of compensation open for further review. Some interested relative might question whether the number of hours are appropriate for the work that was done. They might question the value of the service that was done. The professional is left defending such a proceeding, presumably without compensation, and possibly ending up with substantial reduction in the allowable fee.

A preferable approach to compensation would be to have a compensation which can be mathematically computed and is not a factor of hours spent or hourly rates. Needless to say, such an approach leaves a risk that a mathematical formula might not be appropriate given the tasks that are necessary. It could provide too low a payment in some cases or too high a payment in others. Nonetheless, it is something we should all keep in mind for those situations where it is appropriate.

An approach may be garnered by review of Articles 77 and 78 of the Mental Hygiene Law. These address the appointment of a conservator (Article 77) and a committee (Article 78). Both were replaced by Article 81, and both have been amended over many years prior to their being repealed. In particular, prior to the 1974 amendment of Article 77, the compensation of a Conservator was the same as allowed to a committee appointed pursuant to Article 78 of the Mental Hygiene Law. That provided that the compensation "shall be at the same rates as that of an Executor or Administrator." Mental Hygiene Law Section 78.21.

While the historic treatment of compensation of a Conservator or committee does not control in any way the compensation of an agent under a Power of Attorney, it does give a suggestion of where the agents' compensation might be controlled in a more mathematical formula than would be the case with hourly compensation. Whether it is appropriate would depend on the facts of the principal and the assets owned.

Apart from the compensation of the agent, it is also possible that the attorney/agent might perform legal services for the principal, if such services should be provided for in the modifications of the document.

Language for consideration as additions to the modifications where the agent is a professional might be:

> **I wish to make the following modifications to this Power of Attorney:**
>
> **1. My agent shall be compensated for services in handling my financial affairs at the same rate as that of an executor or administrator of an estate, and may pay said compensation from the funds in his/her hands following the close of each calendar year or more frequently. The commission shall be calculated upon the amount of money received by him/her as income and upon income paid out, whether such income is derived from the corpus of the estate or from any other source, and also a commission for receiving and paying out corpus of the estate paid out during the period. The computation of commissions on income and principal shall commence each year at the initial bracket.**
>
> **2. If an agent is an attorney and performs any legal services for me, the agent shall be entitled to reasonable attorney's fees apart from and in addition to the compensation provided for herein.**

Elder Abuse and the Court System: Oil and Vinegar?*

By Bernard Krooks**

With the aging of the Baby Boomers and increased life expectancies, the number of seniors in this country will grow dramatically within the next few years. With that growth will also come a rise in elder abuse, due to the inevitable complex needs and problems associated with the increase of this vulnerable population. Elder abuse is embedded in the common fragilities of many older adults. The physical, cognitive, and emotional changes that come with aging can increase an older person's vulnerability to abuse.

There is currently no national accord on the definition of elder abuse; each state's definition varies from the other; although there has been more consensus recently. The term elder abuse is generally defined as the physical, sexual or emotional abuse, financial exploitation, neglect, or abandonment of a senior. This type of abuse is often referred to as a hidden crime. It is referred to as such for a number of reasons. First, for every case of elder abuse reported, many more go unreported. In fact, for every incident of elder abuse that is reported, it is estimated that approximately two dozen go unreported.[1] Elder abuse and financial exploitation is largely an uncontrolled problem. Second, the majority of the abusers are family members or those in a close relationship with the elderly person, which often dissuades the senior from reporting the abuse. For example, a mother being abused by her daughter might not want to see her go to jail and as a result never tells anyone about the abuse. The mother may also be humiliated by, or ashamed of, the abuse, and so she keeps it to herself. Third, the capacity of the senior, affected by the abuse and perhaps other illnesses causing further capacity deterioration, may make the ability to prosecute the case challenging. Lastly, very few cases are in fact prosecuted due to the lack of specificity in the legal definition of elder abuse and the difficulty in proving the senior's actual vulnerability. As a result, many instances of elder abuse go unreported and as such, unaddressed.

All states have some variation of adult protective services law and civil or criminal laws that are applied to cases of elder abuse. However, with differences in the laws and insufficient reporting mechanisms, the majority of elder abuse cases go on without much, if any, resolution. While officials of Adult Protective Services in New York State are required to report elder abuse to law enforcement, it is only if they have "reason to believe that a criminal offense has been committed" against someone referred to them.[2] Otherwise, there is no mandatory reporting of elder abuse in New York; all disclosure is voluntary.

As this problem becomes increasingly more apparent and widespread, many on a national, state and local level are working toward transforming the current resources in place for new paradigms integrating increased social services and better oversight of the adult guardianship system to tackle and reduce elder abuse, and care for its victims. Courts, when presented with this issue, have an obligation to protect the vulnerable senior, and commonly do so through the use of adult guardianships. In New York State, this is done under Article 81 of the Mental Hygiene Law, despite the fact that the statute was not created with the intention of protecting specifically victims of elder abuse.

An Article 81 guardianship involves confirming that an individual lacks the mental capacity to handle his/her affairs, either personal and/or financial, and requesting that the court appoint a guardian to make decisions on behalf of the person alleged to be incapacitated. Many faced with trying to combat a case of elder abuse will likely be presented with this form of legal recourse to consider. There is both a strong and ironic relationship between elder abuse and the use of the guardianship system. Oftentimes, a guardianship may be necessary to stop elder abuse, such as when it is needed to obtain medical attention for an incapacitated victim of neglect, or removing that person from the control of someone financially exploiting him/her. However, at other times the guardianship itself may be the source of the abuse. There has been much criticism lately surrounding New York State's guardianship system, and reform is slow to address the issues. Many feel that the current guardianship system is often ineffective, exposed to abuse, and rife with the exploitation of seniors' civil rights.

Various factors play into how effective a guardianship will be to combat a particular case of elder abuse. Systemic failings may place the vulnerable senior at a disadvantage when s/he is the subject of a guardianship proceeding. Many of these are attributable to the structure of the proceedings, the legal standard for incapacity, and the realities of court administration. All of these may converge and explode in instances of elder abuse and cause enormous obscurity when attempting to accurately evaluate the senior's capacity. For example, a victim's capacity to make decisions for him/herself is directly impacted by the degree to which the abuser is involved in those decisions. The difficulty here is that there is no bright line; capacity exists on a gradient.

Capacity is complex and affected by a many number of things, such as the mental and physical stress the individual is experiencing. As a result, it is quite possible for an individual to possess capacity under certain circumstances and not in others. Elder abuse can exacerbate emotional and cognitive impairment, which can often present as the inability to make decisions. Also, in a state like New York with such ethnic and linguistic diversity, capacity may present differently when the senior does not speak English or is unfamiliar with the mainstream culture. As such, many cases of elder abuse find their way into guardianships.

Ascertaining the person's capacity is at the core of these cases. However, it is a difficult task to decipher if the person's alleged lack of capacity is simply due to, or greatly affected by, the abuse, in which case once removed from the abusive environment/relationship, s/he can, and should, be able to continue making decisions without the assistance of a guardian. Or, does this senior in fact lack capacity, and require the assistance of a guardian? The problem with the use of guardianship to address elder abuse lies in the identification of whether the appointment of a guardian is appropriate for someone who simply needs assistance out of the abusive environment/relationship, not a guardian to make all decisions on his/her behalf going forward. It requires a true investigation into whether the victim of elder abuse in fact lacks capacity. Generally, a court evaluator is appointed in most guardianships.[3] S/he is the eyes and ears of the court and investigates the underlying reasons behind the need for the guardianship. However, in many cases, a true investigation is not undertaken by the court evaluator. The investigation is simply a cursory review and reporting of the alleged facts based on one visit made with the alleged incapacitated person a few days before the hearing, which often leads to the guardianship not addressing the true issue at hand, the elder abuse.

Further, due to overburdened New York court dockets, courts do not always specifically tailor the guardian's powers to ensure that the guardian may only exercise those powers needed to address the specific issues before the court, but rather allow for the use of general boilerplate powers, which end up stripping the victim of certain decision-making authorities, which s/he may still be capable of exercising. This is especially problematic for those victims of elder abuse that have specific gaps in their capacity due primarily to the trauma of the abuse. Elder abuse is complex, and the disparity between the statutory intent of guardianships and the realities of their administration, does not add up to a quicker end to the abuse.

There are also additional risks faced by elder abuse victims even after a guardian is appointed. The New York State guardianship statute is administered in such a way that there are a number of gaps in the oversight mechanisms and opportunities for negligence on behalf of the guardians. In many instances, there is outright abuse. Unfortunately, due to an overtaxed and underfinanced guardianship system, victims of elder abuse do not often get the protection they should under the statute even after the appointment of a guardian for the incapacitated person. Most guardians do not have any legal or mental health training, nor are the courts requiring it of them.[4] Few take interest in the victim's care plan or whether the victim can participate in his/her own decisions. A required reporting system currently[5] exists under Article 81, wherein the guardians must account on an annual basis for their actions, both financial and medical, or their lack of action. However, when the average guardian does not file his/her report timely, there are no true consequences to that guardian. Sometimes the court's review of these reports is behind by several years. Oftentimes, there is no follow-up by the court, or it does follow-up but is delayed in its action. While many guardians are well-intentioned and are not actively hurting their wards, the guardian may not be fulfilling all of his/her required duties as guardian, such as visiting with the incapacitated person at least four times a year as required by the statute[6] or prudently managing his/her finances. This lack of monitoring makes it evident that the statutory scrutiny and reporting requirements can be stretched, or even ignored, without any consequence and possibly extreme detriment to the senior. The courts' insufficient oversight of guardianships has provided ripe opportunities in which guardians have financially exploited and/or neglected the victim for whom the guardian was appointed.

The identifying, reporting and addressing of elder abuse is complex and multilayered. As guardianship is a commonly used resource to address elder abuse, victims are distinctly vulnerable to its systematic flaws as it is currently administered. The failure of the courts to appropriately monitor guardianships has left many seniors vulnerable and exposed to elder abuse, even after alleged protective measures have been taken.

Endnotes

1. Under the Radar: New York Elder Abuse Prevalence Study, May 2011.
2. NY Soc. Serv. Law, Art. 9B, §473(5).
3. NYS MHL § 81.09.
4. NYS MHL § 81.19.
5. NYS MHL § 81.31.
6. NYS MHL § 81.20(5).

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**Elizabeth Valentin, a partner with the law firm of Littman Krooks LLP, assisted in the preparation of this article.

Medicaid Under DRA ‘05—18 Months Later

Recent Developments in New York Shape the Elder Law Attorney’s Approach to Medicaid Planning

By Louis W. Pierro

Medicaid eligibility continues to be the “life preserver” that keeps our elderly, frail and disabled clients afloat. In the last edition of the *Elder Law Attorney*, we discussed several of the most significant issues that have arisen under the Deficit Reduction Act of 2005 (DRA ‘05). This article will provide a further update, including issues raised and analyzed at the Elder Law Section Summer Meeting in Stowe, Vermont, August 2-5, 2007.

Basic rules governing Medicaid applications were altered by the Deficit Reduction Act of 2005 in two fundamental ways: 1) The look-back period for transfers made on or after February 8, 2006 was expanded to 60 months; and 2) The penalty period applied to transfers made within the look-back period no longer begins to run on the first day of the month following the transfer, but rather does not begin to run until three criteria are met:

1. The individual is otherwise eligible for medical assistance;
2. The individual would otherwise be receiving an institutional level of care; and
3. An application for such care would be approved “but for” the application of the penalty period.

The implementation of these two new rules, and some of the other changes enacted through DRA ‘05, are updated below.

Must an Individual Be Actually Residing in a Nursing Home to Start a Penalty Period?

The term “institutional level care” could mean one of three things: nursing home services; institutional services equivalent to nursing homes; or home- or community-based services under a waiver program. The most recent guidance from the Centers for Medicare & Medicaid Services (CMS), however, indicates that an individual must be either residing in a skilled nursing facility or *actually receiving waivered home care services*. This presents a Catch-22, as individuals are not eligible for institutional Medicaid coverage or waivered services due to the transfers that would generate the penalty period, which they are attempting to trigger. Although the statutory language speaks of “otherwise eligible,” the interpretation adopted by CMS would require institutional placement.

Can Assets Be Gifted Back in Order to Reduce the Penalty Period and Used to Private Pay for Care During the Pendency of that Period?

An individual’s countable resources at the start of the month for which coverage is sought must be no more than $4,200 in 2007, and countable income must be less than the cost of care at the private pay rate. The question of whether one can simply “gift back” assets that were initially transferred in order to bring the Medicaid applicant down to the eligibility levels, and use those returned funds to private pay for care, has been addressed favorably by at least one county. According to sources in Broome County, DSS has indicated it will approve applications where money has been gifted out, and gifts are being made back to the Medicaid applicant to private pay for care, and Oneida County may follow suit. The initial transfer results in a penalty period calculated based upon 100 percent of the transfer value, with the applicant relying upon the gift back of funds on a monthly basis to reduce the penalty period (addressed in 96 ADM-8), such that when the appropriate number of months passes, the gift back to the Medicaid applicant will reduce the penalty period so that the penalty on the transferred funds would expire. Most commentators believe that this method is not viable in light of the language on page 18 of 06 OMM/ADM-05, which states:

> The exceptions to the application of transfer of asset penalties that apply to transfers made on or after August 11, 1993, continue to apply to transfers made on or after February 8, 2006 (see 96 ADM-8). The following clarification should be noted with respect to assets that are returned to the individual.
>
> For *active* Medicaid cases, if all or part of the transferred assets are returned after the Medicaid eligibility determination, **the assets must be counted in recalculating the individual’s eligibility as though the returned assets were**

> **never transferred**, and the length of the penalty period must be adjusted accordingly. The recalculated penalty period, if any, will begin when the individual is receiving nursing facility services for which Medicaid coverage would be available but for the imposition of the transfer penalty. Therefore, **the recalculated penalty period cannot begin before the assets retained by the individual at the time of transfer, combined with the assets transferred and subsequently returned to the individual, have been spent down** to the applicable Medicaid resource level. (emphasis added)

There is also an example provided on page 19 of the ADM. Nonetheless, practitioners continue to rely on "gifting back," and some counties may approve Medicaid eligibility and reduce the penalty based upon the return of assets. Ironically, it was reported that the reason cited by Oneida County DSS for approving the application on this basis was that they have requested guidance from the New York State Department of Health, but have been unable to get a response to their questions. Caution should be exercised when advising clients on the effect of gifting back assets to reduce the penalty.

Will the Use of a Promissory Note Work to Reduce Assets Below the Medicaid Eligibility Level?

There is growing consensus that a promissory note drafted in compliance with DRA '05 will work to reduce the penalty period, and provide an income stream back to the Medicaid applicant to privately pay the cost of care during the running of the penalty. The two key issues that have arisen are whether the transfer will be treated as having been made for full and adequate consideration (thereby not generating any additional penalty) and whether the promissory note will be treated as having no value as a resource for Medicaid eligibility purposes. In an e-mail dated May 24, 2007 from the Office of Health Insurance Programs of the New York State Department of Health, it was stated

> When the note includes language which makes it non-negotiable, it cannot be sold. Although the person may legally be able to sell his/her interest in the note, most, if not all notes we are seeing are unsecured. We have not been able to find a secondary market for unsecured promissory notes. For these reasons, the outstanding balance of the note is not treated as a countable resource (see MARG p. 269). If the note meets all the DRA requirement (06OMM\ADM-05, p. 24) the lending of money in exchange for a promissory note is not treated as an uncompensated transfer.

Moreover, the e-mail goes on to state that there is no requirement to name the state as a remainder beneficiary on a promissory note, unlike an annuity.

In the first reported Fair Hearing decision dealing with a promissory note, *In re Rose M.*, Fair Hearing No. 4732056R (Albany County), the use of a promissory note was addressed at length. Albany County denied a Medicaid application wherein a promissory note had been entered into that was originally not compliant with DRA '05, although the note had been amended to bring it into compliance subsequent to the Medicaid application and prior to the Fair Hearing. Albany County made a number of assertions cited in the decision, claiming that the promissory note was either a countable resource or that it triggered a penalty period, including "…that the Agency considered these instruments as sham transactions, rendering the appellant ineligible for medical assistance…that the only purpose of this transaction was to reduce the penalty period…that if the appellant cannot offer any other valid explanation for the promissory note, then it must be considered a transfer of assets…that the changes to the Medicaid law in the Deficit Reduction Act of 2005 (DEFRA) were intended to prevent further improper use of techniques, such as sham promissory notes, to avoid a transfer of assets penalty…that if the promissory note and modification at issue was found valid, it would violate the spirit of the new Deficit Reduction Act of 2005…that the promissory note was not actuarially sound, as required by DEFRA 2005, and… that DEFRA 2005 could be interpreted to also prevent *unduly short* payment periods that bear no relation to the purpose of the loan or the life expectancy of the individual receiving the payments." *In re Rose M.*, pp. 6-8. To all of the above, the administrative law judge stated, "The agency's contentions concerning the validity of the promissory note at issue are unpersuasive."

The ALJ did state, however, that "the original promissory note as drafted does not meet all of the criteria to be considered exempt from the transfer of asset penalties under Social Services Law § 366.5(e) and DEFRA 2005. Although the promissory note provides for equal payments during the period of the loan and has no balloon payments at the end, the note by its terms can be cancelled at the appellant's death and there is no provision for the payments to be made to the appellant's estate." The evidence at the Fair Hearing did show that two months after the purchase of the promissory note, the appellant and her daughter modified the note, with the intent that the instrument be non-negotiable, and non-cancellable at death. The

ALJ concluded, "These modifications to the original promissory note comply with the exemption requirements for the purchase of promissory notes cited above. However, this modification of the promissory note does not cure the defect and make the note now exempt from a transfer penalty, resulting in a recalculation of the penalty period by the Agency." *In re Rose M.*, at p. 8. In sum, if the applicant/recipient had all of the funds returned to her, and then re-executed the loan based upon the new promissory note, the penalty period would be recalculated and the note exempt. Unfortunately for Rose M., in light of the circumstances, the ALJ affirmed the County's decision.

It has been widely reported that DSS agencies from Suffolk to Erie Counties, and from New York City to Lewis County, are now accepting promissory notes which follow the DRA '05 requirements for valid instruments. They are properly considered transfers for full and adequate consideration generating no penalty, and further they are not assignable and have no value as a resource for Medicaid purposes. Albany County, the situs of the *Rose M.* Fair Hearing, has a number of other applications that it has rejected, three of which were the subject of Fair Hearings that occurred several months ago (argued by Section Member Tim Casserly) that are yet to be decided. In addition, our office has an application that was filed in Onondaga County (Syracuse) in August 2006, for which we received a denial in April 2007. The note complied with DRA '05 and is non-assignable, and no reason was given by DSS for the denial other than that the note is countable. A Fair Hearing is pending. Notwithstanding the positions of Onondaga and Albany Counties, it appears that in the rest of New York State, and pursuant to guidance from the New York State Department of Health, promissory notes drafted in compliance with DRA '05 will be accepted.

Will a Grantor Retained Annuity Trust (GRAT) Work the Same as a Promissory Note Under DRA '05?

A Grantor Retained Annuity Trust (GRAT), or "long term care annuity trust" (courtesy of Rene Reixach) is a short-term trust with payments over an abbreviated time frame which deplete the corpus, leaving nothing in the trust upon termination. Such a trust may be created by a Medicaid applicant, with either a family member or corporate trustee, such that the value of the transfer is "zeroed out," based upon the calculation of the return of funds through the annuity payment. In addition, the trust should have no value in the hands of the grantor, except as income in the form of the annuity payments. Based upon its structure as an annuity, in order to meet the Deficit Reduction Act requirements and not be considered an uncompensated transfer, the GRAT must be actuarially sound, have equal payments with no balloon payments, and must name the Medicaid program as the first remainder beneficiary (second beneficiary in the case where a spouse or minor or disabled child is named in first position). Once again, Albany County and Onondaga County have rejected Medicaid applications utilizing a GRAT. A number of other counties have approved the GRAT, for which the logic is identical to that of the promissory note.

In a Fair Hearing argued July 31, 2007, which appealed a Medicaid denial based upon a GRAT, Albany County Department of Social Services filed a memorandum which cites a publication entitled "Enclosure," published by the CMS, describing the "new Medicaid transfer of assets rules under the Deficit Reduction Action of 2005." The County quotes that publication as stating, "Some states have experienced problems with individuals who have attempted to circumvent rules penalizing transfers of assets by obtaining promissory notes, loans, or mortgages containing a promise of repayment from transferees. Individuals would then present the note, loan or mortgage instrument at the time of their Medicaid application for long term care services in order to establish that these transactions were actually loans, not gifts. *In some cases, these were merely sham transactions, and repayments of the full amount transferred was neither expected nor enforced.*" (emphasis added) If analogized to the promissory note, which appears to be now accepted by the Department of Health, the GRAT actually provides a greater certainty that annuity payments will be returned, as it imposes fiduciary duties upon the trustee, which are not present in the case of a promissory note. In particular, in the case of a GRAT which has a corporate fiduciary as the trustee, the certainty of payment is assured by the obligations of the corporate trustee and the risks that they run of violating their statutory obligations, facing litigation or sanctions, including losing his or her license.

In the memorandum filed by Albany County (*In re Lillian R.*, Fair Hearing No. 4823013P), the DSS in *Lillian R.* shockingly concludes with respect to the use of a GRAT: "[p]ermitting Medicaid applicants to transfer approximately one-half of any excess resources they have without penalty by simply submitting a form purporting to transform the virtual gift into a highly suspect financial transaction would be an unwarranted and unauthorized amendment of the Medicaid eligibility laws. **The only action that could be worse would be to grant an actual license to steal.**" The specific arguments posed by the County against a use of a GRAT mirror those rejected by the administrative law judge in the *Rose M.* Fair Hearing, including, "If the individual cannot explain what other benefit there is for him/her to have the GRAT, annuity or loan, the law (SSL § 366(5)(e)(3)) requires that the transfer 'shall render the individual ineligible for nursing facility services for the applicable period of time.'" The County also makes the specious argument that choosing a term for the GRAT shorter than the natural life expectancy of a Medicaid applicant prevents it from being "actuarially sound." The County then cites a letter which it sent to the New York State Department of Health dated April 5, 2007, seeking guidance on the use of a GRAT by a Medicaid applicant, stating, "Although NYSDOH has not yet responded to this communication, program staff at ACDSS was contacted by program staff at NYSDOH and informed that GRATs were be considered as a countable resource rather than as a transfer." Based upon that communication, the County denied the Medicaid application. We await a written determination by the administrative law judge based upon the January 31, 2007 Fair Hearing.

The Onondoga County Department of Social Services has also denied a Medicaid application involving a GRAT, taking the position that the amount placed into the "long term care annuity trust" either is all countable as income or is a countable resource. In support of its position, the County cites 96 ADM-8, at p. 5, which states "portions of the trust principal and income which can be paid to or for the benefit of the Medicaid applicant are considered to be an available resource." At the Summer Meeting of the Elder Law Section in Stowe, Rene Reixach presented his position with regard to the GRAT, which will be the substance of his legal arguments in the Fair Hearing in Onondoga County. According to Mr. Reixach, "There are a number of reasons why this position of the agency is incorrect, including that the payments from a GRAT are defined as all income, pursuant to EPTL § 11-A-1.3(a)(1). In each month, all that can be received by the Medicaid applicant is the monthly payment amount, no more and no less." Similarly, citing 91 ADM-17, p. 3, the argument with regard to availability of the corpus from a GRAT fails because resources are measured as a first-of-the-month "snapshot." By definition, the only available funds from a GRAT are the amounts that comprise the income payment in a given month, not the entire corpus of the trust. It should be noted, however, that David Goldfarb opined at the Summer Meeting that "the period payments from the annuity may be treated as a 'restriction' as to when distribution may be made, which would be ignored in deeming the resource available." In support, Mr. Goldfarb cites 42 U.S.C. § 1396p(d)(3)(B)(i), which states, "If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which,…payment to the individual could be made shall be considered resources available to the individual.…" In a properly drafted GRAT, the principal will not be available regardless of circumstances, and the only available payment would be that of the annuity stream of income, similar to the treatment of an income-only trust.

Although it is the author's opinion that a GRAT when properly structured will work as well or better than a promissory note, in light of the guidance now afforded by the New York State Department of Health and *In re Rose M.*, for the moment use of a promissory note may be the safer course.

Had the Mandatory "Income First" Rule Under DRA '05 Changed the Law in New York?

For almost ten years, New York Medicaid applicants seeking an increase to the Community Spouse Resource Allowance (CSRA) had to face a Fair Hearing utilizing the income-first rule. Under DRA '05, income-first is now mandatory in all states.

Prior to the enactment of DRA '05, a series of cases was decided dealing with the requirement imposed at Fair Hearing that the increase to a CSRA of a community spouse, whose income fell below the Minimum Monthly Maintenance Needs Allowance (MMMNA), be calculated based upon the requirement that the purchase of a *single premium immediate life annuity* structured to generate cash flow sufficient to bridge the gap between the community spouse's income and the MMMNA be utilized. The New York State Department of Health defended its use of the self-styled "single premium immediate annuity method," which was first imposed at Fair Hearing, in four cases which all resulted in reversals of the Fair Hearing decisions in Article 78 proceedings in Supreme Court. *See Parks v. Commissioner of Delaware County Department of Social Services and Commissioner of the New York State Department of Health* (Sup. Ct., Sullivan County, Index No. 1288/05, page 4); *Berg v. Commissioner of New York State Department of Health and Commissioner of Nassau County Department of Social Services* (Sup. Ct., Sullivan County, Index No. 1680/0, p. 4); and *Giaquinto v. Commissioner of New York State Department of Health and the Commissioner of the Montgomery County Department of Social Services* (Sup. Ct., Albany County, Index No. 7220-05, p. 5) (all cases citing *In re the Appeal of Charles C.*, Fair Hearing No. 3909119P, August 15, 2003); *see also Hoffman v. Commissioner of Erie County Department of Social Services and Commissioner of New York State Department of Health* (Sup. Ct., Erie County, Index No. 12005 9080). In the *Giaquinto* case, DOH in fact appealed the Article 78 decision to the Appellate Division Third Department, along with the award of attorneys' fees that was made by the Supreme Court. In a subsequent affidavit filed September 15, 2006, however, the Attorney General withdrew the appeal of the merits of the decision, proceeding only with the appeal of the attorneys' fee award. *See Giaquinto v. Commissioner of New York State Department of Health and the Commission of the Montgomery County Department of Social Services* (Appellate Div. 3d Dep't, April 5, 2007, Docket No. 501192).

On March 27, 2007, a decision after the Fair Hearing was rendered in *In re the Appeal of June L.*, which runs counter to the court rulings involving the unauthorized mandate of a single premium immediate life annuity, which was consistently determined to be arbitrary, capricious and without basis in state or federal law. Once again NYSDOH is imposing the immediate annuity requirement through the Fair Hearing. In rendering its decision, the administrative law judge cites a letter sent to State Medicaid Directors on July 27, 2006 from the CMS, holding:

> In cases such as this, State Regulatory authority directs that the department establish a resource allowance adequate to generate sufficient income to raise the community spouse to the MMMNA. Federal guidelines as found in "The State Medicaid Directors" letter of July 27, 2006, provide that "States may use any reasonable method for determining the amount of resources necessary to generate income, including adjusting the CSRA to the amount a person would have to invest in a ***single premium annuity*** to generate the needed income, **attributing a rate of return based on a presumed available rate of interest** or other methods." It is clear that reference need not be limited to the current rate of return which excess resources may be generating. A preferable investment in this case would be to determine the extent of resources required to purchase a ***single premium immediate life annuity*** that would generate sufficient monthly income to raise the Community Spouse to the MMMNA. It should be remembered that the decision is not requiring that the Community spouse actually purchase such an annuity, but rather, that such investment vehicle is simply being used as a reasonable benchmark to establish the amount of excess resources needed to generate sufficient monthly income. (emphasis added)

Despite the ALJ's statement that the annuity requirement is a "reasonable benchmark," and not a mandate, in response to the Fair Hearing decision Saratoga County required that the annuity product be purchased as a condition of Medicaid eligibility. A proceeding under Article 78 has been filed in Albany County to overturn the Fair Hearing decision.

In a subsequent Fair Hearing decision, *In re the Appeal of Morris K.*, decided July 18, 2007, the issue of a single premium immediate life annuity was again addressed, this time with a different result. As required by statute, the initial Medicaid application was denied by the County and the determination was deemed "correct when made." In establishing the amount of resources required to increase income up to the MMMNA, the administrative law judge held, "Although the agency *could use* an investment medium such as an annuity to determine how much a resource could generate in monthly income, in this case the calculations provided by the appellant's representative are persuasive that even when using a higher rate of return of 5% to calculate the income the resources could generate the appellant's spouse still falls below the MMMNA." The appellant's memorandum submitted at Fair Hearing provided the ALJ with detailed calculations based on a presumed available rate of interest, utilizing both a 3% and 5% rate of return.

The pertinent language from the letter to the State Medicaid Directors cited by the ALJ above is "adjusting the CSRA to the amount a person would have to invest in a single premium annuity to generate the needed income," which is modified by the language "attributing a rate of return *based upon a presumed available rate of interest*, or other methods." In reality, the single premium immediate life annuity is not based upon an available rate of interest, as noted by the judge in *Parks v. Moon*, but rather on a return of principal with an interest rate "tacked on." In prior cases, a 3–2% rate of return was held to be reasonable. *See Hoffman v. Weiner*, Sup. Ct., Erie County, December 2, 2005, Index No. 12005 9080, and *In re the Appeal of James Trapanese*, Fair Hearing decision dated September 17, 2004. Clearly, the return of principal from a single premium immediate life annuity is not a reasonable rate of return, but the issue ultimately will have to be resolved by the courts.

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Member Spotlight: Cora Alsante

Interview by Katy Carpenter

Q Where are you from?

A Utica, NY

Q Is that where your family is from?

A Yes. My dad and extended family still live there.

Q And you work in Syracuse?

A Yes, the main office of my firm, Hancock Estabrook, is in downtown Syracuse, in the AXA Towers.

Q Where have you traveled?

A My husband's family is from Sicily and his dad didn't come over to America until he was in his twenties. All of my husband's aunts, uncles and cousins still live there. My husband and I have traveled together to Sicily twice, for our honeymoon and recently with our children.

KC: Wow that must have been a special trip.

CA: Yes, it was great to be able to visit with family. I love to travel. In college, I studied in London. My husband travels a lot for work and sometimes our family gets to accompany him, which is always nice. I've been to Paris, too, and Hawaii, which I loved.

Q So what is your favorite food in Italy?

A Pasta! They have the best pasta. The pizza there is amazing too!

KC: Sounds delicious.

Q How about desserts?

A In Sicily, they serve a breakfast pastry every morning that's similar to a croissant and is filled with cream, apricot preserves or pistachio. They also have delicious lemon ice and amazing gelato.

Q What's your favorite flavor of gelato?

A Definitely pistachio.

Q If money were no object, where would your dream destination be?

A A villa in Tuscany.

Q How many children do you have?

A Three—I have a 16-year-old son, a 14-year-old son and a 12-year-old daughter. I was Section Chair the year I was pregnant with her and she attended her first summer meeting at 2 months old—I believe it was in Newport, RI.

Q Now back to your career, how did you become interested in elder law?

A When I first started to practice, I worked in traditional T&E, and clients would come in with more and more questions on long term care. In order to do justice for my clients, I decided to focus on that area of the law. I still remember my first elder law meeting in the early 90s, everyone was so friendly, energetic and collegial. We are still a close knit group. We've watched each other's children grow, and some of our members are becoming grandparents! I have learned a tremendous amount from the Section and its members.

Q What's your favorite part about your job?

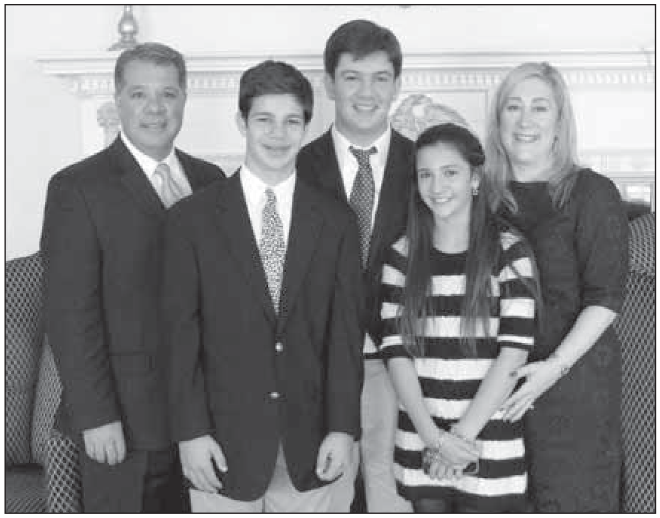
A Since every client is unique, I find it very fulfilling to identify and understand the issues facing a particular client and to find a way to help him or her navigate long term care issues. Having a client tell me they got a good night's sleep for the first time in months after meeting with me is especially rewarding.

Q I read that you were instrumental in the Loretto Foundation Community Trust; can you tell me a little more about it?

A Yes, it all started with a phone call from the Finance Department at Loretto. They were looking for a way to increase the income allowance for community-based Medicaid. Initially, they called me to see if there was a way to get the legislature to increase the allowance, but eventually we created the Loretto Foundation Community Trust. The end result is that eligible individuals have access to needed health and supportive services while maintaining their ability to continue living in their own communities.

Q So what did you want to be when you were 13?

A Ha ha, don’t laugh but it’s the truth—a hairdresser! I wanted to be a hairdresser and own a nail salon, but I came from a strict Italian family where I was the oldest and the only girl. So, at 13 I knew I would be attending college and my dad pushed me to attend law school. I went to Hamilton College and studied philosophy and my advisor was the pre-law faculty member, so it was serendipitous. In a strict Italian family, you do what your dad tells you!



KC: So I’ve been told.

Q Are there hobbies you look forward to on the weekends?

A I’ve run a couple of sprint triathlons and I love spinning.

KC: Wow! You’re active!

Anything that’s healthy and helps with stress. I also like to read novels, and *People* Magazine is my guilty pleasure.

Q Who’s your favorite author?

A Adriana Trigiani, mostly because she writes about life in Italy.

Q Is there a character that embodies your personality?

A That’s a tough one. I would say a combination of Scarlett O’Hara in *Gone with the Wind* and Bette Midler in *Beaches*.

Q Do you have any words used to describe yourself?

A I’m outgoing, compassionate, spiritual, grateful and loyal.

Q Does anyone tell you that you have a doppelgänger or a famous person you resemble?

A Not really. Years ago, when I was younger, someone told me I looked like Kate—from the Titanic…

KC: Winslet.

CA: Yes, Kate Winslet.

Q Is there anything else you want people to know about you?

A I am very fortunate to work in a career that I love, and I come to work every day feeling like I work with family. I’ve been with the same firm for 25 years—so I guess that’s where my loyalty shows.

KC: Yes, that’s quite some evidence.

CA: I also love the joys of being a mom.

Katy Carpenter is a paralegal with Wilcenski & Pleat PLLC in Clifton Park, and a May 2016 graduate of Albany Law School.

2016 Annual Meeting Reflects Broad Scope of the Practice of Elder Law and Special Needs Law

By Joan Lensky Robert

The 2016 Annual Meeting reflected the melding of Elder Law with Special Needs Planning. In past years, programs have concentrated on the practice of Elder Law. This year, however, more than half of the program addressed Special Needs law.

The 2016 program began with the important Elder Law update by Section Past Chair Howie Krooks. Howie's past presentations have highlighted not only New York State statutes and decisions but also federal legislation, issues and trends of importance to us. After the Elder Law Update, new this year will be a separate Special Needs Update. Bob Mascali brought his expertise in Special Needs Planning and trust administration and updated us on important case law affecting our clients with special needs.

We were very appreciative that a panel of five Surrogate's Court Judges discussed SCPA 17-A Guardianships and applications for Special Needs Trusts. Hon. David H. Guy of Broome County, Hon. Peter J. Kelly of Queens, Hon. Nelida Malave-Gonzalez of the Bronx, Hon. Stacy L. Pettit of Albany and Hon. Brandon R. Sall of Westchester addressed bonding, accountings and budgets for Guardianships and Special Needs Trusts as well as the appointment process in their counties. This is the first time our Annual Meeting has had a Surrogate's Court panel, and we were honored to host these judges. Past Chair Fran Pantaleo served as moderator.

The next panel helped us wind our way through the maze of government entitlements and programs our clients face daily. ACA, ABLE, FIDA, MAGI, MLTC, MCO and SNAP are just some of the acronyms that impact our clients' lives. Some have altered traditional Medicaid and have opened planning opportunities for those with special needs. Past Chair Richard Weinblatt moderated a panel consisting of Valerie Bogart, Chair-Elect David Goldfarb and Rene Reixach. They discussed what these programs offer and what the eligibility criteria are. This was a crucial session for anyone who practices Elder Law or Special Needs law.

The program finished with an anticipated energetic discussion of ethics. Mike Ryan moderated and posed hypotheticals to our distinguished panel, comprised of Past Chair Cora Alsante, Joe Greenman and Dave Smith.

This year's program was a departure from prior years' emphasis on Elder Law. The first time I spoke at an Annual Meeting was in 1994. I was a new lawyer (though not a young one!) and OBRA 1993 had just been enacted. I discussed the history of first party and third party Special Needs Trusts and noted that the planning would now differ for those with disabilities under the age of 65 from those above the age of 65. While we had minted the term Elder Law, we had not yet developed the term Special Needs Law. As OBRA 1993 affected most aspects of Elder Law, the new "payback" SNTs were only one of the important changes to our practices. We talked about the new 36-month look-back for transfers and the onerous 60-month look-back for Trusts. Article 81 had also just been passed, and the program highlighted its provisions for incapacitated adults. The practice that was to become Special Needs law encompassed only about 20% of the program.

So this year's Annual Meeting reflected the integration of Elder Law with Special Needs Law. Thanks to Past Chair Fran Pantaleo for spearheading the change of our Section name from the Elder Law to the Elder Law and Special Needs Section. And thanks to current Chair JulieAnn Calareso for inviting me to serve as Co-chair of this year's Annual Meeting. Thank you to all of our Past Chairs who continue to play an active role in the Section. Thank you to all of our speakers this year, and every year, who have devoted hours of time educating section Members. And thanks to Co-chair Liz Briand for working so tirelessly on this program. And most of all, thanks to all of you, our Section members, who, one again, made this Annual Meeting a sellout event.

The Compact for Long-Term Care— A Great Achievement for Our Section

By Howard S. Krooks

In 2004-2005, when I served as Chair of the Elder Law Section, I recall feeling that we, as a Section, had an obligation to do more than just oppose restrictive Medicaid eligibility proposals. Year in and year out, we would oppose such proposals as extending the penalty period to home care cases, or elimination of spousal refusal. And, while opposing proposals that would harm the elderly and disabled population of New York was and remains a vital role played by our Section, I thought we needed to do more than fight off "bad proposals." I felt we needed to show the Legislature that we are a creative, forward-thinking group of elder law attorneys. We needed to show others that we were spending our time not just opposing what we felt were bad ideas that could hurt our clients, but that we were a think tank focused on developing solutions as well.

At the beginning of my term, in June 2004, I tapped one of the Section's greatest talents and a Past Chair, Lou Pierro, to head a working group with the charge to create a white paper on long-term care in New York State. As a result of that white paper, which was adopted by the Executive Committee during the 2004-2005 year, one of the primary initiatives the Section launched was the Compact for Long-Term Care. That initiative was the brainchild of Gail Holubinka, then with MetLife. Gail formerly served as the first Director and primary designer of the New York State Partnership for Long-Term Care, so she was uniquely qualified to spearhead the effort to garner support for the Compact.

The principle behind the Compact was simple: don't force people to become impoverished in order to access government assistance to pay for needed long-term care services, at any level of care. Even home care services or assisted living services would be available under the Compact's approach to financing long-term care. The cornerstone of the Compact is to create a partnership between seniors and government wherein seniors will pay a fair share for long-term care services with the government's support. This program is based upon the belief that public policy concerning social programs should be a contract between seniors and the government where the senior pledges to contribute his/her fair share of the cost burden of long-term care services in exchange for retaining a protected amount of personal assets while receiving government assistance.

Once the white paper was adopted, the Section launched a Compact working group, which "met" every week at 8:00 a.m. for 5 years until the 2010-2011 budget was adopted by the New York Legislature. In that budget, the Social Services Law was amended by adding a new Section 366i, known as the Long-term Care Financing Demonstration Program. This pilot program was supposed to extend to as many as five thousand people. And, although approval under federal law and regulations was required (and never sought by the state), the codification of this pilot program consistent with principles of the Compact represented five years of hard work by our Section. It reflects the fact that the New York legislature listened to our Section, and an important idea that we created. It spoke loud and clear that the Elder Law Section was credible group of lawyers interested in working with the legislature in creating solutions, and not just a group of Medicaid planning attorneys solely interested in the limited purpose of fighting back proposals designed to limit eligibility for the Medicaid program. It demonstrated that the Section very much wanted to be, and was, interested in solving the long-term care crisis in the state. That credibility, and our desire to be part of the process every step of the way, carries forward with the Section to this day. Today, the Section enjoys continued credibility for its wealth of knowledge in all issues pertaining to the elderly and persons with disabilities, its willingness to think outside the box to develop solutions, and to work with legislators and not against them.

I look forward to seeing everyone at future Section meetings.

Elder Law Would Not Qualify for Medicare

By Daniel G. Fish

The most significant development that I noted in my tenure as Chair of the NYSBA Elder Law Section was the breakthrough in recognition of the practice by the public and the bar. When compared with the long history of contract law or real property law that can be measured in centuries, the field of elder law is still nascent. The practice of elder law would not even qualify for Medicare benefits, not having been a discrete area of law for 65 years.

When I started practice at the Institute on Law and Rights of Older Adults at the Brookdale Center on Aging of Hunter College of the City University of New York in 1981, the term "elder law" did not exist. It was not recognized as an area of law that stood on its own. It was simply considered that it identified the clients by age and not the field of law. It was argued that the housing law questions or health insurance questions or trust and estate questions belonged in those already establish practice areas and were not rendered separate simply because of the age of the clients. There were two attorneys in private practice in New York City handling matters that today would be characterized as elder law.

The demographic trends of the last 35 years have had the biggest impact on the recognition of elder law as a specific practice area. The American Bar Association recognized the practical effect of 80 million baby boomers living longer by allowing the recognition of certified Elder Law Attorneys.

The pivotal moment in the development of the practice was the Brooke Astor guardianship case. The reason for the importance of that case to elder law is the fact that so many major law firms were involved: Paul Weiss Rifkin Wharton & Garrison representing JPMorgan Chase, the guardian of the property; Cravath Swaine & Moore representing Annette de la Renta, the guardian of the person; Greenfield Stein & Senior and Warner Associates representing Anthony Marshall, and Flemming Zulack Williamson & Zauderer representing Charlene Marshall. These were firms that had no elder law departments and were not conversant with the term elder law before the case. After the Brooke Astor case these firms and other large firms were distinctly aware of the need to pay attention to this emerging area of law. For the first time they recognized that elder law directly impacted their own clients.

The struggle of elder law has been to distinguish the practice and make it clear that it stands on its own as a discrete area of practice. The future of the development of elder law can be measured by the next tipping point which will be when it is taught in law schools as a substantive course and not as a purely clinical course.

Happy 25th birthday to the New York State Bar Association Elder Law Section.

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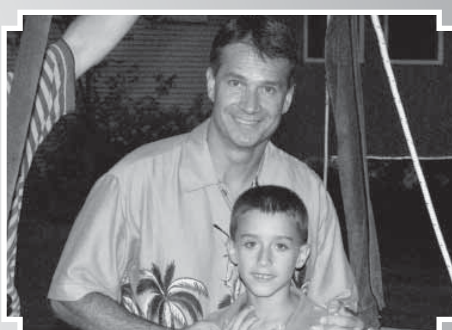




Remembering 2006-2007

By Ellen G. Makofsky

My year as Chair of the Elder Law Section[1] was a very good year, but a challenging one too. The Deficit Reduction Act of 2005 became law on February 8, 2006 and our members were still trying to figure out how to deal with the new legislation and the imposition of much harsher eligibility criteria for our clients who needed access to Medicaid benefits. The Section worked very hard to ensure the passage and implementation of the Compact for Long Term Care, legislation which would provide another option to those who required long term care.[2] We tackled a proposal, in concert with the Trusts and Estates Law Section, for new Living Will legislation to codify existing case law to provide for statutory recognition of the Living Will. The proposed legislation did not endorse the enactment of a form Living Will, but rather it provided that, where an individual had both a Health Care Proxy and a Living Will, the directions of the health care agent be recognized over the static directions contained in the Living Will unless the proponent of the Living Will stated otherwise.[3] The Section also proposed legislation which would permit a supplemental needs trust to be created for the benefit of a spouse to satisfy the elective share.[4] These efforts kept the officers and Executive Committee very busy and engaged. We found it very exhilarating to have the opportunity to impact social policy in a way which would help the aging, frail and disabled clients we served.

My proudest accomplishment as Chair of the Elder Law Section is the creation of the Section's Pro Bono Elder Law Clinic. I envisioned this clinic as a way for all of our members to give back to the populations they served. For the past nine years, with the help of our District delegates and Section members, the Pro Bono Clinic has served thousands of seniors in every judicial district in the State, and has provided face-to-face individual consultations with seniors on issues that concerned them. We are all to be congratulated on this project. It feels good to do good.

As Chair of the Section, I also inaugurated the Section's Unprogram, a program that has neither speakers nor an agenda but instead provides a free-wheeling discussion of substantive or practice–related topics chosen by the participants. This program was modified in the ensuing years, but it keeps rolling along providing information to members which is not readily available any other place.

The relationships and friendships I made with Section members during the year I was Chair are a continuing priceless gift. The other reward I received as Chair was my interaction and increased participation with other members of the Bar Association. My position as Section Chair ushered me into the wider world of NYSBA. I began to interact with the other leaders of NYSBA. The interaction led to my appointment on various committees within the Bar Association. Eventually, I was not only a member of a NYSBA Committee, I chaired several of them, served as an officer of another Section and was recently appointed Chair of the Association's Task Force on Powers of Attorney. The more involved I became in Association activities, the more I understood how NYSBA worked and the more I enjoyed my participation. Instead of just knowing the narrow Elder Law world, I am now immersed in all sorts of legal issues important to all attorneys. It is heady stuff, and now I am about to embark on my third term as Secretary of the Bar Association. It all started with the Elder Law Section, the Section members I know and the many members who have helped me progress on the Association's leadership ladder.

Thank you all for enriching my professional life.

Endnotes

1. The Section did not become the Elder Law and Special Needs Section until years after my term when Fran Pantaleo determined that our Section's name should better reflect what its members did. Hurrah, Fran!
2. The Compact provided that the person in need of long term care pledged to pay from his or her own funds a defined amount for long term care costs for a period of time. At the end of that time the government would pick up most of the long term care costs without requiring a further spend down of assets. Participants were to contribute a portion of their income to defray costs and co-payments. Although the Section, with lots of hard work, managed to secure passage of the legislation the Compact was never implemented by New York State and essentially died with its passage.
3. Although members of the Elder Law and Trusts and Estates Law Sections and NYSBA lobbied hard for this legislation we were unable to secure the proposal's passage and to this day there is no statutory Living Will legislation in New York State.
4. Nine years later, the Section is still working to secure passage of this proposed legislation.

Member Spotlight: Ami S. Longstreet

Interview by Katy Carpenter

Q Where are you from?

A Syracuse.

Q I see you have stayed local. What do you like about the area and community you serve?

A It's a friendly community and I've lived here basically my whole life (except some time in Vermont and Albany). I have a lot of community contacts, family and friends. My roots are here.

Q Have you traveled anywhere fun?

A Yes. I just got back from skiing in Montana. I also love to visit my daughter and grandchildren in Greenville, South Carolina. My other daughter lives in Boston and my son is in vet school in St. Kitts.

Q Where is your favorite place?

A For years my family and friends traveled to Martha's Vineyard. That would be my favorite place.

Q What's your favorite part about your job?

A My favorite and probably my least favorite parts of my job are the clients. I learn as much from them as they do from me. I like to help—whether they are elderly or not. I enjoy the variety of personalities, going to Court and visiting clients at their homes—it keeps my job interesting.

Q Have you ever been given advice that you remember?

A My mother always told me not to let anyone put barriers up. She did not work outside of the home after she married and wanted to make sure I had an opportunity for a career. I come from a long line of lawyers. My father was a trial lawyer, both of my grandfathers and my great-grandfather were all lawyers and I have a nephew and some cousins who are lawyers—I guess it was a foregone conclusion!

Q Do you have a project or accomplishment that you consider to be significant in your career?

A Not specifically—it's a totality of things. My clients seem to appreciate the work I do for them and I find that rewarding. Additionally, I am constantly involved on boards, usually three at a time. I'm currently on the boards of the Alzheimer's Association, the Estate Planning Council and YMCA. I feel lucky that I can meaningfully contribute to my community.

Q Have you had any turning points in your life?

A I was a CPA before law school. I spent a few years in Vermont and probably would have gone to law school in Vermont if UVM had a law school but through that evolution I ended up back in Syracuse.

Q Before becoming a lawyer and before you became a CPA, what did you want to be when you were little?

A I always knew that I never wanted to be a lawyer…but here I am! I evolved and becoming a lawyer became what I wanted and I am now glad that I had that change of heart.

Q Are there hobbies or special interests you look forward to on the weekends?

A Yes, lots of things! I like to ski and I play tennis and golf. I also enjoy working out and running. I like to travel and read. I try to fit work in between all of my activities.

Q Where do you see yourself in 5 years?

A Same place both for my work and home life. I would like to travel more.

Q Do you have any words used to describe yourself?

A Hard working, genuine—no pretenses.

Katy Carpenter is a paralegal with Wilcenski & Pleat PLLC in Clifton Park, and a May 2016 graduate of Albany Law School.

Helping Clients Retire Successfully

By Timothy E. Casserly and Michelle I. Casserly

Last year the Financial Planning Association conducted a survey of more than 750 financial planning professionals to identify the key challenges that will influence planners in the future. Among the topics surveyed, respondents were asked what issues are of most concern to their clients today. One of the most frequent client concerns was how to plan appropriately for age-related change including the death of a spouse, elder care and long-term care. As elder law attorneys we are in an ideal position to help address these client concerns and it is likely you already have an existing client base to work with.

Over the course of practicing elder law for the past twenty-five years we have worked with many families tackling the traditional elder law issues of planning for long-term care, diminished capacity, protecting an inheritance for loved ones and crisis planning due to illness, incapacity and death. Often this work is done with the adult children being involved. Now, these children, recognizing the benefits of the work that was implemented for their parents, are returning to do their own planning as they approach their retirement. Some of these prospective clients may have worked with a Financial Planner, Investment Advisor or utilized online programs for a rough idea of how to plan for retirement earlier in their working years. A typical pre-retirement plan (i.e., one that is done more than ten years in advance), would start with data gathering to determine net worth, cash flow, savings and investments, then lead to identifying goals for short term (e.g., major expenditures—new home, second home, college education) and for long term (e.g., retire comfortably by a certain age). With this information, a plan to build wealth, reduce debt, insure against catastrophic loss and meet ongoing expenses is designed and implemented. Thereafter, it is monitored and adjusted to minimize taxes and investment risk. Now, however, the focus is quite different than the prior planning which was based on assumptions for spending, inflation, savings rates, health and longevity and time horizons. Now, retirement is imminent, so earlier assumptions can be clarified, made more definitive or disregarded entirely. This article will briefly address a number of key differences from the more traditional, prospective retirement planning many people do in their 30s, 40s and 50s so you can structure the conversation and personalize a plan tailored to your clients who are at or very near their retirement. From prior experience, we have identified eleven areas where prior assumptions can be replaced with present circumstances to give us a starting point for discussions with our clients on how best to plan for a successful retirement.

1. **Clients probably no longer have minor children, so child support is not a leading consideration**. Typically, a major budget item had been support for minor children. By now, the routine expenses for food, clothing, schooling, insurance, housing and transportation have been transferred to the children themselves. This change not only frees up cash flow for actual expenses, but it also removes the need to save for future expenses such as college, weddings and family vacations.

2. **Surviving spouse may not be capable of earning.** When planning for cash flow and expenses in the event of death or disability, most younger couples plan that the surviving healthy spouse will continue to work or go back to work if their spouse can no longer earn an income. Now, because of age, health, skill sets, experience or the job market, the options for a healthy surviving spouse returning to work may be limited or impractical. Consequently, the family may instead need to rely on savings, pensions and any life insurance policies already in place. Also, with younger couples you typically plan for the event that either spouse may be unable to work. At retirement, you may have a better idea of which spouse is likely to die or become disabled sooner. Therefore, changes to pension payouts, health benefits and insurance payouts must be reviewed to anticipate any new expenses or lost income.

3. **Living situation may change.** This can be as simple as a move to a new state with a lower tax rate and cost of living or a move necessitated by health reasons to a facility with more expensive living expenses and fees. This is a good place to start the conversation with clients about planning options. According to the National Council on Aging, forty (40%) percent of couples have not discussed where they want to retire. At retirement age the plan is not as straightforward as taking the annual expenses of home ownership and adjusting for inflation to project how it affects cash flow. Now you must consider the tax implications involved in selling or otherwise transferring the house, including the differences in capital gains and basis when gifting to a trust

or making outright gifts. If aging in place is the desired objective there may be tax deductions for some home improvements to make a home handicap accessible. There may be other strategies to save money/and or protect assets where there is a caretaker child living in the house. Another consideration is how the choice of domicile affects prior planning, taxes, expenses and availability of care.

4. **Insurance portfolio should be reviewed to provide for changed circumstances.** The risks that clients may have insured against in the past have likely shifted, so changes to insurance plans may be needed. Prior planning may have focused on covering the loss of a spouse, children's college expenses, larger mortgages or disability. Now, the larger expenses are paid off or reduced and the prior risks are no longer relevant. Also, there may be other savings in place if a catastrophe strikes causing death or disability. Now it may be more important to insure against different risks—long-term care, Medigap coverage or liabilities on the second to die.

5. **Spending patterns may change.** Major purchases and work-related expenses such as commuting, meals, equipment and clothing will likely drop. However, there will often be an increase in travel, leisure and health expenses, especially if some of these expenses were covered by an employer in the past. After years of saving, a client's discretionary spending may increase in order to enjoy retirement. For this client the day has come to enjoy those savings and start spending. Conversely, some clients may have spent years splurging, living on credit, and ignoring saving for the future. These clients may need to restrict their spending, recognizing the finite years of earning power and resources in order to ensure they don't outlive their money. In either case, this phase of life calls for a review (or maybe even a first time view) at what a fixed income can adequately cover.

6. **A vital planning objective is assuring the availability of, and securing a payment mechanism for, acute medical care and custodial care for chronic conditions.** We can assist our clients in this area by having them outline an emergency plan for acute medical care that includes names and numbers of preferred doctors, hospitals, pharmacies and payment sources such as Medicare and any other insurance.

   For custodial care, explore their preferred options and determine whether these options are viable. Often a person wishes to age in place in his or her home with family members as caretakers. If the likely family caregivers work full time and/or live out of the area, you may need to advise your client that a "Plan B" should be considered, including options other than staying in the home. This discussion should include long-term care expenses for all options including community based Medicaid, adult day care and home health aides.

   A recent study by Fidelity Investments reports that in 2015 a couple retiring at age 65 could expect to pay $245,000 for out-of-pocket health care costs throughout retirement. A study by Nationwide Retirement Institute released in early December, 2015, reports that only 10% of affluent pre-retirees (those with at least $150,000 annual household income) have discussed their future health care costs with their financial advisor. As elder law attorneys, we are in the perfect position to advise clients on planning for the costs of future medical care and developing strategies that may allow them to remain in their homes.

   If skilled care is part of the plan, the same issues that arise with acute care must be discussed—availability and affordability. Discuss whether the budget can handle long-term care premiums or the extent to which they can partially ensure this risk. You can also discuss whether it is realistic to plan for Medicaid by gifting funds without affecting the retirement they have in mind.

   In any case, urging clients to consider their health care and family's longevity can help them address and plan for potential health costs and options.

7. **In general, public benefits assume an important part in the planning process (e.g., Social Security, Medicare, Medicaid).** After paying into the Social Security system for so many years, there is a tendency to want to elect benefits as soon as possible. This, however, may not be the best strategy for maximizing such benefits over one's lifetime. However, for many people this will be a major portion of their retirement income. The Social Security Administration calculated that today's "medium" earner will have 42% of his or her income replaced by Social Security. It is important to look at each spouse's benefits options, other income, desire to work up to or past retirement age, and current health and family longevity before claiming social security for one or both spouses. If there are other sources of income, it might be better to delay taking Social Security benefits to the

age of 70 to maximize those benefits over one's remaining years. There are several other strategies to consider if a spouse has his or her own benefits, only a spousal benefit, widow benefits or benefits as a divorced spouse. Congress has recently curtailed some of the planning options but we can assist clients in maximizing their overall lifetime payout.

It is also important to consider the extent to which Medicare and Medicaid benefits will play a potential role in paying health and long-term care costs, either by necessity (the only affordable option), or by design (through the use of asset protection planning). There may also be a gap in time between loss of employer health coverage and age 65/Medicare eligibility. We can advise a client on how to plan to fill this gap so as to remain insured.

8. **Often, planning for receiving a lump sum must be anticipated.** It is not unusual to have a lump sum of some type become part of the planning process. This might be due to an inheritance, sale of a home, retirement payout or life insurance benefit. In each case there will be unique tax and cash flow considerations in determining how best to use the money. It might be used to pay down debt, create an income stream, invest, buy into a retirement community or make gifts to family or charities. Some clients may be relying on such a lump sum from any of these sources in order to have a successful retirement and it may not be coming as soon as they would like (or need) it. These realities and expectations will need to be discussed and examined to determine whether such payouts will be timely or viable in each individual circumstance.

9. **Investment needs may change.** Investment needs may not only change but they may become relevant for the first time. Until retirement, investments may have been handled by a person's pension plan, a deceased or former spouse or clients may not have ever had a lump sum to invest themselves. It is advisable to find an advisor to help identify an acceptable risk tolerance, so an investment portfolio may be designed to meet their spending needs without undue risk. The other aspect of changing needs is that more risk was acceptable during working (accumulation) years because you could work through any periods of market volatility. However, without an income, it might be time to be more conservative in a portfolio to reduce broader fluctuations that you cannot withstand or replace. Alternatively, it is important to not be so conservative so as to ignore a retirement time horizon that may go for thirty-plus years. It may be prudent to leave a percentage of the portfolio in stocks to allow for growth and to compensate for inflation of spending needs.

10. **Trusts may become a more important planning tool.** For many pre-retirement clients with or without younger children, coordinating a simple will, beneficiary designations and joint titling will sufficiently cover their estate planning needs. At retirement, there are usually more variables to consider and the idea of estate administration becomes less speculative. As a result trusts become a more important planning tool to carry out a client's objectives. There are many different situations where trusts can be beneficial including avoidance of probate due to potential will contests, owning real estate in multiple states, outliving your distributees, thus making it difficult to obtain waivers of citation, asset management in the event of incapacity or death, asset protection, and tax planning, to name a few.

11. **Dealing with actual or potential incapacity is a major planning concern.** At retirement age clients may no longer be able to do everything for themselves. They may receive or have received a diagnosis of something that signals the probable onset of mental and/or physical limitations in handling decisions relating to health care, finances, transportation, and living conditions. Each of these will have an impact on cash flow and a surrogate decision maker will be needed to continue or alter their financial plan accordingly. In these situations, it is important that the plan is even more fully documented than a conventional plan so others can step in if necessary. Invariably, you have worked with clients who handled all of their financial planning themselves. When a person becomes incapacitated someone in the family now comes to you for help. The problem that arises is that their self-governed plan may have made perfect sense and was suitable to them, but to a third party it seems financially irresponsible or disjointed. With more documentation, the surrogate decision maker can provide continuity with the investments, cash flow and tax strategies of the principal.

Each of these eleven issues are worthy of broader analysis, but raising these topics will help you effectively advise your clients to plan for what is a fairly universal overall retirement planning objective: Being able to unite lifetime and post-death planning, using income and assets to provide comfortable post retirement lifestyle (including medical and custodial care as needed), whether or not capacity is retained.

Deficit Reduction Act of 2005: Changes to the Medicaid Look Back and Commencement of the Penalty Period

By Michael J. Amoruso

Introduction

On February 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005[1] ("DRA") into law. Portions of the DRA provide for the first monumental changes to Medicaid eligibility rules since OBRA 1993. Of the many changes wrought by the DRA, perhaps the most significant include the changes to the look-back period and the commencement of the penalty period due to an uncompensated transfer of assets. Given these changes, consumers and providers alike will need the guidance of an elder law attorney schooled in the sophisticated Medicaid eligibility rules to navigate the minefield created by the DRA. This article will explore the changes to both the Medicaid look-back period and the commencement of the penalty period caused by the DRA and by the recently proposed New York State enabling legislation, as it existed in the Budget Bill on April 1, 2006. At the time this article is published, however, New York State is in the middle of an unresolved budget debate which may substantially affect the conclusions contained in this article.

The author would like to thank Daniel Fish, Esq., René Reixach, Esq., Howard Krooks, Esq., Louis Pierro, Esq., Stephen Silverberg, Esq., Vincent Russo, Esq. and Bernard Krooks, Esq. for their insight and analysis regarding the DRA during the preparation of this article.

It is important to note, however, that we are in uncharted waters regarding how the DRA provisions for look-back and commencement of the penalty period will be interpreted and implemented. At this early date, we do not have the benefit of an ADM, GIS, fair hearing decision or court decision interpreting these provisions. In fact, issues regarding the constitutionality of the DRA itself remain unresolved. Thus, the discussion in this article will be refined by precedent as we elder law attorneys test these new rules.

The Medicaid Look-Back Period

I. Pre-DRA

Prior to February 8, 2006, there were two separate look-back periods to determine whether an individual disposed of assets for less than fair market value, namely, (1) thirty-six months (or three years) for direct transfers of assets and (2) sixty months (or five years) for transfers made to or from a trust. In particular, the federal Medicaid law provided:

> The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual…60 months).[2]

The trigger date for the look-back, unaffected by the DRA, for an institutionalized individual is the first date the individual is receiving institutional services (at home or in a facility) and applies for Medicaid under a State plan.[3] For an individual requiring community Medicaid, the trigger date is the date on which the individual applies for Medicaid or the date on which the individual disposes of assets for less than fair market value, if later.[4]

Given the disparity in the look-back period for direct transfers (3 years) and transfers involving trusts (5 years), some elder law attorneys leveraged these look-back periods to maximize asset preservation.

> ***Example 1:*** Assume a regional rate for three years of nursing home assistance is $314,064 and a client has $630,000 in available resources. Prior to the DRA, if the client did not require nursing home care for 3 years, the elder law attorney may have suggested a direct gift of $314,000 to the client's children and a $314,000 transfer into an irrevocable income only trust. This strategy may have preserved $628,000 if the client did not apply for Medicaid until the expiration of 3 years. The direct transfer to the children would be outside the look-back period. While the transfer into the trust would be within the 5 year look-back, the penalty caused by the transfer would have expired in three years ($314,000/$8724 = 35.99 months).

Under the DRA, however, this leveraging of the look-back period is no longer a viable strategy for the client.

II. Post-DRA

The DRA amended the Federal look-back statute to include the following:

> The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual…, *or in the case of any other disposal of assets made on or after the date of the enactment of the Deficit Reduction Act of 2005*, 60 months).[5]

While the author would agree that the drafting of this new provision in conjunction with the existing 42 U.S.C.A. § 1396p(c)(1)(B)(i) is poor, at best, such language clearly expresses Congress's intent to change the look-back period for any post February 8, 2006 transfer to five (5) years. Confusion may exist, however, regarding when the five (5) year look-back period will truly be five (5) years. The author respectfully suggests that the look-back period will not be five (5) years until February 8, 2011.

Specifically, 42 U.S.C.A. § 1396p(c)(1)(B)(i) explicitly preserves the three (3) year look-back for any transfer before February 8, 2006. The DRA does not authorize a back door opportunity for the Medicaid administering agency to require the Medicaid applicant to disclose five (5) years of transfers before February 8, 2006 simply because a transfer was made on February 8, 2006. For such post-DRA transfers, the look-back period should remain at three years until February 8, 2009.

> ***Example 2:*** Ned made a single charitable transfer to the Alzheimer's Association on February 10, 2006 and is applying for institutional Medicaid on August 1, 2006. Although the pre-DRA look-back period would only require a disclosure of all transfers from August 1, 2003, does the DRA allow the local agency to require a disclosure of all transfers from August 1, 2001 to present? NO!

In fact, it is not until February 8, 2011 that the look-back of five (5) years will be applicable—five (5) years from February 8, 2006. The author does not suggest, however, that the look-back will remain three (3) years until February 8, 2011. Instead, the five year look-back should be "phased-in" with February 8, 2009 as the trigger date for the first increase in the traditional three (3) year look-back period.

> ***Example 3:*** Ned made a single charitable transfer to the Alzheimer's Association on February 10, 2006 and is applying for institutional Medicaid on May 1, 2009. The local Medicaid administering agency should require Ned to disclose all transfers for the past 3 years and 3 months. Remember, May 1, 2009 is not yet 5 years from February 8, 2006 so 5 years of disclosure should not need to be provided.

Essentially, the author suggests that after February 8, 2009, there should be an ascending sliding scale as to the number of years and months for which disclosure will be required until the five (5) year threshold is reached on February 8, 2011.

A. New York State Enabling Legislation

On or about April 1, 2006, the New York State budget bill provided enabling legislation for the DRA changes in New York.[6] It is important to note, however, that as a result of certain budget vetoes of Governor Pataki on or about April 12, 2006, the state of the budget and the fate of the proposed DRA enabling legislation is uncertain. In the event that the Governor, Senate and Assembly cannot negotiate a compromise to the budget, the Governor's vetoes will make certain provisions of his corresponding appropriations bill law until March 31, 2007, including, (1) imposing a five (5) year look-back for community Medicaid and institutional Medicaid, (2) imposing penalty periods for community Medicaid, (3) changing the start of the penalty period caused by an uncompensated transfer to the date of Medicaid application, and (4) eliminating spousal refusal for community Medicaid. It is also important to note, that by virtue of the Governor's vetoes, New York State may not be in compliance with the Federal Medicaid Program.

Assuming, however, that a compromise is reached to enact the NYS Budget Bill as it existed on April 1, 2006, then such legislation should contain the DRA enabling legislation. As it existed prior to the Governor's vetoes, the NYS Budget Bill adopted the DRA's five (5) year look-back period for all transfer *on or after* February 8, 2006.[7] Specifically, S. 6457-C ("Budget Bill") provides:

> § 50-a. Paragraph (e) of subdivision 5 of section 366 of the social services law…is relettered paragraph (f) and a new paragraph (e) is added to read as follows:
>
> * * *
>
> (e) For transfers made on or after February eighth, two thousand six:
>
> * * *
>
> (vi) "look-back period" means the sixty-month period immediately preceding the date that an institutionalized

individual is both institutionalized and has applied for medical assistance.

(vii) "institutionalized individual" means any individual who is an in-patient in a nursing facility, including an intermediate care facility for the mentally retarded, or who is an in-patient in a medical facility and is receiving a level of care provided in a nursing facility, or who is receiving care, services or supplies pursuant to a waiver granted pursuant to subsection (c) of section 1915 of the federal social security act.[8]

PRACTICE NOTE: Periodically contact your local DSS (HRA for NYC) or log on to the NYSBA Elder Law Section listserve to see if an ADM or GIS is issued to provide guidance on the DOH's interpretation and implementation of the DRA look-back period.

Starting on February 9, 2009, New York's seniors and disabled persons will be overburdened by the responsibility of providing over three (3) years of financial statements with their Medicaid applications. Today, in most cases, it is difficult for clients to obtain even three (3) years of statements. In fact, certain financial institutions may not retain a customer's monthly statements (including deposit slips and cancelled checks) for greater than three (3) years. This is certain to be an issue that the elder law attorney will confront after February 8, 2009, when the look-back period begins the gradual ascent to five (5) years.

Region	Counties	Rate
New York City	Bronx, Kings, New York, Queens and Richmond	$9,132
Long Island	Nassau and Suffolk	$9,842
Northern Metropolitan	Westchester, Dutchess, Orange, Putnam, Rockland, Sullivan and Ulster	$8,724
Western	Alleghany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming	$6,540
Northeastern	Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington	$6,872
Rochester	Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne and Yates	$7,375
Central	Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga and Tompkins	$6,232

Commencement of the Penalty Period

I. Pre-DRA

For transfers before February 8, 2006, Medicaid is entitled to look-back three (3) years from the first day of the month of application to identify direct transfers and five (5) years for trust-related transfers. As mentioned above, the purpose of the look-back is to see if the Medicaid applicant ("A/R") divested himself of otherwise available assets to pay for his care in order to qualify for Medicaid. Generally, whenever an A/R makes an uncompensated transfer of property (a gift or donation), a time period of ineligibility ("Penalty Period") for Medicaid institutional coverage (i.e., nursing home or Lombardi Program coverage) is created.[9] *Prior to February 8, 2006, such Penalty Period commences on the first day of the month following the month of transfer.*[10] There is no Penalty Period for community Medicaid eligibility.

The Penalty Period is calculated by dividing the value of the transferred property by the average monthly costs of nursing home care in the A/R's geographic region.[11] The 2006 rates are listed in the chart at left.[12]

***Example 4*:** Ned gifts real property in Albany County to his nephew Bill that has a fair market value of $150,000. Ned cannot apply for institutional Medicaid for 21.83 months ($150,000/$6,872 = 21.83).

1. Transfers to Persons Exempt from Penalty Period

Uncompensated transfers of the home (i.e., gifts) to a "qualified individual"[13] are exempt from the imposition of a Penalty Period. Specifically, a transfer to A/R's:

a. spouse;

b. child under the age of twenty-one (21);

c. child who is certified blind or certified disabled of any age;

d. sibling with an equity interest in the home and who was residing in the home for at least one year *immediately* prior to the date the A/R became institutionalized and continues to lawfully reside in the home;

e. “caretaker child” who was residing in the home for at least two years immediately prior to the date the A/R became institutionalized *and* who provided care, as defined in 18 N.Y.C.R.R. 311.4(a)(1), to the A/R which permitted the A/R to reside at home rather than in the facility and such child continues to lawfully reside in the home.[14]

Similarly, uncompensated transfers of other assets are exempt from the Penalty Period if the assets:

a. were transferred to the individual’s spouse, or to another for the sole benefit of the individual’s spouse;

b. were transferred from the individual’s spouse to another for the sole benefit of the individual’s spouse;

c. were transferred to the individual’s child who is blind or disabled, or to a trust established solely for the benefit of such child; or

d. were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled.[15]

In long-term care crisis planning (i.e., immediate institutional Medicaid is required), a transfer to a qualified individual is an attractive proposition in terms of Medicaid eligibility and recovery. A transfer of the home or other asset to any of these individuals or trust, alone, will not cause a Penalty Period for Medicaid eligibility. In addition, a transfer to a qualified individual, *other* than the spouse, will protect the home or asset from Medicaid recovery. Remember, a transfer of the home or asset to a spouse may insure Medicaid eligibility of the A/R (since there is no Penalty Period for the spousal transfer) and it may protect against the imposition of a lien if the spouse continues to reside in the home. However, if the home or other asset remains in the estate of the spouse, then it may be subject to Medicaid recovery at the spouse’s death. Thus, if an exempt transfer to a spouse is utilized, it is imperative that the elder law attorney advise the spouse during post-Medicaid eligibility asset preservation planning to remove the home or other asset from the spouse’s estate. Obviously, an exception to this, however, is if the transfer is made in trust solely for the benefit of the (a) spouse, (b) child or (c) disabled person under age 65, and such person is receiving Medicaid. In such case, the home or other asset may be subject to Medicaid recovery at their death.

These qualified transfers will play an important role in asset preservation planning in a post DRA environment.

II. Post-DRA

Perhaps the most profound and devastating effect of the DRA to seniors and disabled persons (and their families) is the change in the Penalty Period start date. As discussed above, for transfers *prior* to February 8, 2006, the Penalty Period commences on the first day of the month following the month of transfer.[16] This statutory start date authorized clients to make uncompensated transfers (i.e., to children, charities, churches, temples) and qualify for Medicaid as long as the individual privately paid for care (or waited out) the resulting Penalty Period. Such a statutory system was fair and, most times, not harmful to our seniors and disabled clients when properly guided by qualified elder law counsel. The pre-DRA Penalty Period start date required our clients *immediately* to be accountable to the State for any uncompensated transfers of assets.

Under the DRA, however, the Federal government flips this fundamentally fair start date on its head and, instead, penalizes seniors when they are most frail and vulnerable—only when they are receiving institutional level care and have just $4,150 to their name. Specifically section 6011 of the DRA amends 42 U.S.C. § 1396p(c)(1)(D) as follows:

> (i) In the case of a transfer of asset made before the date of the enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.
>
> (ii) In the case of a transfer of asset made on or after the date of the enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, *or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (c) based on an approved application for such care but for the application of the penalty period,* ***whichever is later***, and which does not occur during any other period of ineligibility under this subsection.[17]

While poorly drafted, the DRA appears to mandate that the Penalty Period (for an uncompensated non-exempt transfer) will not commence until the A/R *files* an application for institutional Medicaid and would be eligible for such coverage except for the resulting Penalty Period.[18] This is the point in time that the individual is receiving (a) nursing home services, (b) a level of care in any institution equivalent to nursing home services, or (c) home or community based services under a waiver program (i.e., the Lombardi Program),[19] and, Penalty Period aside, the A/R is otherwise financially eligible for institutional Medicaid (i.e., non-exempt assets < $4,150 and available monthly income < medical expenses).[20]

> **PRACTICE NOTE:** Prepare the client for the possibility of filing two applications if there was a post-DRA transfer. While we need guidance through an ADM or GIS, presumably the initial application will be denied and the penalty period will be calculated by the DSS/HRA. At the expiration of the Penalty Period, the A/R may be forced to re-apply to obtain coverage.

Such a harsh provision has a profound and detrimental impact on the safety and well-being of an individual requiring immediate nursing home care under the Medicaid program who unwittingly made an uncompensated transfer of assets within the last 5 years. It is important to note, however, that the DRA does *not* impose a Penalty Period for community Medicaid.

Consider the following two examples to illustrate the dramatic difference between the pre-DRA and post-DRA penalty start date:

> ***Example 5 (Pre-DRA Penalty Start Date):*** Mary Senior is 76 years old and lost her husband to Alzheimer's disease in early 2005. In August 2005, Mary makes a one time donation to the Alzheimer's Association in the amount of $10,000. In addition, in August 2005, her granddaughter was unable to obtain financial aid for college so Mary gave her $20,000 to use for tuition. Mary has a stroke in January 2006 and she now requires 24 hour custodial care in a nursing home. Mary resides in Westchester County and has $2,000 in her name. The gift to the Alzheimer's Association and to her granddaughter would cause a 3.4 month Penalty Period **which commences on September 1, 2005 and ends in December 2005.** Assuming other factors for eligibility, Mary is eligible for institutional Medicaid in January 2006 when she needs care.

> ***Example 6 (Post-DRA Penalty Start Date):*** Mary Senior is now 80 years old and lost her husband to Alzheimer's disease in 2005. In August 2006, Mary makes a one time donation to the Alzheimer's Association in the amount of $10,000. In addition, in August 2006, her granddaughter was unable to obtain financial aid for college so Mary gave her $20,000 to use for tuition. Mary has a stroke October 1, 2010 and she now requires 24 hour custodial care in a nursing home. Mary resides in Westchester County and has $2,000 in her name. The gift to the Alzheimer's Association and to her granddaughter would cause a 3.4 month Penalty Period **which does not commence until Mary files an application for Medicaid in October 2010 and would not end until January 2011. Assuming other factors for eligibility, Mary would not be eligible for institutional Medicaid until January 2011** based upon the two transfers made approximately 4½ years earlier. With only $2,000 in her name how can she pay for her care during the 3.4 month penalty caused at such late date?

> **PRACTICE NOTE:** For transactions such as Mary Senior's in Example 6, consider litigation or fair hearing to demonstrate that such transfers were made exclusively for a purpose other than to qualify for Medicaid.[21]

Surprisingly, it appears during the rush to pass the DRA that certain moderate Republican U.S. Congresspersons were ill advised as to the effect gifts and charitable donations have on the Penalty Period. In a letter dated January 17, 2006, from U.S. Congresswoman Susan Kelly of New York on the impact of gifts and donations on the Penalty Period she explicitly states:

> If a person makes an innocent gift or donation, the transferor CANNOT be penalized for making a gift or donation during the look-back period as long as he or she can demonstrate an exclusive purpose for the transfer other than to qualify for Medicaid. In addition, there will be no penalty when the transferor can demonstrate intent to transfer the asset for full market value or when the transferred assets are subsequently returned.

For a law that narrowly passed the U.S. Senate by a tie-breaking vote cast by the Vice President of the United States and merely passed the U.S. House of Representatives by two (2) votes, it is heartbreaking to read that our leaders may have been misinformed. Nowhere in the DRA is there a definition of an "innocent gift or donation." Most important, however, such a statement misses the mark because the A/R must overcome the presumption in law that a gift was made to qualify for

Medicaid. That is the very reason why the law imposes a Penalty Period for non-exempt transfers. While the author does not know what is meant by the phrase an "innocent gift or donation," consider the following example:

> ***Example 7:*** Ned is diagnosed with Parkinson's disease in 2006. Over the next 4 years, to help deal with the pain of the diagnosis, Ned donates his life savings of $50,000 to a scientific research association that promises to find a cure and to his local church. In 2010, Ned requires nursing home care and files a Medicaid application which is denied due to the $50,000 transfer. At a fair hearing, Ned must make a showing to overcome the presumption that he donated the money to qualify for Medicaid even though he was afflicted with Parkinson's at the time the gift was made and knew that without a cure he would need nursing home care. Can Ned prevail? Is this the type of "innocent gift or donation" that CANNOT result in a Penalty Period to Ned?

PRACTICE NOTE: Consider attaching Representative Susan Kelly's letter as an exhibit to a Medicaid application where there appears to be an unintentional gifting of assets (as Ned in Example 7, above) to demonstrate Congress's legislative intent not to impose a penalty for such an "innocent gift or donation."

A. New York Enabling Legislation

Assuming that the NYS budget impasse ends with an adoption of the Budget Bill as it existed on April 1, 2006, the Budget Bill should provide enabling legislation for the DRA which is effective July 1, 2006.[22] Specifically, the Budget Bill amends Social Services Law § 366[5](e) as follows:

> (e) For transfers made *on or after February eighth, two thousand six:*
>
> * * *
>
> 2) The uncompensated value of an asset is the fair market value of such asset at the time of transfer, minus the amount of the compensation received in exchange for the asset.
>
> 3) In determining the medical assistance eligibility of an institutionalized individual, *any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services for the period of time specified in subparagraph four* [sic][23] *of this paragraph.*[24]
>
> * * *
>
> (5) *Any transfer made by an individual or the individual's spouse under subparagraph three of this paragraph shall cause the person to be ineligible for services for a period equal to the total, cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average monthly costs of nursing facility services provided to a private patient for a given period of time at the time of application,* as determined pursuant to the regulations of the office of temporary and disability assistance. The period of ineligibility shall begin the first day of a month during or after which assets have been transferred for less than fair market value, *or the first day the individual is receiving services for which medical assistance coverage would be available based on an approved application for such care but for the provisions of subparagraph three of this paragraph, whichever is later,* and which does not occur in any other periods of ineligibility under this paragraph.

In addition to adopting the DRA look-back period (discussed above), the Budget Bill adopts the cruel and harsh Penalty Period start date. While at first blush it may appear that the Budget Bill departs from the DRA Penalty Period start date—by commencing on the first day the individual is receiving "medical assistance coverage" (i.e., community Medicaid instead of institutional Medicaid)—a later reference in the same sentence to subdivision (c) dealing with nursing home services may negate the possibility that the Penalty Period can commence on the filing of a community Medicaid application. Clearly, this issue of statutory construction is one that must be addressed by a NYS Department of Health ADM or possibly, the Courts.

PRACTICE NOTE: The most effective outcome of the DRA is that the traditional rule of halves planning is eliminated from the elder law attorney's arsenal. Prior to the DRA, the elder law attorney may have advised a client to transfer up to half of the client's assets either outright or in trust for beneficiaries and retain the remaining half of assets to pay for care during the Penalty Period. Such a strategy was effective because the Penalty Period, prior to the DRA, commenced the month immediately following the month of the transfer. Thus, if the client required care during the Penalty Period, the client could use the retained assets to pay for such care until the Penalty Period expired. Since the Penalty Period under the DRA does not start until the individual is receiving nursing home care and is otherwise eligible for institutional Medicaid (i.e., income and resource requirements), traditional rule of halves planning serves no purpose. Remember, by retaining half of the assets (assuming greater than $4,150), the individual is not "otherwise eligible" for Medicaid.

Perhaps the most alarming aspect of the Penalty Period is the fact that it exposes an individual who requires nursing home care to the possibility that he will not be admitted into a facility due to a transfer years earlier. If an individual made a transfer three (3) years prior to their immediate need for nursing home care, that causes a multi-month (or multi-year) Penalty Period (beyond any potential Medicare coverage), and the individual has no assets or insurance remaining to pay for care, the practical chances of that individual being offered admission into a nursing home are likely to decline. This exposure to the stark reality of the business side of a nursing home (filling beds to generate income), will certainly place such an individual in a dire situation. On the flip side, in the event a new resident, out of sheer desperation, fails to disclose a post-DRA transfer, that will place the nursing home in the precarious position of filling a bed that fails to generate income until the expiration of the Penalty Period. These competing concerns demonstrate the harsh reality of the Penalty Period to both the A/R and the care facility.

It is important to note however, that while the Budget Bill as it existed on April 1, 2006 does *not* impose a Penalty Period for community Medicaid, by virtue of Governor Pataki's vetoes of the Budget Bill on April 12, 2006, a penalty period may now exist for community Medicaid until March 31, 2007 as contained in the Governor's corresponding Appropriations Bill. During the months ahead, the elder law attorney must vigilantly follow and digest the developments of the Budget Bill and inform the client about this fluid situation *prior* to offering advice regarding eligibility for community Medicaid.

1. Transfers Exempt from the Penalty Period

Most important, however, New York State's enabling legislation, as it existed in the Budget Bill on April 1, 2006, preserves the exempt transfers to certain qualified individuals that existed for pre-DRA transfers. In particular, if the asset transferred is the A/R's home, no penalty will be assessed if the home is transferred to the A/R's

a. spouse;

b. child under the age of twenty-one (21);

c. child who is certified blind or certified disabled of any age;

d. sibling with an equity interest in the home and who was residing in the home for at least one year *immediately* prior to the date the A/R became institutionalized;

e. "caretaker child" who was residing in the home for at least two years immediately prior to the date the A/R became institutionalized *and* who provided care which permitted the A/R to reside at home rather than in the facility.[25]

If the A/R transfers assets other than the home, such transfers are exempt from the Penalty Period if the assets

a. were transferred to the individual's spouse, or to another for the sole benefit of the individual's spouse;

b. were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;

c. were transferred to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child; or

d. were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled.

As with pre-DRA transfers, the elder law attorney should first identify whether an opportunity exists to utilize an exempt transfer before initiating the harsh Penalty Period start date under the DRA. Such transfers have proven effective in the past and will continue to be a strong tool in the elder law attorney's arsenal post-DRA.

In the event that the possibility of an exempt transfer does not exist, there may be hope to escape the harsh Penalty Period if the A/R can demonstrate that any transfers were made exclusively for a purpose other than to qualify for institutional Medicaid.[26] It is important to note, however, that since the Penalty Period under the DRA will not commence, in some cases, for many years later, the exclusive purpose for such a transfer, in fact, may have been for a purpose other than to qualify for Medicaid. Further, the Budget Bill provides that if a satisfactory showing is made to demonstrate that the A/R (or spouse) (a) intended to dispose of the assets at fair market value or other valuable consideration or (b) that all assets transferred for less than fair market value have been returned to the A/R, then a Penalty Period may be avoided.[27]

PRACTICE NOTE: If you identify that a nonexempt transfer was made by the A/R, explore the purpose and circumstances surrounding the transfer. Was the A/R in good health with no expectation of requiring nursing home care at the time of transfer? Was the transfer made as part of the individual's estate planning (i.e., consistent history of annual exclusion gifting while in good health)? Can the facts rise to a level that the A/R may succeed at a fair hearing or in Court?

2. Undue Hardship Provision

Interestingly, both the DRA and the Budget Bill, as it existed in the Budget Bill on April 1, 2006, contain a provision that may permit the A/R to obtain institutional Medicaid if application of the Penalty Period would deprive the A/R of medical care that would endanger the A/R's life or health or deprive the A/R of food, clothing or shelter.[28] In fact, the NYS Office of Temporary and Disability Assistance ("OTDA") must inform all individuals affected by the Penalty Period in writing of the hardship waiver process.[29] The Commissioner of the OTDA must develop a hardship waiver process that is timely so that the A/R has a sufficient opportunity to appeal an adverse decision.[30] Under current regulations, A/Rs in New York may establish undue hardship if (1) they are otherwise eligible for institutional Medicaid, (2) they are unable to obtain appropriate medical care without Medicaid, (3) despite best efforts are unable to have transferred assets returned or obtain fair market value for the transferred assets.[31] "Best efforts" to obtain the transferred assets or their fair market value includes cooperating with the DSS to pursue such assets or obtain their fair market value, perhaps through litigation, from the donee (i.e., children, charity, trust).[32] Unfortunately, however, hardship waivers under pre-DRA law were rarely granted in New York.[33]

One positive addition under the DRA and the Budget Bill, as it existed in the Budget Bill on April 1, 2006, is the fact that if the A/R is an institutionalized individual, the nursing home, with the A/R's consent, may file a request for a hardship on the A/R's behalf.[34] While this may not increase the likelihood of success, this provision does provide for a Medicaid paid bed hold for the A/R at the facility for up to thirty (30) days (if certain criteria to be promulgated by the OTDA are met).[35] Also, the A/R's case would be handled by the nursing home's attorney who may have a higher level of expertise in such matters.

PRACTICE NOTE: An opportunity exists to expand our practice in this area by representing nursing homes that pursue hardship waivers for A/Rs who are admitted into their facility.

III. The Challenge for the Elder Law Attorney

With the elimination of rule of halves planning, asset preservation planning is turned on its head for the elder law attorney. Instead of creating a penalty and self-paying for care throughout the penalty period until the A/R is Medicaid eligible, in a post-DRA world, the A/R will have to be made *immediately* "otherwise eligible" for Medicaid to start the Penalty Period. How can the elder law attorney accomplish the seemingly impossible?

The elder law attorney will probably rely on often-overlooked strategies, such as: caregiver agreements, exempt transfers, and litigation to overcome the presumption that a transfer was made for the purpose of obtaining Medicaid. Also, the DRA appears to sanction the purchase of a life estate interest if the A/R resides in the home for a year after such purchase.[36] The use of the life estate in this fashion may need to be explored. In addition, the elder law attorney may investigate the existence, viability and use of products such as a short-term immediate annuity (assuming it meets stringent requirements of the DRA). Likewise, long-term care insurance will be an important tool in future asset preservation planning (assuming that a client can financially afford it and medically qualifies). Finally, the irrevocable income only trust may become a more attractive alternative to clients who decide, wisely, to plan well before the five (5) year look-back is an issue. The trust may offer more protection and flexibility over a direct gift and now has parity with the direct gift with regard to the look-back period.

IV. Conclusion

There can be no doubt that in a post-DRA environment, the ones who will suffer are the chronically ill and medical providers. One can only hope, for the sake of our Nation's chronically ill citizens, that either a constitutional challenge to the DRA will prevail or that repeal legislation, once the impact of the DRA is truly understood, will march through the halls of Congress and the White House. Thanks to the tireless efforts of the New York State Bar Association, the Elder Law Section's Officers and Executive Committee, the Budget Bill includes language that provides for New York's Medicaid eligibility laws to retreat to pre-DRA rules if either event occurs.

With the devastating change in the Penalty Period start date, asset preservation planning is no longer an area where the generalist can "dabble" in elder law. Given the intricacies of the DRA and the level of sophisticated planning needed in a post-DRA world, clients will require advice from elder law attorneys that thoroughly understand the Medicaid rules to safely navigate them through the uncharted waters of the DRA.

Endnotes

1. Public Law 109-171 (2006).
2. 42 U.S.C.A. § 1396p(c)(1)(B)(i).
3. 42 U.S.C.A. § 1396p(c)(1)(B)(ii)(I) and 42 U.S.C.A. § 1396p(c)(1)(C)(i).
4. 42 U.S.C.A. § 1396p(c)(1)(B)(ii)(II).
5. Public Law 109-171 § 6011(a).
6. S. 6457-C, A. 9557-B (January 20, 2006).
7. *Id.*
8. *Id.*
9. Social Services Law § 366[5](d)(3).
10. Social Services Law § 366[5](d)(4).
11. Social Services Law § 366[5](d)(4); 18 N.Y.C.R.R. § 360-4.4(c)(2)(iv).
12. OMM GIS 04 MA/033.
13. Social Services Law § 366[5](d)(3)(i)(A)-(D); 18 N.Y.C.R.R. § 360-4.4(C)(2)(iii)(8)(1)-(4).
14. *Id.*
15. Social Services Law § 366[5](d)(3)(ii).
16. Social Services Law § 366[5](d)(4).
17. Public Law 109-171 § 6011(b).
18. *Id.*
19. 42 U.S.C.A. § 1396p(c)(1)(C)(i).
20. Social Services Law § 366.
21. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iii)(B). *E.g., Cacchillo v. Perales*, 172 A.D.2d 98, 576 N.Y.S.2d 916 (3d Dep't 1991); *Kulikowski v. New York State Dept. of Social Services*, 166 A.D.2d 858, 563 N.Y.S.2d 536 (3d Dep't 1990).
22. S. 6457-C § 50-a; Social Services Law § 366[5](e)(2)-(5).

    The reference to subparagraph 4 is a misprint in the Budget Bill, as the appropriate reference should be to subparagraph 5.

24. The Budget Bill continues to amend Social Services Law § 366[5](e)(3) by stating that the following transfers are uncompensated unless they meet stringent parameters:

    > For purposes of this paragraph: (i) the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless: the state is named as a beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant, or the state is named in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value; and the annuity meets the requirements of section 1917(c)(1)(G) of the federal social security act; (ii) the purchase of a life estate interest in another person's home shall be treated as the disposal of an asset for less than fair market value unless the purchaser resided in such home for a period of at least one year after the date of purchase; (iii) the purchase of a promissory note, loan, or mortgage shall be treated as the disposal of an asset for less than fair market value unless such note, loan, or mortgage meets the requirements of section 1917(c)(1)(I) of the federal social security act.

25. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(i)(A)-(D).
26. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iii)(B). *E.g., Cacchillo v. Perales*, 172 A.D.2d 98, 576 N.Y.S.2d 916 (3d Dep't 1991); *Kulikowski v. New York State Dept. of Social Services*, 166 A.D.2d 858, 563 N.Y.S.2d 536 (3d Dep't 1990).
27. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iii)(A) & (C).
28. Public Law 109-171 § 6011(d), S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iv).
29. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iv).
30. *Id.*
31. 18 N.Y.C.R.R. § 360-4.4(c)(1)(ii)(d)(2).
32. *Id.*
33. Vincent J. Russo and Marvin Rachlin, *New York Elder Law Practice*, § 8:35 (West 2005).
34. S. 6457-C § 50-a; Social Services Law § 366[5](e)(4)(iv).
35. *Id.*
36. S. 6457-C § 50-a; Social Services Law § 366[5](e)(3)(ii).

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How to Legally Obtain Medical Marijuana in New York

By Sharon Kovacs Gruer

New York is now among the more progressive states which permit the legal use of medical marijuana. Since the process for obtaining it is complicated, clients may inquire as to how they may obtain medical marijuana legally.

The New York program provides access to medical marijuana to certified patients who have cancer, HIV/AIDS, ALS (Lou Gehrig's disease), Huntington's disease, Parkinson's disease, multiple sclerosis, intractable spasticity caused by damage to the nervous tissue of the spinal cord, neuropathy, epilepsy and/or inflammatory bowel disease, and any of the following conditions where it is clinically associated with or a complication of a condition under this paragraph, or its treatment: cachexia or wasting syndrome; severe or chronic pain; severe nausea; seizures; and/or severe or persistent muscle spasms (NYS Public Health Law Section 3360 [7][a]). The commissioner may add other diseases.

According to the New York State Department of Health website, as of January 7, 2016, nearly 150 doctors from across New York state already took the required course, registered for the program, and are able to certify patients.

Every physician making a certification shall consult or have a designee consult the prescription monitoring drug program registry prior to making or issuing a certification, for the purpose of reviewing a patient's controlled substance history.

In order to obtain medical marijuana, the client must receive a New York State Department of Health Medical Marijuana Certification from a registered physician. The client should then access the Department of Health's online patient registration system to apply for a registry identification card. In order to obtain the registry identification card, clients first need to sign up for a personal "New York government ID" at *my.ny.gov*.

After they obtain their New York government ID, clients need to log on to *my.ny.gov* and click the "Health Applications" icon (*apps.health.ny.gov/pub-auth/applist.html*) and the "Medical Marijuana Data Management System" link to register. The client will need a valid Department of Health Medical Marijuana Program certification issued and signed by a registered practitioner, photographic identification, documentation of New York State residency, and designated caregiver information, if applicable. Information may be found at *http://www.health.ny.gov/regulations/medical_marijuana/patients*. Clients with valid registry identification cards are then able to purchase medical marijuana from one of the designated dispensing locations in New York State.

Information on the registered organizations can be found on the Department of Health website: *http://www.health.ny.gov/regulations/medical_marijuana/application/selected_applicants.htm*.

There is a $50.00 application fee pursuant to Public Health Law Section 3363 (2)(f).

The registry ID card will be mailed to the certified client after the application is approved. Clients must have the registry ID card and their certification in order to purchase approved marijuana products. New York does not accept certifications or registry ID cards from others states.

Clients may designate up to two caregivers during the registration process. After the client's application is approved, the designated caregiver(s) must then register with the department. The certified caregivers may lawfully possess, acquire, deliver, transfer, transport or administer the marijuana. No person may be a designated caregiver for more than five (5) certified patients at one time.

If a patient is under 18, the designated caregiver shall be a parent or legal guardian of the certified patient, a person designated by a parent or legal guardian, or an appropriate person approved by the department upon a sufficient showing that no parent or legal guardian is appropriate or available.

The problem for many clients, as of January 7, 2016, is that the Department of Health did not post a list of the doctors who took the course, are registered for the program, and are able to certify patients. If a client's physician did not take the course and did not register for the program, it is difficult for that client to obtain information on which other physicians to see in order to obtain the certification. New York State's website, as of January 7, 2016, stated that it "will soon" post a list of those registered physicians who consent to providing their names and specialties. However, that is of no help to those clients seeking a physician and the lack of a list impedes their ability to obtain help under the new law.

Recovering from Estate Recovery

By T. David Stapleton, (Antique Chair)

The creative triumvirate of our Chair and *Journal* co-editors has asked that I provide a memoire of my term as Section Chair. I thought I would start at the very beginning, usually a very good place to start.

I recall, like it was yesterday, the phone call from Dan Fish, asking if I would be willing to be nominated to serve as Treasurer of the Section. My reply was: "Dan this usually means that I would be expected to serve in the higher officer positions until ultimately becoming Chair of the Section." He told me, that's exactly what the nominating committee expects. I then responded: "Dan do you realize how old I will be when I reach the position of Chair?" His reply: "David, do you think the Elder Law Section should care how old you will be." We both laughed, and after conferring with my wife and partners, I accepted the nomination and ultimately became the Section's oldest Chair to this date.

When elected Chair at the 2011 Annual Meeting, I gave an acceptance speech in which I paid tribute to those who so admirably served ahead of me, and who had elevated our Section to great prominence. However, I did point out that I did bring one unique attribute to this position, and that was: "For the first time in its near 20-year history, this Section would now have a Chair that actually looks like an Elder Lawyer."

Fortunately, there were four years of "boot camp," serving in the other officer positions, before becoming Chair, and I was able to learn first-hand the role of serving as Chair. I did have hopes that my term would be free from any controversial issues arising. Those hopes were dashed by the Medicaid Redesign Team promulgating a list of changes in the rules affecting the administration of Medicaid. At the end of March our state legislature passed legislation providing for Expanded Estate Recovery, to the effect that a broader range of assets were now to be available for recovery. It was left to the Department of Health (DOH) to craft the regulations required to govern the implementation and enforcement of the statute.

Draft regulations were issued by DOH for comment just six (6) days after I became Chair, and in doing so adversely affected many of the techniques our Section members utilized to protect assets for Medicaid applicants and their families. I asked myself, "why did this have to happen on my watch." In response, I established an Estate Recovery Litigation Task Force, chaired by Rene Reixach and David Goldfarb, and added this project to the Legislation Committee, chaired by Amy O'Connor and David Goldfarb, and to our lobbying efforts.

Later in September the DOH issued its first draft of proposed permanent regulations. This resulted in Section representatives spending a great amount of time meeting with the DOH, trying to educate its members as to the adverse consequences of their proposed regulations and how those regulations were in conflict with existing statutes, case law, and regulations.

While these negotiations were pending, Rene, under the auspices of NAELA, prepared a lawsuit, which he had scheduled to file on a certain date in December, only to be advised on the day prior that DOH allowed the proposed permanent regulations to lapse, and agreed to enter into further negotiations with our Section representatives.

The year of 2011 was a time of great uncertainty for our membership, so we decided to conduct a Webcast on October 31, to provide what guidance we could to Section members, entitled "What Should We Do Now?" While it was still impossible to project where all this was going to lead, David Goldfarb, Anthony Enea, Lou Pierro and I did want to share what we thought were still viable approaches to protect our clients, despite the limitations of the then-proposed regulations.

Although later advised that we were not supposed to do so, during this time of uncertainty many of us contacted legislators on our own, to educate them as to the adverse consequences of "what they had wrought" with this legislation, particularly as interpreted by the Health Department.

I vividly recall calling an influential Senator's office, not someone I knew, and asking for the Senator's legislative aide. When she came on the phone, we entered into an extensive discussion about the impact of the legislation, as interpreted by the Health Department. I explained how devastating and unfair it was to retroactively consider a life estate subject to estate recovery, and impose the payment for that amount upon the titled owner of the property. Her response was: "Oh, my goodness, does that mean that my dad will have to pay for Gramma's life estate upon her death?" With a smile on my face, I said that's exactly what it means. She was really distressed, and as I hung up, I thought that might help us with at least one vote. Others in the Section wrote or called their representatives, mostly with favorable responses.

On March 31, 2012 the Expanded Estate Recovery legislation was repealed, and therefore so were its regulations. Our Bar Association lobbyists to the State Capitol informed me that this was one of the most significant legislative victories in the history of NYSBA.

At the 2012 Spring Meeting in Saratoga we had a ceremonial cutting of the original statute, by Fran Pantaleo and David Kronenberg. I introduced the ceremony as "the Elder Law Section version of repeal."

Despite our preoccupation with Expanded Estate Recovery, we were able to continue to add worthwhile programs to our Section:

A. The first of these was the establishment of a Mentoring Program chaired by Joan Robert and Tim Casserly, which has proved very popular with new members of the section.

B. We also established a Mediation Committee, chaired by Laurie Menzies and Judie Grimaldi, with the goal to develop an awareness within the Section of its attributes, and to provide an educational opportunity to obtain the required certification to serve as a Mediator.

C. Under the leadership of Ron Fatoullah, assisted by Bob Mascali and Ira Salzman, we were able to bring forth a New York version of THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JUSRISDICTION ACT, which was passed by the State Legislature in May, 2012.

During the several weeks following the repeal, and as the clock on my tenure started to run down, I received many accolades from Section members and others regarding those successes. While pleased to have received these compliments, I always responded that it was my good fortune to serve as the conductor of magnificently talented symphony orchestra during this opus. This was not false modesty, but reflected my honest opinion. I was truly in awe of the talent that was at my disposal and generously shared during my tenure. No one ever said no to my requests for assistance. These many individuals, too numerous to name, served the Section and their Chair above and beyond the call. I am so grateful.

At my final Executive Committee Meeting I gave a farewell speech, in which I extended my compliments and appreciation for the support I received during my term. I also pointed out that:

There were executive committee members who also served me in a personal capacity, and that was to make sure that I didn't lose my "common touch":

1. It started early. I had no sooner stepped down from the stage after my acceptance speech in NYC when I was met by the comment: "Nice speech, Dave, did your daughter (Palin's press secretary) write it for you?"

2. Then during my initial officers' telephone conference as Chair, I was reassured by an officer: "Don't worry, Dave, we've got your back, and we promise to catch you on the first bounce."

3. After a lobbying visit to legislators in the State Capitol, there was a comment made about one politician having a hairpiece, at which point one of the women turned to me and said: "Dave, is it fair to assume that you're not wearing a rug?" This, of course, I confirmed.

4. Then there was the time I missed an officers' call because I was tied up in a Fair Hearing. As a result, I received an email in which I was fired. However, shortly thereafter the sender thought better of it and retracted it, realizing I might not consider that a punishment.

5. During my term, I mentioned to my wife: can you believe that this country lawyer is the Chair of this great Section? In your wildest dreams, did you ever imagine that I would become chair of the Elder Law Section?

   Her response: "David, honey, I hate to tell you this, but you're not even in my wildest dreams," she said with a wink and a smile.

I finished my farewell by saying that I loved it all, and that my wife and I appreciated their efforts to keep me humble.*

*Four of the above incidents actually happened, but one was a fabrication, and I'll let you guess which one.

A closing thought: I continue to treasure the wonderful support I received as Chair, and as a result, am addicted to attending Section meetings and spending time among the people who continue to greatly enrich my life, both professionally and personally.

The Unauthorized Practice of Elder Law: Why Florida Got It Right and New York Needs to Catch Up

By Anthony J. Enea

Several years ago I was tasked with chairing the Unauthorized Practice of Law Task Force (UPL) for our Section. While many members were very concerned with non-attorneys engaging in Medicaid planning and their handling of Medicaid applications, unfortunately there was not a sufficient desire on the part of the Section to undertake the necessary and difficult steps to prevent non-attorneys from promoting themselves as "Medicaid planners."

During the deliberative process about UPL, it was not unusual to hear a member of the Executive Committee express the concern that our taking a proactive approach on this issue would appear like we were just focused with protecting our territory and legal fees. While the optics of any endeavor are always a factor, I believe the Section lost sight of the true need for legislative change to the definition of the unauthorized practice of law, which is necessary to protect the public from non-attorneys offering legal advice and providing, in essence, legal services in the field of elder law.

Perhaps more than any other state, Florida has taken a proactive and highly structured approach to dealing with what its Elder Law Section saw as a significant problem: non-attorney Medicaid "planners" advising the public on how to obtain Medicaid benefits in Florida. Non-attorneys are providing services which are virtually identical to those being provided by Florida attorneys.

Although Florida does not have a statutory definition of the "unlicensed practice of law," it is defined though case law. Additionally, the Florida Supreme Court has tasked the Florida Bar with the responsibility of investigating and prosecuting UPL, which is a third degree felony, punishable by up to 5 years in prison.

Before an investigation or prosecutorial action can be commenced by the Florida Bar, a written allegation/complaint of the unlicensed practice of law (UPL) has to be filed with the Florida Bar. As a result of a significant number of complaints of non-attorneys engaging in Medicaid planning, the Florida Bar Standing Committee on UPL petitioned the Florida Supreme Court for an Advisory Opinion on what constitutes UPL in Medicaid planning.

At the public hearings, which took place in February of 2013, it was repeatedly demonstrated that non-lawyers were engaging in Medicaid planning, and that said non-attorneys were unregulated, unlicensed, with no educational or advertising requirements, which resulted in financial harm to the public. In January 2014 the Florida Bar Standing Committee on UPL submitted a formal request for a formal opinion to the Florida Supreme Court on whether non-attorneys engaged in Medicaid planning activities culminating in the submission of a Medicaid application, such as drafting of personal service contracts, preparation and execution of qualified income trusts and, most importantly in my opinion, "rendering legal advice regarding the implementation of Florida law to obtain Medicaid benefits," constituted UPL.

On January 15, 2015, the Florida Supreme Court in SC 14-211 adopted the proposed opinions of the Standing Committee on UPL of the Florida Bar Association; the Court ruled it is UPL for non-attorney "Medicaid Planners" to engage in:

(a) Drafting Personal Service Contracts;

(b) Determining the need for, preparing and executing a Qualified Income Trust;

(c) Selling personal service Contracts or Qualified Income Trusts or kits in the area of Medicaid planning;

(d) *Render legal advice regarding the implementation of Florida Law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract of qualified income trust.* (Emphasis added).

A non-lawyer in Florida may assist a Medicaid applicant with the preparation of the Medicaid application, as it is authorized by law.

Thus, it appears that under Florida law a non-attorney is only permitted to engage in the ministerial act of assisting with gathering the information necessary and completing the Medicaid application; however, any other advice provided by the non-attorney regarding the transfer of assets, structuring of income and assets, deeming of income, and other issues that commonly arise with the preparation and filing of a Medicaid application, such as exempt asset transfers, spousal refusal and the potential for a lawsuit against the refusing spouse, would all be UPL under Florida law. Clearly, the path of non-attorney Medicaid planners in Florida is now legally fraught with significant peril.

On October 5, 2015, the United States Supreme Court denied the Petition for Certiorari of William D. Burns challenging the opinion of the Florida Supreme Court. Thus, the opinion of the Florida Supreme Court is the law in Florida.

While the path in New York to accomplish what the Florida Bar has done will inevitably be different, and perhaps significantly more difficult as legislation may be required, unless the Attorney General is willing to prosecute those who have inflicted financial harm upon the unwitting members of the public who have retained their services. It is still a path that, in my opinion, our Section needs to seriously explore.

I encourage our Section officers and the Executive Committee of the Section to re-engage on the issue of the Unauthorized Practice of Law. In doing so, we should consult with those in the Florida Bar who were instrumental in the issuance of the Florida Supreme Court opinion as well as those charged with overseeing the Unauthorized Practice of Law at the State Bar to explore what steps will be needed in New York to prevent the unlicensed and unregulated Medicaid planner from giving legal advice on matters related to Medicaid benefits to members of the general public, with often disastrous consequences.

Service to Our Members and the Public

By Frances Pantaleo

Muriel Kessler recounts in her piece the formation of our Section, and the vision and leadership required to make it happen back in the early 1990s. Springing from the former NYSBA Special Committee on Seniors, with collaboration and leadership from Muriel and the General Practice Section, our Section had as its mission:

> [The service of] the legal profession and the public-at-large as a clearinghouse of information on all phases of Elder Law, including economic, social, emotional financial, familial and heath care issues; to provide an array of resources to address the needs of the elderly, and to weave professional principles and ethical concerns into its programs and symposiums.

My husband, Robert Freedman, was one of the founders of the National Academy of Elder Law Attorneys and worked with Muriel and Mortimer Goodstein to create the Elder Law Section. He was honored to be the third chair of the Section, and has remained an active and vibrant part of the Section over the years. During those early years, I was teaching as a clinical professor at Cardozo Law School and cut back to part-time work while our children were young. Bob and I wrote a chapter on Elder Law for a West publication and then collaborated on an article entitled "In Defense of Medicaid Planning"[1] which we presented at the 1994 NAELA Symposium held in Seattle in May 1994. At the time, there was a growing concern that Congress might attempt to criminalize Medicaid planning. Bob and I felt strongly that Medicaid planning was an understandable and ethical reaction to an unfair health insurance system which penalizes seniors who have the misfortune to get the wrong disease in their twilight years. Why should middle-class seniors who chose to take steps to protect their homes and hard-earned retirement savings be penalized or scorned for consulting with a lawyer when the wealthy are applauded for taking advantage of tax planning strategies? Our article argued forcefully that Medicaid planning was both legal and ethical.

In January 2009, I was elected to serve as Treasurer of the Section effective June 1, 2009. And so began my journey toward serving as Chair for the 2013-2014 year. The path to Chair takes several years, and during that journey there is plenty of time to observe and learn from the Chairs who precede you. Most Chairs have one or two goals or pet projects that they launch either during their period as Officers, or upon assuming position as Chair. I had two main goals which were both rooted in my desire to support our members. The first was to focus attention on mental health and problems of addiction within the legal profession and to provide some resources to members of our Section who might need assistance. Towards this end, I instituted Friends of Bill W.[2] meetings during our Summer and Fall meetings. I also advocated to include presentations by staff from NYSBA's Lawyer's Assistance Program at a Section CLE program and to our Executive Committee and for a program on stress management to be held at a meeting for CLE credit!

My second goal was to secure approval of a change in the Section's name to more accurately reflect the diversity of the work that many "elder law" attorneys had been providing to families and individuals with disabilities for many years. To this end, I urged the Executive Committee to change the name of the Section to include Special Needs Planning.

The Section had a longstanding standing committee, called the Committee on Persons Under a Disability. This committee was the precursor to what became the Special Needs Planning Committee in late 2008 and early 2009. Vincent Russo and Joan Robert, two former Chairs of the Section, chaired this newly named Special Needs Planning Committee.

This change in committee nomenclature and committee focus reflected the momentum that many of our Section's practitioners had been experiencing—incorporating planning for persons with special needs into their practices. Whether it was our older clients looking to make arrangements for their adult disabled children or our younger clients having children with special needs requiring customized and more attentive planning, the inclusion of special needs planning into our practices, and eventually into the name of the Section, was both natural and logical. Our unique understanding of government benefits programs, our comfort in dealing with families who are overwhelmed by complex bureaucratic systems and complicated medical problems, our heightened sensitivity to difficult family dynamics and ethical dilemmas are welcome skills which the elder law attorney brings to the table when working with individuals with disabilities and their families.

In fact, our Section's quarterly publication, the *Elder and Special Needs Law Journal*, went through a transformation in 2011. The Co-Editors at the time, Andrea Lowenthal and David Okrent, advocated to the Section's Executive Committee for the renaming of our journal to include the phrase "Special Needs" in its title, so as to more accurately reflect the content often included. What was formerly known as the *Elder Law Attorney* launched its inaugural issue as the *Elder and Special Needs Law Journal* with the Summer 2011 edition.

This slow evolution of our Section culminated when I pushed for our Section's name change. There was discussion among the Executive Committee members as to whether the inclusion of the phrase "Special Needs Planning" in the name of the Section was appropriate. While not every member of our Section engages in planning for persons with special needs, the same could be said of other facets of elder law practice. For example, not every member of our Section works in the guardianship area, or prepares and submits Medicaid applications. The inclusion of Special Needs Planning into our Section title most accurately reflects the breadth of knowledge and skills that are contained within the membership of our Section.

Our Executive Committee in fall of 2013 approved the changing of our Section's name from "The Elder Law Section" to "The Elder Law and Special Needs Section." The membership of the Section as a whole adopted the name change at our 2014 Annual meeting in New York City, held on January 28, 2014. We were fortunate that the Executive Committee of the New York State Bar Association approved the name change at its January 30, 2014 meeting. I felt tremendous pride and satisfaction in seeing this change adopted, and believe that it does a great service to our Section members and to the public who can now look with confidence to our Section for referrals for practitioners with experience in special needs planning.

Our Section continues to evolve in the depth of its resources for persons with special needs. We recently formed a Special Ed Committee to assist our members to stay abreast of developments in this unique niche area of law. In addition to the general elder law pro bono legal clinics that our Section has been offering for many years, our Section recently began offering special needs pro bono clinics to address the needs of families and persons with special needs.

I look forward to the growth that our Section will experience in the next 25 years, and I am proud to have been at the helm of the Section in its inaugural 25 years. I would like to continue to explore ways that we can provide emotional support to our members. Last May, I attended a three-day silent meditation retreat for attorneys at The Garrison Institute on the beautiful banks of the Hudson River in Garrison, New York.[3] (Yes, I know this sounds like the beginning of a bad lawyer joke.) I would like share some of the joy, peace and renewal that I found at that conference with our members. However, since the bliss of that three-day retreat, I plunged back into my hectic life and practice and haven't had the time to reflect and organize my thoughts into an article or proposal for the Executive Committee.[4] Stay tuned.

Endnotes

1. "In Defense of Medicaid Planning: Federal Law Prohibits States from Applying Debtor-Creditor Laws to Transfers of Assets," NAELA Quarterly, Vol 7, No. 4 (Fall 1994).
2. Meetings of Friends of Bill W. are informal Alcoholics Anonymous meetings which are held during conferences, on cruise ships and other locations which might present temptations for persons who struggle with addiction.
3. The Garrison Institute once again hosted a three-day silent meditation retreat for lawyers on May 5th through 8th, 2016. Unfortunately, I was not able to attend as this was the same weekend as the Trusts and Estates Law Section Spring Meeting in Carefree, Arizona. For more information about the meditation retreat, see the website of the Garrison Institute.
4. Life has been so hectic that I would not have been able to put together this short article without gentle prodding, and an initial draft of this article being handed to me by our amazing current Chair, JulieAnn Calareso. How does she do it all? Thank you, JulieAnn, for your unending store of energy, enthusiasm and talent. You will be a tough act to follow.

Spousal Budgeting Under New York State's Managed Long-Term Care Program

By Richard A. Weinblatt

It was truly an honor to serve as Chair of the Elder Law and Special Needs Section. Although the job is challenging, it is also extremely rewarding.

As Chair, I had the privilege of working with so many talented and dedicated members of our Section and overseeing the great work that our Section does in advocating for the elderly and persons with special needs. I also had the opportunity to be involved with legislative and policy issues that greatly affect many people's lives.

Each Chair faces unique challenges, some more daunting than others. Looking back over the years, I remember Joan Robert being faced with the Deficit Reduction Act of 2005 during her term as Chair, and David Stapleton having to deal with a drastic change in the estate recovery statute. I also recall how our Section, under their leadership, worked tirelessly to analyze these changes and to successfully advocate for the people we represent.

I was fortunate not to have been confronted with the major changes that Joan and David faced. What I did face, however, was a change in New York State Department of Health's ("DOH") policy with respect to New York State's implementation of the Affordable Care Act's provision relating to married persons receiving managed long-term care services ("MLTC").

This year, another issue relating to New York State's implementation of the Affordable Care Act's provision relating to married persons receiving MLTC services has been brought to our attention and is presently being addressed by our Section. Resolution of this issue may require a statutory change. This Article will review the issues relating to New York State's implementation of the Affordable Care Act's provision relating to married persons receiving MLTC services.

Post-eligibility Budgeting and Contributions to a Supplemental Needs Trust

Section 2404 of the Affordable Care Act extended the protection against spousal impoverishment to MLTC recipients. On August 5, 2014, DOH issued a policy directive (GIS 14 MA/15) that effectively prohibited married individuals receiving MLTC services from contributing their excess income to a supplemental needs trust.

This directive was premised upon New York State's interpretation that in addition to extending spousal impoverishment protection to MLTC recipients, Section 2404 of the federal Affordable Care Act requires the application of post-eligibility budgeting rules to MLTC recipients. Under the post-eligibility budgeting rules, contributions to a supplemental needs trust are not permitted.

In opposition to the issuance of GIS 14 MA/015, our Section issued a memorandum which was sent to DOH expressing our position that GIS 14 MA/015 violated federal law. We pointed out that both 42 U.S.C. §1396r-5(h)(1)(A), and the language that is substituted, only apply to the issue of redefining an institutional spouse and community spouse for the purpose of extending spousal impoverishment protections to spouses of MLTC recipients, and that the Affordable Care Act does not alter the post-eligibility budgeting rules for persons who are not in a medical institution or intermediate care facility.

In November 2014, DOH issued GIS 14 MA/025, which rescinded its prior directive in GIS 14 MA/15. Pursuant to GIS 14 MA/025, the local districts were directed to apply the policy set forth in GIS 12 MA/013 for married individuals who receive home and community-based waiver services (HCBS) under waiver authorized under Section 1915 (c) of the Social Security Act, and to apply the policy set forth in GIS 13 MA/018 for married individuals enrolled in MLTC under the 1115 waiver. GIS 13 MA/018 provides for spousal impoverishment budgeting with post-eligibility rules only when it is more advantageous to the applicant. Thus, married MLTC recipients effectively have a choice of using spousal impoverishment budgeting with post-eligibility rules or not using spousal impoverishment budgeting and contributing excess income to a supplemental needs trust.

By allowing the contribution of excess income to a supplemental needs trust many individuals will be able to remain in their homes. Although this will help most of our clients, it is my view that GIS 13 MA/018 still violates federal law. Since post-eligibility budgeting rules do not apply to 1115 waiver programs, contrary to GIS 13 MA/018, MLTC recipients should be able to use spousal impoverishment budgeting and contribute excess income to a supplemental needs trust.

Spousal Impoverishment Budgeting Where One Spouse Is in an Institution

At least one county's Department of Social Services is denying spousal impoverishment budgeting in cases where one spouse is receiving services in an institution and the other spouse is receiving MLTC services. This appears to be based upon New York State implementation of the Affordable Care Act in Section 366-c of the Social Services Law. Although Section 366-c appears to support the position taken by the county, such position violates federal law and is contrary to the intent of the Affordable Care Act, which is to extend spousal impoverishment protection to MLTC recipients.

As noted above, Section 2404 of the Affordable Care Act extended the protection against spousal impoverishment to MLTC recipients. This was done by amending the portion of the definition of an "institutionalized spouse" in 42 U.S.C. §1396r-5(h)(1)(A) to include a person receiving MLTC services. The Affordable Care Act did not amend the portion of the definition of an "institutionalized spouse" in Section (h)(1)(B).

Before the amendment, 42 U.S.C. §1396r-5(h) read as follows:

> h) Definitions. In this section:
>
> (1) The term "institutionalized spouse" means an individual who—
>
> > (A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [*42 USCS § 1396a(a)(10)(A)(ii)(VI)*], and
> >
> > (B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.
>
> (2) The term "community spouse" means the spouse of an institutionalized spouse.

After the amendment, during the five-year period that begins on January 1, 2014, Section (h) of 42 U.S.C. §1396r-5 is to be read as follows:

> h) Definitions. In this section:
>
> (1) The term "institutionalized spouse" means an individual who—
>
> > (A) is in a medical institution or nursing facility or who is eligible for medical assistance for home and community-based services provided under subsection (c), (d), or (i) of section 1915 [*42 USCS § 1396n*], under a waiver approved under section 1115 [*42 USCS § 1315*], or who is eligible for such medical assistance by reason of being determined eligible under section 1902(a)(10)(C) [*42 USCS § 1396a(a)(10)(C)*] or by reason of section 1902(f) [*42 USCS § 1396a(f)*] or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k) [*42 USCS § 1396n(k)*], and
> >
> > (B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.
>
> (2) The term "community spouse" means the spouse of an institutionalized spouse.

It is important to note that Section 2404 of the Affordable Care Act did not amend that portion of the definition of an "institutionalized spouse" found in (h)(1)(B). Under (h)(1)(B), a Medicaid recipient in an institution or nursing facility whose spouse is residing in the community and receiving MLTC services is an "institutionalized spouse" because the Medicaid recipient in the institution is not married to a person in a medical institution or a nursing home. Since the spouse in an institution or nursing facility is an "institutionalized spouse," pursuant to (h)(2), the spouse of the institutionalized spouse is a "community spouse." Under spousal budgeting, if the community spouse's income is less than the minimum monthly maintenance needs allowance (presently $2,980.50) a portion of the institutionalized spouse's income is budgeted to the community spouse in order to bring the community spouse's income up to an amount not to exceed the minimum monthly maintenance needs allowance.

In 2013, New York State implemented Section 2404 of the Affordable Care Act by amending Section 366-c(2)(a) of the Social Services Law which defines the term "institutionalized spouse." New York State's definition of "institutionalized spouse," however, is now inconsistent with 42 U.S.C. § 1396r-5(h).

The definition of "institutionalized spouse" in Section 366-c(2)(a) reads as follows:

> (a) For purposes of this section an "institutionalized spouse" is a person (i) who is in a medical institution or nursing facility and expected to remain in such facility or institution for at least thirty consecutive days; or (ii) who is receiving care, services and supplies pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act or is receiving care, services and supplies in a managed long-term care plan pursuant to section eleven hundred fifteen of the social security act; and (iii) who is married to a person who is not in a medical institution or nursing facility *or is not receiving waiver services described in subparagraph (ii) of this paragraph;* (emphasis added)...

By including the emphasized words, New York State excludes from its definition of an "institutionalized spouse" a married person residing in a facility or an institution who has a spouse in the community receiving MLTC services. Since under this definition the Medicaid recipient residing in a facility or institution is not an "institutionalized spouse," the spouse residing in the community receiving MLTC services is not a "community spouse." Therefore, no portion of the institutionalized spouse's income is budgeted to the spouse residing in the community receiving MLTC services.

For example, under New York's definition, if a married person residing in a nursing home has monthly income of $595 and his or her spouse residing in the community receiving MLTC services has monthly income of $300 per month, the spouse in the institution retains $50 per month and the balance is paid to the nursing home. None of the nursing home spouse's income is allocated to the spouse residing in the community receiving MLTC services even though such spouse has only $300 of income. Under the federal statute, the spouse in the institution retains $50 per month and the remaining $545 is allocated to the spouse residing in the community receiving MLTC services, bringing such spouse's income to $845 per month.

Thus, Section 366c-2(a) of the Social Services Law violates federal law and is inconsistent with the intent of the Affordable Care Act. Since it is a statutory inconsistency rather than a mere policy inconsistency, a legislative amendment to change to Section 366c-2(a) of the Social Services Law would appear to be required.

Conclusion

In New York State, current spousal budgeting rules for MLTC recipients differ depending upon whether the spouse of the MLTC recipient is residing at home or in an institution.

If neither spouse is residing in an institution, in accordance with GIS 13 MA/018, the MLTC recipient has a choice of using spousal impoverishment budgeting with post-eligibility budgeting rules or contributing his or her excess income to a supplemental needs trust.

If the MLTC recipient has a spouse residing in an institution, pursuant to Section 366-c of the Social Services Law, spousal impoverishment budgeting is not available to protect the spouse receiving MLTC services. This may prevent such spouse from affording to remain in his or her home.

As set forth above, New York State law is inconsistent with federal law. Our Section is presently addressing this issue and I am hopeful that it will be successfully resolved.

Acknowledgments

Much of this Article is taken from memoranda sent by our Section to DOH. I would like to acknowledge and thank the members of our Section who have worked so hard on this issue and who have contributed to writing these memoranda. Special thanks to David Goldfarb, Rene Reixach, Valerie Bogart and Aytan Bellin.

Some Advice from the All-Time Treasurer…

By Marty Finn

What's a Financial Officer?

I know many of you have wondered about the role of the Section's Financial Officer. I often wonder myself. I was appointed as Financial Officer of the Section in 2008 when I was asked and recommended by Tim Casserly to take over for a retiring David Pfalzgraf. Tim felt my accounting background would be appropriate for the position—or at least that is how he sold me on the job. Generally, my role involves a variety of financial tasks for the Section for which it is helpful to have the same person, year after year, rather than a revolving door of officers each year. Each month, I receive financial reports from the NYSBA Treasurer's office and review them for accuracy and any issues. As many of you who attend the Section Executive Committee meetings know, I review and comment on our financial reports at these meetings. I also assist the officers in preparing an annual budget for the Section and reviewing that budget with our Executive Committee at our summer meeting. One of my greatest joys in the job, however, is responding to financial requests of the Section Chairs for our summer meetings. For example:

In 2008 in Baltimore, Maryland, Tim Casserly asked that we rent out Oriole Park at Camden Yards for a Section softball game. I said No!

In 2009, Section Chair Michael Amoruso requested that, rather than staying at the hotel where the conference was being held, he would like to stay at the Lincoln Room in The White House. Again, I said no.

In 2010 in Philadelphia, Section Chair Sharon Kovacs Gruer asked that we rent the Liberty Bell, bring it the hotel for our cocktail party so attendees could have their picture taken with it. Great idea, but no. Based on my history with our parties, we would have cracked it again—and who's gonna pay for that?

In 2011, lovable Section Chair Dave Stapleton thought it would be fun to have attendees carted between meeting events in horse-drawn carriages—keeping with the Manchester, Vermont ambiance. Worried about who would be responsible for the cost of cleaning up the horse droppings, I said no.

In Boston, in 2012, Chair Anthony Enea suggested we enlist New England Patriots Bill Belichick to be a keynote speaker for our program. Worried about the cost—and that he wouldn't say enough to fill up his time slot—I nixed that idea. (The fact that I am a diehard NY Jets fan had nothing to do with it!)

In Hamburg, New Jersey in 2013, Section Chair Fran Pantaleo requested Swedish massages be provided to all attendees. Again, great idea—but can't trust all of our group with a masseuse. Request denied.

In 2014, in Hershey, Pennsylvania, Section Chair Richard Weinblatt thought a wrestling tournament between Section members in rings filled with melted chocolate would be fun. Too messy—in many ways. No!

Finally, in 2015, Chair JulieAnn Calareso, in Newport, Rhode Island, scheduled a regatta for all attendees on rented yachts. Too hoity-toity for my taste—and too much money. I cancelled that.

I hope the above proves to you that I have been—and will continue to be—a good steward of your Section's finances. If you have any questions about our finances or my role, please do not hesitate to contact me. If you have a spending request, you know the answer.

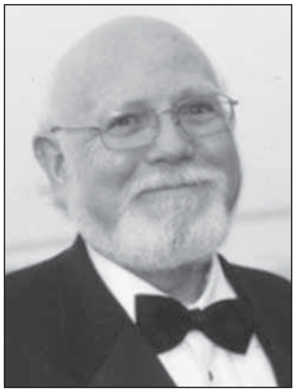
Lobby Day

On February 24, 2016 Section members JulieAnn Calareso, David Goldfarb, David Stapleton, Marty Hersh, Tara Anne Pleat, Jeff Asher, Valerie Bogart, Britt Burner, Deep Mukerji, David Kronenberg, Tammy Lawlor, and Matt Nolfo met with members of the NYS Senate and Assembly to request opposition to four components of the Governor's budget bill: (1) Elimination of Medicaid Spousal (and Parental) Refusal; (2) The Reduction of the Minimum Community Spouse Resource Allowance; (3) The Proposal to Require a Nursing Home Level of Care As a Condition of MLTC Eligibility; and (4) The Proposal to Reduce Benefits For Qualified Medicare Beneficiaries (QMB) Who Depend on Medicaid to Ensure Affordable Access to Health Care.

We are pleased to see that in the final budget items 1-3 were removed; however, there will be some downward adjustment in benefits to QMB beneficiaries. We expect to provide a short report in an upcoming edition of the *Journal* on the impact this adjustment will have on those QMB beneficiaries.

Introduction to David Goldfarb

By David Goldfarb



I wanted to take this opportunity to introduce myself to anyone who doesn't know me and give a little further background information to those who do know me. As Chair-Elect of the Section, I will become Chair in June 2016, having the honor to follow the current Chair, JulieAnn Calareso. I have had the privilege to work with many of the past chairs of the section and members of the section's committees and have been impressed with both the knowledge and dedication of so many of our section members.

I received my BA degree from the University of Wisconsin at Madison in 1969, where I was Student Body President in my senior year. Some of you may recall how tumultuous 1968-69 was on campuses throughout the United States. I received my JD Degree from New York University School of Law in 1972. I began working for the Legal Aid Society in New York City in 1972. I was fortunate that as an attorney I was able to handle cases in every level of trial and appellate court in New York State and in the federal courts. This included the New York State Court of Appeals and two cases in the United States Supreme Court. The cases in the Supreme Court were *Alexander v. Fioto*, 430 U.S. 634 (1977) which I argued in 1977 and *Blum v. Yaretsky*, 457 U.S. 991 (1982) which I second seated with my good friend John Kirklin and was on the brief. *Yaretsky* was a case dealing with Medicaid nursing home patients' rights and many of the co-counsel were former and current members of this Section.

I went into private practice in 1989 and formed the firm Goldfarb & Abrandt with Jeffrey Abrandt which later became Goldfarb Abrandt Salzman & Kutzin LLP with partners Ira Salzman and Michael Kutzin. I have co-authored the book *New York Elder Law* for Lexis/Matthew Bender with Professor Joseph Rosenberg of CUNY Law School since 1999. I have also co-authored two books dealing with my avocation, historic preservation; they are in the Arcadia Press "Images of America" series—*St. George* (2009) and *Stapleton* (2010). I have written articles for the *New York State Bar Journal*, *NAELA News*, *Elder and Special Needs Law Journal*, *Trusts and Estates Law Section Newsletter*, and other publications.

I was chair of the City Bar's Committee on Legal Problems of the Aging from 1996-1999. I am a member of the American College of Trusts and Estates Counsel (ACTEC). I have been active in both the Trusts and Estates Law Section and the Elder Law and Special Needs Section of the New York State Bar Association, having been chair and vice chair or various committees of both Sections. I am proudest of my work as a member of this Section's Legislation committee where I have been part of the team that has successfully lobbied on behalf of our clients regarding the state budget proposals for the past 15-plus years. We have stopped the legislature from ending community-based spousal refusal and were successful in getting the legislature to repeal the expanded Medicaid estate recovery statute.

Most recently I represented this Section on the NYSBA Power of Attorney Task Force under Task Force Chair Ellen Makofsky where we recently presented a report on a proposed statutory amendment which has been adopted by the NYSBA House of Delegates and will now be presented to the State Legislature.

I look forward to my term as chair beginning in June 2016. We have some great Section conferences planned for summer and fall. I look forward to working with all the members of the Section and getting as many new members involved as possible. I hope working with the Section will prove as rewarding for all of you as it has been for me.

Section Committees and Chairs

Client and Consumer Issues
Melinda Bellus
Legal Services of the Hudson Valley
30 South Broadway
Yonkers, NY 10701
mbellus@lshv.org

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

Veronica Escobar
The Law Offices of Veronica Escobar
153-01 Jamaica Avenue, Ste. 201
Jamaica, NY 11432
vescobar@veronicaescobarlaw.com

Elder Abuse
Joy S. Solomon
The Hebrew Home at Riverdale
Administration Office
5901 Palisade Avenue
Riverdale, NY 10471
joy.solomon@hebrewhome.org

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

Jeffrey A. Asher
Law Offices of Jeffrey A. Asher, PLLC
43 West 43rd Street, Ste. 72
New York, NY 10036
jasher@asherlawfirm.com

Ethics
Natalie J. Kaplan
Elder Law on Wheels
477 Madison Avenue, Ste. 530
New York, NY 10022
nkaplan@elderlawoffices.com

Financial Planning and Investments
Ronald A. Fatoullah
Ronald Fatoullah & Associates
60 Cutter Mill Road
Ste. 507
Great Neck, NY 11021
rfatoullah@fatoullahlaw.com

Guardianship
Patricia A. Bave
Kommer Bave & Ollman LLP
145 Huguenot Street, Ste. 402
New Rochelle, NY 10801
pbave@kboattorneys.com

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

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

Legal Education
Richard A. Weinblatt
Haley Weinblatt & Calcagni, LLP
One Suffolk Square
1601 Veterans Memorial Hwy, Ste. 425
Islandia, NY 11749
raw@hwclaw.com

Frances M. Pantaleo
Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, NY 10601
fpantaleo@bpslaw.com

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

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

Liaison to Law Schools
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
Drinker Biddle & Reath LLP
1177 Avenue of the Americas
New York, NY 10036
advocator66@gmail.com

Marianne Artusio
Touro College
acob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722
MarianneA@tourolaw.edu

Mediation
Beth Polner Abrahams
Polner Abrahams Law Firm
350 Old Country Road, Ste. 101
Garden City, NY 11530
Beth@bpabrahamslaw.com

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

Medicaid
Valerie J. Bogart
New York Legal Assistance Group
Evelyn Frank Legal Resources
Program
7 Hanover Square, 18th Fl.
New York, NY 10004
vbogart@nylag.org

Rene H. Reixach Jr.
Woods Oviatt Gilman LLP
2 State Street, Ste. 700
Rochester, NY 14614
rreixach@woodsoviatt.com

Membership Services
Salvatore M. DiCostanzo
Maker, Fragale & Di Constanzo, LLP
350 Theodore Fremd Avenue
Rye, NY 10580
smd@mfd-law.com

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

Mental Health Law
Suanne L. Chiacchiaro
45 Wintercress Lane
East Northport, NY 11731
slc4law@optonline.net

Mentoring
Anne E. Dello-Iacono
Raskin & Makofsky
600 Old Country Road, Ste. 444
Garden City, NY 11530
anne@raskinmakofsky.com

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

Publications
Tara Anne Pleat
Wilcenski & Pleat PLLC
5 Emma Lane
Clifton Park, NY 12065
TPleat@WPLawNY.com

Judith Nolfo McKenna
Law Office of Judith Nolfo McKenna
1659 Central Avenue, Ste. 208
Albany, NY 12205-4039
judy@mckennalawny.com

Real Estate and Housing
Jeffrey G. Abrandt
Goldfarb Abrandt Salzman
& Kutzin LLP
350 5th Avenue, Ste. 4310
New York, NY 10118-1190
abrandt@seniorlaw.com

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

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

Sponsorship
Elizabeth Briand
Bleakley Platt & Schmidt LLP
One North Lexington Avenue
White Plains, NY 10601
ebriand@bpslaw.com

Technology
Moira Schneider Laidlaw
Shamberg Marwell Hollis Andrey-cak & Laidlaw, P.C.
55 Smith Avenue
Mount Kisco, NY 10549-2813
mlaidlaw@smhal.com

Monica P. Ruela
Makofsky & Associates, P.C.
600 Old Country Road, Ste. 444
Garden City, NY 11514
monica@makofskylaw.com

Veteran's Benefits
Felicia Pasculli
The Elder Law & Special Needs
Practice of Felicia Pasculli, Esq., PC
One East Main St., Ste. 1
Bay Shore, NY 11706
felicia@pascullilaw.com

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