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Message from the Chair

Martin Hersh

As I write this message I am looking out of the window of my office and seeing the leaves on the trees that cover the beautiful Catskills starting to change color. Summer has turned to Fall. The mountains will take on the appearance of a beautiful tapestry full of Fall colors. However, soon, as the wind and rain blow, the leaves will fall to the ground, leaving a mostly grey, dull appearance. With the changing of seasons as a backdrop, I note the recent failure of the Senate in their efforts at the repeal and replacement of the Affordable Care Act (Obamacare). However, like Summer the turning to Fall, and then Winter, there will, in all likelihood, be changes next year that, whether it be through the federal tax law overhaul or otherwise, will lead to some, if not all of the "leaves" of the ACA to change. This will deeply impact the Medicaid system as we know it. These changes will have a significant influence to our practices and for those people that we represent.

I have been involved in Elder Law planning since the mid-1980s, when I handled, mostly, crisis Medicaid matters. One common thread that I have observed since then is that we, as Elder Law attorneys, have been able to change with the times as the laws have become more and more restrictive and oppressive to our clients. We need to be ready to deal with whatever changes are to come. As Bob Dylan wrote back in 1964:

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you
Is worth savin'
Then you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'.

Our Officers, members of our Executive Committee and Elder Law and Special Needs practitioners, as a group, will not "sink like a stone." We know that times are a-changin' and we will react appropriately. Historically we

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have not let changes to the laws stop us from assisting our clients, challenging wrongful laws, and formulating new methods to achieve our client's goals. From the changes in the lookback period, to "Granny goes to jail," then "Granny's lawyer goes to jail," and then the Deficit Reduction Act, we have always found ways to work within the confines of the law to provide the best legal advocacy possible for our clients. This will not change. The New York State Elder Law and Special Needs Bar, its leadership and its members have always been at the forefront of formulating ways to reach our clients' goals when laws have changed. We have challenged wrong, unfair or unlawful decisions at Fair Hearings, Article 78 proceedings, and with suits in both state and federal courts. We, as members of the Elder Law Bar, cannot nor will we sit idly by and not challenge and react to the changes that will, most assuredly, be coming.

Keeping the upcoming challenges in mind, and as I mentioned in my incoming chair's message in the Summer issue of the *Journal*, we need to increase membership and participation within our Section. Our Section membership is both dwindling and aging. We need both new as well as younger members to become involved with our Section, as this adds to the value and vitality that new members provide. They offer new ideas, input and participation, and this will only help to strengthen our Section and help meet the challenges ahead. I, again, ask each of you to reach out to colleagues and espouse the values of membership in our Section. If each of us can bring in just one new Section member, we'd become one of the largest Sections in NYSBA, and a better Section for it.

Our summer meeting at Lake Placid was a terrific success. I wish to thank the program co-chairs, **Deborah Ball** and **Michael Dezik,** for all of their hard work in putting together an outstanding program. I have heard nothing but praises. Chair-elect **Judith D. Grimaldi** gave a riveting Elder Law Update. She was even able to update us on the Senate's version of the Better Care Reconciliation Act, which was released that morning! Vice-Chair **Tara Pleat** then provided us with an excellent presentation on best options for planning with trusts. We then had three break-out sessions that allowed the attendees to attend two of the three sessions, which covered nuts and bolts of submitting a Medicaid application, presented by **Sara Meyers**; post guardianship issues, presented by **Anthony Lamberti**, and **Jill Choate Beier**'s presentation on estate planning for digital assets. The next day we had four sessions of 13 different roundtable topics; with each topic presented twice. This gave each attendee the ability to choose four sessions that they found most interesting. Everyone I have spoken to thought that this format was fantastic. That evening, at the Lake Placid Golf Club, we were treated to a breathtaking display of mother nature's fireworks, as we enjoyed cocktails under a tent during a wild thunder and lightning storm. The program ended on Saturday with **Ron Fatoullah** and **Bill Pfeiffer** presenting on financial planning for the elder law practitioner; **Moriah Adamo**, talking about "myth busters": tales from a nursing home attorney, and finally, an extremely interesting ethics of email presentation by **Matthew Fuller**. All in all the program was jam packed with timely and interesting material. I want to thank each presenter for giving their time to prepare and present at the meeting. I also want to thank each sponsor and exhibitor for their support. We have been able to keep the programming costs down, significantly, due to their continued support. Next summer's meeting will be from July 12-14, 2018 at Queen's Landing Hotel, Niagara-on-the Lake, Ontario Canada. I am looking forward to Chair-elect **Judith Grimaldi** putting together a fantastic program.

Our Fall program was held at the DoubleTree Hilton in Tarrytown, New York on October 26 and 27. I was glad to have had both **Lisa Friedman** and **Miles Zatkowsky** as my two extremely dedicated program co-chairs. Like the Summer meeting, the program was packed with substantive programming and it included Friday morning roundtable discussions, which allowed each of us to pick and choose various topics that we wanted to learn about. There was also a session on ethics for elder care lawyers. A cocktail reception and dinner was held at Tappan Hill mansion which is on the former estate of Mark Twain.

Our Annual Meeting will be at the New York Hilton on January 23, 2018. Former Section Chair **Fran Pantaleo** and **Scott Silverberg** are the co-chairs for this program. Former Section Chair **JulieAnn Calareso** will be providing the general update which is typically the main topic that draws such large crowds. JulieAnn is a terrific speaker, and I am looking forward to her presentation. Former Section Chair and President-elect of NAELA, **Michael J. Amoruso**, will be speaking about federal Medicaid changes and Medicaid issues from other states that may give us a glance into what the future may hold for New York Medicaid. This is a "can't miss" and all elder law practitioners should try to attend. Mike is a captivating speaker and his talk will give us insight on what the future may hold for elder law in New York.

On April 19-20, 2018, our UnProgram will be held at the Desmond Hotel in Albany. For those of you that are unfamiliar with the UnProgram, it was initially developed by the National Academy of Elder Law Attorneys. There are a range of topics and moderators for each topic. Small groups of about 10 to 15 members meet and are encouraged to engage in discussions on each topic. After about an hour members rotate to a different room, topic, and moderator. There are typically 20 or more topics over the course of the two-day UnProgram. I have attended at least a dozen NAELA UnPrograms and have co-chaired two for our Section. I have always looked forward to these programs as they offer a fantastic opportunity to learn, engage with and meet other practitioners with similar interests. If you have not attended an UnProgram in the past I strongly urge that you do so. If you have attended one, please do so again. Not only does your voice of experience help others expand their knowledge, but there

is always something to learn. Even one nugget learned is worth the expense of attendance.

The SNT Fairness Act was finally signed by Governor Cuomo on August 21, 2017. Now a person under 65 can create their own SNT. This was a long battle and **Mike Amoruso** spearheaded it. Mike worked tirelessly to get it passed. We all owe him a debt of gratitude. I, personally, wish to thank Mike for his herculean efforts in getting this enacted. In the next legislative session I am hopeful that the new POA legislation will be enacted. **David Goldfarb** has been one of the driving forces behind getting the POA to be simplified. On behalf of our Section, I have submitted the POA legislation as a legislative priority to NYSBA for 2018. This coming session I anticipate that there will be proposals dealing with financial abuse and the banking law that we, as a Section, will be involved with, as well as changes as a result of due process concerns surrounding 17-A guardianships. Our legislation committee, of which **Jeffrey Asher** and **Deepankar Mukerji** are co-chairs, has done a wonderful job in keeping up with the different proposals on these and other areas that will impact our practices.

One of my priorities, as Chair, was to have more of our standing committees create communities on our Web site. I am pleased to say that several have done so. These communities aid in distributing information and ideas to other committee members. Thanks to each committee for creating your community. For those who have not done so yet, please reach out to **Lisa Bataille**, our Section liaison, and she'll help you. Without Lisa to lean on I'd be at a loss.

In closing, I wish each of you a wonderful 2018. If you have any questions or issues, feel free to contact me at elder.law@verizon.net. I look forward seeing many of you at future meetings, as well as meeting those of you that I have not yet had the privilege of meeting and getting to know. Please come up to me and introduce yourselves at the next meetings. I welcome your participation in our Section.

Martin Hersh

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Message from the Co-Editors-in-Chief

Judith Nolfo McKenna

We are off to a wonderful autumn with our new Chair Marty Hersch and our newest officer Deep Mukerji. This issue has a great interview with Deep. We had no idea Deep was born in Texas and spent his early years in Alabama. We welcome Deep as an officer, and look forward to his continued leadership.

We have a fascinating new article from a new contributor, Elizabeth Adinolfi, discussing the intersection of guardianship laws and family law. We truly appreciate when a Section member steps forward with an article, or idea for an article. We had to delay this issue as we did not have enough submissions. Each committee has been asked to contribute for a particular issue of the *Journal*. If you are a co-chair or vice chair of a committee, and do not remember when your article is expected, as a reminder here is the schedule:

Spring 2018 Issue (Articles due 2/15/18)
1. Mental Health
2. Guardianship
3. Legislation
4. Financial Planning and Investments

Summer 2018 Issue (Articles due 5/15/18)
1. Health Care Issues
2. Practice Management
3. Technology
4. Medicaid

Fall 2018 Issue (Articles due 8/15/18)
1. Veterans Benefits
2. Special Needs Planning
3. Mediation
4. Estates, Trusts and Tax Issues

Tara Anne Pleat

Another excellent article, regarding Article 81 of the Mental Hygiene Law, was submitted by James L. Hyer and Steven M. Stieglitz. Again, our thanks for reaching out to us as new contributors. Thanks again to our former chair, Anthony Enea, for his submission discussing UTMA accounts. Anthony is a consistent contributor to the *Journal*, and we are very grateful for his efforts and submissions. Joseph Bollhofer's article about digital assets is always a welcome and relevant topic in our practices.

Our new member spotlight features Robin Goeman, by our resident interview specialist, Katherine Carpenter. We owe a great deal to Katy, as she has been learning every aspect of the *Journal* in the last year and we look forward to her ascending to the co-chair role with Patricia Shevy next year!

Tara and Judy
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JOIN A COMMITTEE

Professional Growth Opportunities

Elder Law and Special Needs Section committees address, from the perspective of an elder law practitioner, unique issues facing the elderly, those with disabilities and those in the legal profession. The Section offers you the opportunity to serve on many committees and to network with attorneys throughout the state. Committees give you the opportunity to research issues, influence legislation that affects the elderly and/or those with disabilities, and achieve professional development and recognition.

Elder Law and Special Needs Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space availability permits.

___ **Client and Consumer Issues** (ELD4000)
___ **Diversity** (ELD6800)
___ **Elder Abuse** (ELD7600)
___ **Estates, Trusts and Tax Issues** (ELD1200)
___ **Ethics** (ELD7300)
___ **Financial Planning and Investments** (ELD4400)
___ **Guardianship** (ELD1600)
___ **Health Care Issues** (ELD3600)
___ **Legal Education** (ELD1900)
___ **Legislation** (ELD2300)
___ **Mediation** (ELD7400)
___ **Medicaid** (ELD2900)
___ **Membership Services** (ELD1040)
___ **Mental Health Law** (ELD6100)
___ **Mentoring** (ELD7500)
___ **Practice Management** (ELD3300)
___ **Publications** (ELD6600)
___ **Real Estate and Housing** (ELD3900)
___ **Special Ed** (ELD8000)
___ **Special Needs Planning** (ELD3800)
___ **Sponsorship** (ELD6500)
___ **Technology** (ELD7800)
___ **Veteran's Benefits** (ELD6700)

NYSBA

Exercising Caution When Permitting a Ping Designation in an Article 81 Proceeding

By James L. Hyer and Steven M. Stieglitz

James L. Hyer

Steven M. Stieglitz

Article 81 of the New York State Mental Hygiene Law (MHL) provides a vehicle for the appointment of a Guardian of the person and/or property of an individual, either through a determination of incapacity of an individual (referred to as an alleged incapacitated person, AIP) or by that individual providing consent to such appointment (referred to after consent has been provided as a person in need of a guardian, PING). For the reasons outlined in this article, attorneys should use caution when agreeing to a settlement wherein no determination of incapacity is made, but instead the AIP consents to the appointment of a Guardian, as doing so may result in the need for future court intervention and added cost to the clients.

Oftentimes, clients seeking legal assistance in regard to an Article 81 proceeding are concerned with a family member whom they believe can no longer handle their own financial and/or personal affairs. In some cases, these clients then seek a court order where the client would have the legal authority to manage the affairs of that person as a Guardian. In other cases, the client has been served with a petition wherein another interested party is seeking appointment of a Guardian. In either situation, all clients share one goal, finality. They all would like to obtain a decision from the court which they believe will allow their loved one's affairs will be managed properly, without the need to seek court intervention again in the future

Despite each Article 81 Proceeding being unique in nature, there are generally three (3) main steps in every matter. The first step is whether the Petitioner will be seeking a determination of incapacity of the subject party or whether the AIP will consent to a PING designation. Throughout this article, we will discuss why a designation of incapacity is preferable to a PING designation, which may be arrived at through a negotiated compromise or initially when the proceeding is commenced.

The second step will only be necessary if a determination of incapacity is made, which will then prompt the court to decide what constitutes the "least restrictive means" of assisting the party. The court only decides to rely on advance directives currently in place or the appointment of a Guardian of the person and/or property of the AIP.

It should further be noted that this "least restrictive means" language is incorporated directly into the language of MHL Article 81.01: "The legislature finds that it is desirable for and beneficial to a person with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independent and self-determination of which they are capable." Further, when creating the Article 81 statute as opposed the old conservatorship law, the legislature's intent was to provide the incapacitated person with the greatest amount of independence as discussed in the case of *In re Rebecca P.*, 24 Misc. 3d 1222(A), 899 N.Y.S.2d 62 (Sup. Ct. 2009).

Many Article 81 Proceedings turn on the issue of whether the AIP has valid advance directives, such as a Power of Attorney appointing a fiduciary to make decisions pertaining to their property and a Health Care Proxy wherein the AIP has appointed a fiduciary to make their health care decisions. In the event such advance directives exist and are found to be legally enforceable, many decisions have held that these documents constitute the least restrictive means of protecting an AIP, preventing the need for an appointment of a Guardian. *See In re Samuel S.*, 96 A.D.3d 954, 957, 947 N.Y.S.2d 144, 147 (2d Dept. 2012). Practitioners should note that even if the purported advance directives are alleged to exist, significant litigation in such proceedings occurs when parties seek to set aside advance directives by alleging that the documents were executed during a time period when the AIP lacked the capacity to execute the estate planning documents. Even if the legality of such advance directives is not in question, parties may seek the appointment of a Guardian alleging that the fiduciary appointed is inappropriate to serve or that the scope of authority granted in those documents is too narrow to serve the needs of the AIP. *See In re Carl R.P.*, Jr., 44 Misc. 3d 1219(A), 997 N.Y.S.2d 97 (Sup. Ct. 2014).

The final step occurs when a determination of incapacity has been made concerning the AIP and the court determines that the "least restrictive means" of assisting an AIP is the appointment of a Guardian or a PING who consents to the appointment of a Guardian, permitting the court to make a determination of who should serve as the Guardian of the person and/or property of the subject party. When determining who shall serve as the Guardian of an AIP, the court looks at several factors, including, but not limited to:

1. Any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501, 5-1601 or 5-1602 of the general obligations law and §§ 2965 and §§ 2981 of the Public Health Law;
2. The social relationship between the incapacitated person and the person, if any, proposed as Guardian, and the social relationship between the incapacitated person and other persons concerned with the welfare of the incapacitated person;
3. The care and services being provided to the incapacitated person at the time of the proceeding;
4. The powers the guardian will exercise;
5. The educational, professional and business experience relevant to the nature of the services sought to be provided;
6. The nature of the financial resources involved;
7. The unique requirements of the incapacitated person; and
8. Any conflicts of interest between the person proposed as guardian and the incapacitated person.

N.Y. Mental Hyg. Law § 81.19 (McKinney)

Although many factors need to be evaluated in each case, a substantial challenge may be presented in cases where incapacity of the AIP is in dispute. In such cases, the AIP may have significant mental health issues, drug abuse problems and other issues that may lead to a determination of incapacity, but only after a contested hearing. Regardless of the basis of incapacity, being physical or mental, courts often find incapacity if the AIP is unable to engage in normal activities of daily living without the assistance of another individual.

Specifically, under § 81.02 of the Mental Hygiene Law, amongst other factors, the determination of incapacity is made after giving consideration of the person's:

1. management of the activities of daily living, as defined in subdivision (h) of section 81.03 of this article;
2. understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
3. preferences, wishes, and values with regard to managing the activities of daily living; and
4. the nature and extent of the person's property and financial affairs and his or her ability to manage them.

The process discussed above is not engaged in by the court when a PING designation is applied for by an individual who is the subject of the proceeding. Instead, the PING provides their consent to the appointment of a specific Guardian of their choice, rather than the court reviewing which family members, friends, other interested parties, or a court-appointed fiduciary, provides the best alternative. Moreover, the court does not engage in evaluating as to which powers the fiduciary should be granted over the ward. On the contrary, the PING provides consent to the scope of authority that the fiduciary will have, which may not comport with the PING's current needs or foreseeable needs in the future.

In an effort to facilitate a resolution while avoiding a hearing, the parties and the court may agree to a settlement which involves the appointment of a Guardian with the consent of the AIP, thereby changing the designation of the AIP to a PING. This may be problematic in the future for the many reasons discussed below if that consent is later withdrawn.

The MHL does not provide specific instruction on how the needs of a PING are to be addressed when initial consent is withdrawn and there is little case law on the issue. A 2013 decision entered by the Suffolk County Supreme Court provides significant guidance:

> The concept of a consent guardianship both begins and ends in Mental Hygiene Law § 81.15 (a) wherein a distinction is made *637 between a person agreeing to the appointment of a guardian and a person determined by the court to be incapacitated. Case law on this subject is sparse. Indeed, this was first noted 17 years ago in Matter of Loccisano and again in 2009 in Matter of JS (24 Misc 3d 1209[A], 2009 NY Slip Op 51328[U] [Sup Ct, Nassau County 2009]).
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> * * *
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> Allowing an alleged incapacitated person to consent to a guardianship permits him or her to sidestep the issue of incapacity, maintain a greater degree of dignity, and assists the petitioner in maintaining a re-

lationship with the individual alleged to be in need of a guardian, which is often strained by the commencement of such a proceeding. Courts frequently, therefore, will permit individuals to consent to the appointment of a guardian. The problem inherent in the use of consent guardianships is that if the individual, subsequent to the appointment of the guardian, either refuses or becomes incapable of consenting to a necessary expansion of powers, the streamlined procedure provided by Mental Hygiene Law § 81.36 is unavailable. In such a situation it is necessary to file a new application to appoint a guardian wherein the person's incapacity can be established.

* * *

A consent guardianship is created on the basis of the individual's agreement thereto and it does not morph into a non-consent guardianship with its inherent finding of incapacity because an emergency occurs and an expansion of powers becomes necessary. Granting an application to expand powers pursuant to Mental Hygiene Law § 81.36 without the individual's consent would effectively be a declaration of incapacity without a hearing to determine said incapacity. Such a procedure is not **4 authorized by Mental Hygiene Law § 81.36 and would violate the essence of the protections provided to alleged incapacitated individuals by the drafters of article 81 of the Mental Hygiene Law. It would also trample on the individual's due process rights (see Matter of Levy v Davis, 302 AD2d 309 [1st Dept 2003]).

Matter of Buffalino, 960 N.Y.S.2d 627 (Suffolk Sup. Ct. 2013)

As noted above, the process by which the court determines what scope of authority is to be provided to an incoming Guardian of an AIP involves a review of many factors to properly tailor the Guardianship Judgment to meet the needs of the AIP, while avoiding the provision of powers that are unnecessarily broad and oftentimes the Court will require that a Guardian apply for court approval prior to utilizing certain powers such as the sale of real property of the ward or payment of professional fees for the benefit of the ward.

In the case of a PING designation, the proposed Guardian is forced to negotiate with the AIP before the court's decision. The AIP may lean toward an inappropriate restriction of the scope of powers that may be necessary for the Guardian to protect the interests of the AIP in personal matters and property management. Such a situation may result in the Guardian being forced to accept the appointment without all of the necessary powers to protect the AIP or PING. Additionally, after the appointment of the Guardian, the Guardian may have to attempt to obtain the consent of the PING to additional powers. If the PING does not consent, an entirely new proceeding must be commenced where a finding of incapacity may then be sought to re-establish prior powers voluntarily consented to by the PING in addition to the new powers sought by the Guardian over the now AIP. This would cause a duplication of efforts that may be necessitated by what initially appears to be a shortcut in the first proceeding.

In light of *Buffalino*, it would be advisable for attorneys representing a party seeking the appointment of a Guardian in an Article 81 proceeding to pursue a finding of incapacity of the AIP, rather than to merely seek the AIP's consent. The PING designation can be particularly problematic when the AIP is younger and the incapacity results from mental illness, substance abuse and similar situations where the AIP will retain the capacity to object to an expansion of powers after the initial judgment. While both the IP and PING determinations may provide for the ultimate goal of the appointment of a guardian for the AIP, only a finding of incapacity will provide finality, while an appointment through consent may cause the need for another proceeding where a finding of incapacity will then be sought due to later withdrawal of consent of the PING. Such a situation would place the client in the difficult financial and emotional position of having to re-litigate the same proceeding twice.

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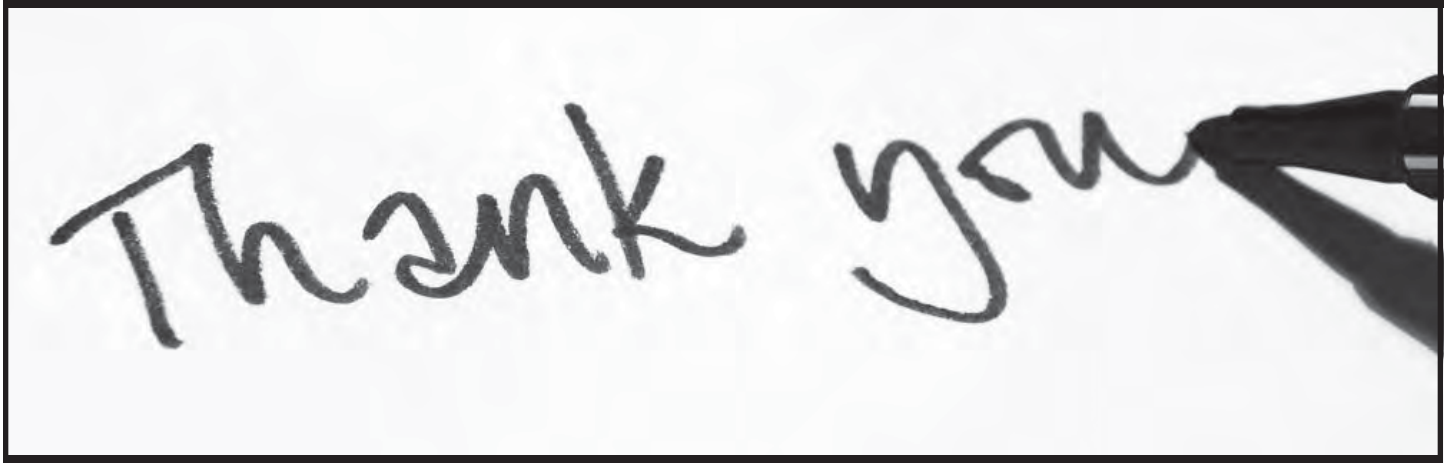


As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Sharon Stern Gerstman
President

Pam McDevitt
Executive Director

NYSBA

The Intersection of Guardianship and Matrimonial Law

By Elizabeth A. Adinolfi

Elizabeth Adinolfi

As our family structures become more complex, so do guardianship cases. By the mid 1970s, the divorce rate had reached 48%.[1] Forty years later, practitioners and the courts must grapple with cases involving family dysfunction with roots reaching back decades, while insuring that the rights and interests of the Alleged Incapacitated Person remain paramount. As multiple remarriages and "gray divorce"—divorcing after 30-40 years of marriage—become more common, advising both clients and the courts becomes more difficult and complex. In addition to the frequently dysfunctional family dynamics resulting from divorce that the guardianship practitioner must manage, issues implicating matrimonial law are becoming increasingly common in guardianship proceedings. Perhaps the most significant are issues relating to dissolving an existing marriage, or the AIP entering into a new marriage.

A practitioner may have as a potential client an adult child looking to retain counsel to bring an Article 81 proceeding to become her father's Guardian. One of her primary motivations for seeking to become Guardian is to bring divorce proceedings to dissolve the father's marriage to his second (or third or fourth) wife, who is perceived to be a gold digger only interested in her spouse's money, and not in caring for him as his health and mental acuity declines. This is perhaps the culmination of years, if not decades, of resentment toward the second spouse, whom the daughter blames for her parents' divorce. While she should be advised that a court would most likely be hesitant to appoint the daughter as Guardian in light of the hostility with her father's wife, even if that hurdle could be surmounted, the remedy the daughter seeks is not available.

Assuming the wife in this scenario is not amenable to the idea of a divorce, there is no way to procure a divorce through an Article 81 proceeding. This is one question where the law in New York State is clear: a Guardian may not prosecute an action for absolute divorce. *In re Cresap-Higbee*, 3 A.D. 3d 424 (1st Dep't 2004) (citing *Mohrmann v. Kob*, 291 N.Y. 181, 184 (1943) (construing Civ. Prac. Act § 1377)). Nor may a Guardian continue to prosecute an action for divorce once the plaintiff in the action is declared to be an Incapacitated Person. *See DE v. PA*, 2016 N.Y. Slip Op. 51230 (Westchester Co. June 22, 2016). The Court of Appeals has held that marriage is a unique status, one that "Legislature has guarded jealously by the enactment of those statutes which govern divorce." *Mohrmann*, 291 N.Y. at 187. Absent a revision to the Domestic Relations Law permitting an action for divorce to be brought on behalf of an Incapacitated Person, the Court of Appeals reasoned that the right to seek a divorce belongs solely to the individual. *Id.* at 190. Given that the Legislature did not explicitly provide for a Guardian to have the power to initiate divorce proceedings when it drafted Article 81, *Mohrmann* remains good law 70 years later.

However, Article 81 does not prevent an individual who has been declared an Incapacitated Person (IP) from being sued for divorce. *See Linda G. v. Norman G.*, 2006 N.Y. Misc. LEXIS 2631 at *5-6 (Sup. Ct. N.Y. Co. 2006); *Christopher C. v. Bonnie C.*, 40 Misc. 3d 859, 861 (Sup. Ct. Suffolk Co. 2013). In this instance, if the wife wishes to divorce, she is free to initiate divorce proceedings and the Guardian would defend against the action. The Guardian could also attempt to induce the wife to file for divorce in exchange for an adequate financial settlement. Another option available to a Guardian is to seek a legal separation as opposed to an absolute divorce. The Court of Appeals has held that a *guardian ad litem* may maintain an action for legal separation (*see Kaplan v. Kaplan*, 256 N.Y. 366, 371 (1931)), although a legal separation can provide only for an award of spousal maintenance and exclusive possession of the marital residence; it cannot provide for the equitable distribution of marital assets. DRL 236(B)(5)(a).

However, there is a significant restraint on the Guardian's ability to procure a divorce or a legal separation: the wishes of the IP. MHL 81.20 (3) commands that "a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person", and MHL 81.20 (7) commands that a Guardian "shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living." Attempting to procure a divorce where the IP has not expressed a desire to dissolve the marriage could constitute a breach of the Guardian's fiduciary duties, and form a basis for the Guardian's removal. There are numerous mechanisms for protecting the IP without the expensive and drastic step of a divorce or legal separation. For example, once a Guardian is appointed, he or she must act to ensure that assets are not being dissipated to the IP's detriment (which is frequently the motivation for family to want the Incapacitated Person divorced), arrange for adequate home care services if the IP needs assistance with activities of daily living, and monitor the IP to ensure that there is no physical or emotional abuse.

A different scenario practitioners may encounter is a prospective client seeking to be appointed Guardian of a parent or relative whom they believe is being financially

exploited by a new spouse, often a person the family may have just learned about. In these cases, there is a strong chance that the Court can grant relief. Guardianship courts in New York have addressed cases involving, *inter alia*, an elderly woman who, after a period of prolonged illness, married a high school acquaintance who came back into her life; *In re Dot E.W.*, 172 Misc.2d 684 (Sup. Ct. Suffolk Co. 1997); an elderly man who married his nurse, who was 43 years his junior; *In re Joseph S.*, 25 A.D.3d 804 (2d Dep't 2006); an elderly man who married a woman 37 years his junior, and with whom he never resided or had a romantic relationship, *In re H.R.*, 2008 NY Slip Op. 52404(U), ¶ 1, 21 Misc. 3d 1136(A), 1136A (Sup. Ct. Nassau Co. 2008); and an elderly man who married his live-in home care attendant, *In re Dandridge*, 120 A.D.3d 1411 (2d Dep't 2014). In all of these cases, the courts found that while divorce is not an option, an annulment is an available remedy in an Article 81 proceeding, *see* MHL § 81.29(d). MHL § 81.29(d) provides:

> If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1601, or 5-1602 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated.

In 1997, four years after the adoption of Article 81, Justice A. Gail Prudenti was the first judge to address how MHL § 81.29(d) applied to marriage. Justice Prudenti reasoned that, for purposes of entering into a marriage, marriage is treated no differently than a civil contract and hence, "[c]onsent of parties capable in law of contracting being essential," "[a]ny lack [therein] makes the marriage void (Dom. Rel. Law, §§ 5 and 6) or voidable (L PI ... and an action may be maintained to annul it." *In re Dot E. W.*, 172 Misc. 2d at 693 *quoting Shonfeld v. Shonfeld*, 260 N.Y. 477, 479 (1933); *Kober v. Kober*, 16 N.Y.2d 191 (1965). Where the evidence demonstrates that the party was "incapable of understanding the nature, effect, and consequences of the marriage" at the time of the marriage, then the court has the power to annul it in the course of an Article 81 proceeding. *In re Joseph S.*, 25 A.D.3d 804 (2d Dep't 2006) (*quoting Levine v. Dumbra*, 198 A.D.2d 477, 477-478 (2d Dep't 1993)).

In re Dandridge, *supra*, presents a cautionary tale for unwary practitioners. In *Dandridge*, the Appellate Division, Second Department, reversed the judgment of annulment and remanded the case for further proceedings because the Article 81 petition had not included annulling the marriage as part of the relief requested, nor had the petition been amended to include such relief. The court found that this deprived the wife of proper notice and an opportunity to be heard, necessitating the remand. There are other procedural issues which practitioners should be aware of. Under MHL § 81.07(3), a spouse is ordinarily not served with the petition, just the order to show cause and notice of proceeding. However, in order to obtain jurisdiction over the spouse, proper service of the petition according to Domestic Relations Law § 232 must be made, and the Order to Show Cause and petition should be drafted to provide for proper service upon the spouse. Under Domestic Relations Law § 236B(2)(b), there are specific automatic orders that must be served in connection with all matrimonial actions, which include annulments, that restrain the spouses' ability to "sell, transfer, encumber, conceal, assign, remove or in any way dispose of" property, regardless of how the property is titled. Particularly where a Temporary Guardian is not appointed in the Order to Show Cause, the automatic orders provide a safeguard to preserve the AIP's assets.

Many people, including attorneys, believe that an annulment eliminates a spouse's rights to maintenance and equitable distribution of marital property. However, this understanding is incorrect, and both equitable distribution and spousal maintenance are available in an annulment proceeding and must be addressed by the Court when annulling a marriage. *In re Dot E. W.*, 172 Misc. 2d at 694-95; *see also Matter of Joseph S.*, 25 A.D.3d at 804 (remanding Article 81 case back to the trial court where court annulled marriage but did not determine equitable distribution). Usually in these cases, the marriage is of such short duration that no marital property has been acquired, and there is only a very weak claim to spousal maintenance. However, these are still issues a practitioner must be prepared to address when seeking to annul a marriage in an Article 81 proceeding.

While many people are shocked to learn that equitable distribution is available when a marriage is annulled, this can work to the IP's benefit. The Equitable Distribution Law can be used to recoup assets that have been taken from the incapacitated spouse, making a turn-over proceeding unnecessary. Under New York Law, gifts from one spouse to the other are marital property subject to equitable distribution. *See Chase v. Chase*, 208 A.D.2d 883, 884 (2d Dep't 1994). Accordingly, any property that the spouse claims the incapacitated spouse gifted to him or her—jewelry, automobiles, even cash—is marital property which the Court can, after weighing the factors set forth in the Equitable Distribution Law,[2] award back to the incapacitated spouse. Given the exploitative, if not outright fraudulent, nature of these marriages, the Court has broad powers to fashion an equitable distribution

award that restores the incapacitated person to his or her premarital financial condition as much as is possible.

As multiple remarriages, and correspondingly complicated family dynamics, become more common, guardianship cases present a minefield of matrimonial issues for practitioners who lack familiarity with New York Domestic Relations Law. To best serve our clients, guardianship practitioners should endeavor to develop a basic understanding of the Domestic Relations Law, and its available remedies. In highly conflicted cases, especially those involving significant financial assets, consultation with an experienced matrimonial attorney, or even bringing someone on as co-counsel, may be necessary. However, practitioners should possess sufficient knowledge of matrimonial law to recognize when such consultation is warranted and to avoid the types of procedural errors that can leave an AIP's assets vulnerable to dissipation, lead to reversal on appeal and wasteful additional proceedings, and leave counsel vulnerable to a claim of malpractice.

Endnotes

1. Statistical Abstract of the United States: 2011, available at https://www.census.gov/prod/2011pubs/11statab/vitstat.pdf.
2. In New York, property is not automatically divided in half and distributed equally to each spouse. Instead, the court must consider 14 specific factors in determining the equitable distribution of property:
    - the income and property of each party at the time of marriage, and at the time of the commencement of the action;
    - the duration of the marriage and the age and health of both parties;
    - the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
    - the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
    - the loss of health insurance benefits upon dissolution of the marriage;
    - any award of maintenance under subdivision six of this part;
    - any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
    - the liquid or non-liquid character of all marital property;
    - the probable future financial circumstances of each party;
    - the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
    - the tax consequences to each party;
    - the wasteful dissipation of assets by either spouse;
    - any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
    - any other factor which the court shall expressly find to be just and proper.
    - DRL § 236(B)(5)(d).

Elizabeth Adinolfi, Esq., is a partner in Phillips Nizer LLP's Litigation and Matrimonial Law Practices, and the Chair of the Firm's Guardianship Practice. Ms. Adinolfi has served as Court Evaluator, guardian; and counsel to guardians, high-net-worth individuals alleged to be incapacitated, and family members in complex guardianship proceedings. She is often is appointed to represent AIPs in cases that involve issues of matrimonial law. She is a member of the Guardianship Committee of the Elder & Special Needs Law Section and a member of the Family Law Section of the New York State Bar Association.

Senior Member Spotlight: Deepankar Mukerji

Interview by Katy Carpenter

Q Where are you from?

A I was born in Texas and moved to Alabama early in my life. My family moved to Riverdale, New York when I was 10 and then I moved up to Westchester County.

Q What do you like about the area and community you serve?

A I love New York City! It's full of culture and there are so many activities, places to go and eat and always so much going on—it never stops!

Q Do you travel?

A I don't travel much but I visit Kolkata, India every few years.

Q Tell me about your family.

A My late father was a nuclear physics professor at Texas A&M then at the University of Alabama then CUNY (which is why I moved from Texas to Alabama to New York). My mom was always socially active and involved in different social groups like the UN Women's Guild. I have a sister who is a science professor at Wesleyan University. As for me, I'm married with two kids ages 17 and 12.

Q What's your favorite part about your job?

A Fundamentally, I enjoy problem solving, helping families navigate complex programs and finding a solution that puts them in a better place than they were before.

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

A I'm always happy to win fair hearings! And although I'm not in court on a regular basis, I enjoy prevailing in court—it's an accomplishment.

Q Have you had any turning points in your life or career?

A I've had multiple careers. I studied English in college and then went to work for a bank and a liquor store in wine sales. From there I took a job with the Westchester County Executive where I worked with different commissions (for the homeless, for housing and Social Services), wrote speeches and acted as a liaison to local, state and federal governments. I enjoyed my time there as it was a great learning experience. However, working for the county, the threat of being fired worried me so I continued working in the administration within the Department of Social Services while I went to law school at night. I worked with DSS in liens and recovery for 10 years before I transitioned to private practice in 2007.

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

A I loved cars – I wanted to be a car designer or an architect since I loved building things, but I have no artistic talent!

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

A Two things: I enjoy playing the guitar (electric and acoustic). I have four or five guitars and I most recently bought a 1956 National Steel guitar, which I love! I also play tennis with my son—any day I can play the guitar and get on the court to play tennis is a good day!

Q Have you ever been given advice that you remember?

A I'm fortunate to have received good advice over the years and through my law school transition and then from a government position to private practice. I can't single out one piece of advice, but I always found my community and colleagues to be generous and helpful.

Summer Meeting Write-Up

By Michael D. Dezik

I encourage anyone who is interested in understanding the amount of effort that goes on behind the scenes at one of our conferences to program chair a meeting. The flurry of activity that involves the logistics, sponsorship acquisition, materials, etc. etc. is truly amazing. I would like to take this opportunity to thank everyone in the Bar who helped make this summer's program the success that it was. Marty, Deborah and I all enjoyed putting the program together and working with this great team of people. Our goal at the outset was to offer a number of different types of formats, varying from lecture to roundtable to breakout sessions, to give the membership the ability to choose their own course of approach. While this requires a great deal more work for our presenters, planners and staff, we felt that this broad array of topics would allow everyone to get something different out of this summer's program.

The High Peaks Resort in Lake Placid was a terrific venue, offering stunning views of the lake and easy access to downtown. While the weather didn't necessarily cooperate, we had a brief glimpse of sunshine on Friday afternoon following the morning program which allowed my wife, Katie, to get some kayaking in and for me to take a swim with my 5-year-old daughter (I'm sure you heard her if you were anywhere on the resort). I hope all of you were able to enjoy this small gesture by Mother Nature as we were.

The program kicked off on July 13 with a welcome from our Section Chair Marty Hersh and then the 2017 Elder Law Update by Judy Grimaldi, delivering "hot off the press" coverage of the Affordable Care Act, which had been approved by the Senate that very morning. Tara Pleat reviewed best practices in trust planning before kicking off our three breakout sessions for the afternoon, with Sara Meyers discussing the nuts and bolts of the Medicaid application, Anthony Lamberti discussing post-guardianship appointment issues, and Lake Placid native Jill Choate Beier discussing estate planning for digital assets. Thursday's program wrapped up just after 5:30. Many attended the cocktail hour in the courtyard and dinner at the resort.

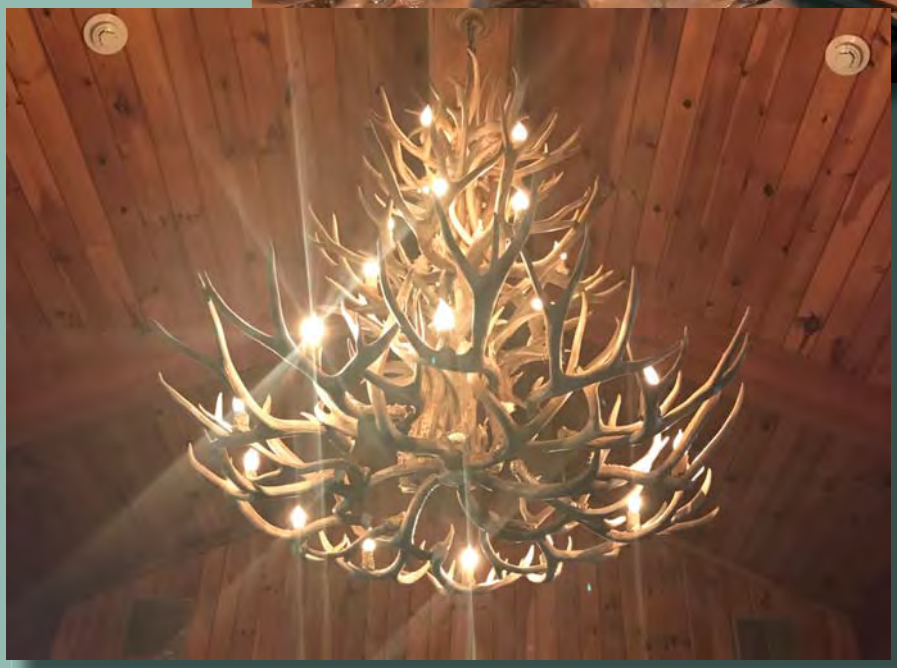
Friday's program format consisted of roundtable format discussions from a host of terrific speakers. The idea was to allow each topic to be delivered twice so that there would be an opportunity to sit in on any topic during the four sessions offered. On behalf of Marty, Deborah and myself, I would like to thank our excellent group of speakers for bringing their depth and skill to this part of the program. Specifically, Lorese Philips for her discussion of essential modifications to the New York State Power of Attorney; Tara Anne Pleat for her discussion of tax planning in elder law; Robin Goeman for discussing Medicaid home care issues; David Kronenberg for his discussion on Will planning in elder law; Glenn Witecki for his discussion on health care decision-making; Timothy O'Rourke for his discussion on return of gifts in light of Medicaid; Ronald Fatoullah for his discussion on paperless office practices; Salvatore Di Costanzo for his discussion on best practices for office file progression; Miles Zatkowsky for his discussion on software and technology for modern elder law offices; Britt Burner for her Medicaid case study; Judy Grimaldo for her advanced Medicaid case study; Marty Finn for his discussion on advanced estate planning for wealthy clients; and Robert Mascali for his discussion on the ABLE Act. This program required a lot of effort both in people-power and materials, but we felt that this was essential as a conversational format can reveal issues and information that a classroom format may not provide as well as giving you the ability to direct the discussion to matters that are pertinent to your practice. We hope that you enjoyed this part of the program and that this type of format will continue to be available in future programs. Friday's program ended a little after 1:00 with a number of activities available for the afternoon.

Friday night's dinner brought some spectacular thundershowers but it was dry under the enclosure with views over the sprawling hills of the Lake Placid Club as we dined with our colleagues, families and sponsors. Perhaps the best part of dinner was the twin rainbows that appeared just as desert was being served.

Saturday morning book-ended the Summer Meeting with three great presentations. First, Ron Fattoulah and Bill Pfiefer delivered an informative presentation on financial planning in elder law. Moriah Adamo showed us the perspective of the long-term care facility in Medicaid planning. Finally, Matthew Fuller provided a sobering glimpse of the dangers of cloud computing and e-mail.

It was sincerely a joy to serve a Co-Program Chair with Deborah and working with Marty in putting this program on. I do hope that you enjoyed attending and learning as much as we all enjoyed putting this together. I can't thank the staff at the Bar Association enough for their effort and assistance in pulling everything together. They are the heroes that make our lives easier and make people like Deborah, Marty and me look good.

Elder Law and Special Needs Section 2017 Summer Meeting



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A Message to the Section Regarding the Summer Meeting

By Michael Miller, NYSBA President-Elect

Congratulations to Section Chair Marty Hersh, Program Co-Chairs Deborah Ball and Michael Dezik, and to all of the superb presenters at the Section's Summer Meeting in Lake Placid. As I mentioned in my remarks, this Section has a very well-deserved reputation for its thoughtful and compassionate advocacy and keen scholarship.

The excellent presentations at the meeting reflect our profession and our Bar Association at its best: Association members donating their valuable time and knowledge—what Abraham Lincoln referred to as our stock in trade—to ensure that we are best equipped to counsel our clients when they turn to us to help them through difficult times.

For those who couldn't make it, in addition to excellent roundtable discussions, Judie Grimaldi gave an exceptional legislative update, Tara Anne Pleat provided keen insights about decanting trusts, Ron Fatoullah and Bill Pfeiffer discussed the fiduciary and suitability standards regarding investment options and choices, Moriah Rachel Adamo gave a terrific presentation concerning the nursing home perspective vis-à-vis the Medicaid application and guardianship proceedings, and Matthew Fuller provided a profoundly sobering and disturbing discussion concerning the ethical implications of employing email communications for sensitive and confidential information in the age of massive email breaches.

Michael Miller

And the social events were terrific, too—great fun and camaraderie!

To UTMA or Not to UTMA?

By Anthony J. Enea

Whenever a child is born many parents and grandparents begin the process of planning for that child's education and other needs. Whether it be the child's birthday, baptism, bar/bat mitzvah, communion or confirmation, these events present the opportunity to gift to the minor child. However, the issue that inevitably arises is whether a custodial account should be utilized to hold the monies gifted to the minor child.

Prior to January 1, 1997, parents and grandparents in New York could utilize an account governed by the Uniform Gift to Minors Act ("UGMA"). An UGMA account was a custodial account where a parent or grandparent could irrevocably gift for the benefit of a minor child (under the age of 18).[1]

On January 1, 1997, UGMA was repealed in New York by the enactment of the Uniform Transfers to Minors Act ("UTMA"). UTMA also allowed any parent or grandparent to establish custodial accounts for a minor child (In New York, the age of Majority for all UTMA accounts is twenty-one (21) years of age, unless, the donor / transferor specifically stipulates to age eighteen (18) as the age of majority).[2] In addition to parents and grandparents, any other adult may also make the transfer to a minor child and any adult or bank/trust company may act as the custodian of the account.[3]

The title of the account in substance must state "John Smith (*name of Custodian*) as custodian for David Smith (*the minor*) under the New York Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians in the event the first nominated custodian dies or is unable to serve.[4]

Once a gift is made to an UTMA account the account is irrevocable.[5] The funds deposited to the account cannot be returned to the donor/transferor who transferred the monies or assets (stocks, bonds, etc...). However, the Custodian may utilize the funds in the account for the use and benefit of the minor in any amount the Custodian considers advisable without Court order and without any regard to the duty or ability of the Custodian personally, or any other person to support the minor, and without regard to the minor's property and income.[6] During the time the custodial account is in existence the Custodian shall collect, hold, manage, invest and re-invest the custodial property in accordance with the standard of care that would be observed by a prudent person dealing with the property of another. The Custodian must at all times keep the custodial property separate and distinct from all other property.

The use of a custodial account also results in the income tax liability on any interest and dividends being taxed to the child who, in most cases, is in a lower tax bracket then the custodian parent and/or grandparent.

Anthony J. Enea

The minor child has no access or control over the property/monies in the custodial account until he or she reaches the age of twenty-one (21) years.[7] Once the minor reaches the age of 21 the monies/assets in the custodial account must be turned over to the child. It is the minor child turning twenty-one (21) years of age that resulted in the phrase "UTMA Regret" being coined. Sadly, all too often a significant number of twenty-one (21) year olds do not have the maturity or financial acumen to take control over and manage a significant amount of money. In addition, there are many potential problems that arise during a child's life that are unforeseen at the time the funds are gifted to an UTMA Account. For example, the child may be diagnosed with a developmental and/or learning disability or the child may have troubles with the law and/or develop a drug and/or alcohol addiction. If these types of circumstances arise, the funds gifted to the minor will still become available to the minor at age 21, and may hinder either state or federal aid that would otherwise be available to a disabled individual or unfortunately, will allow for available funds to further a drug or alcohol addiction. Even if the child does not have a serious developmental disability and/or addiction, the mere fact that he or she could be financially irresponsible and squander the money and assets in the UTMA account is a possibility.

It is, in my opinion, the unforeseen and unpredictable nature of life that makes an UTMA account a poor choice for most parents and/or grandparents. While a parent and/or grandparent can always encourage a child or grandchild not to take the money at age twenty-one (21) and to instead transfer the funds to a Trust account for the child's benefit, this is not always an available back-up plan, especially where the twenty-one year old does not wish to transfer the assets to a trust. The trust would be for the child's benefit with his or her parents as the trustees and would provide for the trust to terminate at an agreed upon age, other than twenty one. This trust would allow the funds to continue to be available for the child's benefit, but eliminates the heightened risk of financial

irresponsibility if the funds were to stay in the child's name alone. While I have seen several children with large UTMA accounts agree to transfer their funds to a trust, whether or not a child or grandchild will agree is a significant risk posed by an UTMA account. The temptation may be too great for some children.

A much more prudent option that will eliminate the uncertainty as to how responsible a twenty-one year old will be is to create a trust for one's minor children and/or grandchildren that holds the monies one would otherwise gift to an UTMA account. The trust could have as many beneficiaries as the creator/grantor desires and could have provisions as to the use of the Trust principal and/or income for the benefit of the child and/or grandchild that is fashioned in accordance with the wishes of the grantor/creator of the Trust. Most importantly, the Trust can continue until the child and/or grandchild attains a specified age or for the life of the child and/or grandchild.

The Trust can also provide that if the child/grandchild is a person with special needs and/or developmentally or physically disabled, that his or her share of the trust principal and income be held in a Special Needs or Supplemental Needs Trust for his or her benefit.[8] This would allow the child and/or grandchild with special needs to receive any federal and/or state benefits he or she is entitled to (i.e., Medicaid, Supplemental Social Security Income) without the trust principal and/or income affecting his or her eligibility for the aforementioned benefits.[9]

An additional advantage of the Trust is creditor protection benefits for the trust beneficiary during the period of time the trust is in existence because the beneficiary does not have access and/or control over the trust assets. The trust will also prevent the beneficiary with financial problems and/or a substance abuse issue from squandering the monies intended for his or her education and future. Additionally, the beneficiary who may experience marital problems and/or divorce will also be protected by the use of a trust.

The grantors/creators of the trust can still take advantage of the "personal exclusion" for gift tax purposes by gifting $14,000 or less per year for each beneficiary (a husband and wife can gift up to $28,000 per year, per beneficiary) without having any gift tax consequences and without utilizing any portion of their lifetime estate and gift tax credit of $5,490,000 per person.[10] If the trust utilized is Irrevocable, the trust income and/or dividends will be taxed to the beneficiary of the trust whose income tax rate should be lower than the Grantor/Creator of the Trust.

In conclusion, the use of a Trust for the benefit of a child or grandchild although more expensive than opening an UTMA account, has significant advantages and protections that are not available when one utilizes an UTMA account. In my opinion, the answer to the question "to UTMA or Not to UTMA?" is to not UTMA.

This article appeared in the Fall 2017 Trusts and Estates Newsletter.

Endnotes:

1. EPTL § 7-4.1 [Repealed].
2. EPTL § 7-6.2; EPTL§7-6.21.
3. EPTL § 7-6.3.
4. EPTL § 7-6.3(a).
5. EPTL § 7-6.11(3)(b).
6. EPTL § 7-6.14.
7. EPTL § 7-6.20.
8. EPTL § 7-1.12.
9. EPTL § 7-1.12(b)(2).
10. IRS-2016-139; Revenue Procedure 2016-55.

Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has an office in Somers, New York. Mr. Enea is the Past Chair of the Elder Law Section of the New York State Bar Association, and is the Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA. Mr. Enea is the President of the Westchester County Bar Foundation and a Past President of the Westchester County Bar Association.

New York NAELA Niche

By Robert P. Mascali

There have been a number of recent developments on the federal front that are of interest to practitioners in the areas of elder law and special needs planning, and New York NAELA is pleased to be able to supply this update for your information.

1. CMS GUIDANCE ON ABLE ACCOUNTS

On September 7, 2017, the Centers for Medicare and Medicaid Services issued guidance on the Implications of the ABLE Act for State Medicaid Programs, which can be found at www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf.

While attorneys should consult the entire document for a complete analysis, a few points are worth specific mention:

a. Eligibility to Participate in a Qualified ABLE Account

The guidance discusses the eligibility factors for establishing an ABLE account and states that the determination of eligibility for an ABLE account is the responsibility of the ABLE program in which an individual seeks to establish the account. In addition to eligibility, if an individual is receiving SSI or SSDI based on a disability or blindness that occurred before age 26 it is also possible to file a disability certification with the program. However, the guidance makes a specific point that "no inference" can be drawn from such a certification in applying for coverage under Medicaid. Finally, while there is as of yet no formal system for qualifying a particular ABLE program CMS has concluded that state Medicaid agencies should "presume" an ABLE program is a qualified program in the absence of evidence to the contrary.

b. Contributions to ABLE Account

Third party contributions to an ABLE account, whether for MAGI or SSI-based eligibility, determinations are to be disregarded, although a thorough reading of the document is suggested to be able to appreciate the differing methodologies for those two different groups. However, quite significantly the guidance states that distributions from a first party special needs trust or pooled trust should be treated the same as contributions to an ABLE account from any third party.

c. Contributions by Third Parties Who Apply for Medicaid

There is no special treatment accorded to transfers to an ABLE account by a third party who may apply for Medicaid and seek coverage of long-term services and supports, and the normal transfer of asset rules would apply. The guidance provides an example of a grandfather who has contributed to the ABLE account of his granddaughter, which would need to be evaluated depending upon the date of the transfer to the account.

Robert P. Mascali

2. LEGISLATIVE REPEAL OF AHLBORN EFFECTIVE OCTOBER 1, 2017

As a result of the 2006 Supreme Court case of *Arkansas Dept. of Health and Human Services, et al. v. Ahlborn* (547 U.S.268) a Medicaid agency was only permitted to obtain reimbursement for medical care received by a Medicaid-enrolled plaintiff from that portion of any monetary award specifically attributable to medical costs due to the plaintiff. A provision in the Bipartisan Budget Act of 2013 legislatively repealed *Ahlborn* and the legislation allowed the Medicaid agency to seek full reimbursement for all related medical costs before the plaintiff could receive any recovery for lost wages, non-economic damages, or any other type of damage recovery. The original effective date for this legislative repeal of *Ahlborn* was delayed until October 1, 2014 by the "Protecting Access to Medicare Act of 2014" (HR 4303) and a second extension contained in the "Medicare Access and CHIP Reauthorization Act of 2015" (114 P.L.10) provided that the effective date was to be October 1, 2017. While there are efforts to adopt a further extension as of the date of the writing of this article, there has been no legislation adopted to delay the implementation of this statute. NY NAELA will continue to monitor developments and will keep our colleagues in the Elder Law and Special Needs Section apprised of further developments.

3. CMS IMPLEMENTS NEW POLICY REGARDING MSAs

During this past winter, CMS issued a new policy directive, effective October 1, 2017, regarding reimbursements under the Medicare Secondary Payer program—specifically as it relates to Medicare Set Aside in no fault and third party liability cases, referred to as Liability Medicare Set Asides, or LMSAs. The purpose of the new policy directive is to have the Medicare Administrative Contractor retained by CMS track the existence of LMSAs against submitted claims to ensure that payments for Medicare-related injuries and expenses that have been settled in the litigation are being paid from the LMSA rather than charged to, and paid by, the Medicare program. While this instruction does not change current Medicare authority or expand it, the expectation is that the policy change will bring up other issues in those instances where parties are settling a lawsuit for damages with a Medicare component and may be a harbinger to a new mandate as regards MSAs in general. Again, NY NAELA will keep our colleagues informed as to future developments on MSAs.

Robert Mascali is an attorney with over 40 years' experience in the nonprofit, government and private sectors. He is currently a senior consultant with The Centers, a national organization that administers special needs trusts and Medicare Set Aside Arrangements throughout the United States. In addition, Mr. Mascali is admitted to practice before the courts in the Commonwealth of Massachusetts and the State of New York and is currently "of counsel" with Bourget Law Group in Falmouth, MA and with Pierro, Connor and Associates, LLP in Latham, NY. He concentrates in the areas of Special Needs Planning for persons with disabilities and their families and care givers, Long-Term Care Planning, and Elder Law and Estate Planning. Mr. Mascali is a member of the New York State Bar Association and the Elder Law and Special Needs Section and the Trusts and Estates Law Section. He serves on the Executive Committee and is the Section's liaison to the National Academy of Elder Law Attorneys (NAELA). He is also a member of Massachusetts NAELA and is the Past President of the New York Chapter of NAELA. Mr. Mascali is a member of the Academy of Special Needs Planners and is a frequent presenter and author on topics dealing with elder and special needs law and planning.

New Member Spotlight: Robin Goeman

Interview by Katy Carpenter

Q Where are you from?

A I'm from Holland, Michigan. It's a small town with a big Tulip Festival.

Q What do you like about the area and community you serve?

A I've worked in Brooklyn since 2003. I enjoy the diversity of the people, the architecture, and the history. Where I live in Red Hook, I can see the Statute of Liberty from my kitchen! I enjoy life in the city, though where I grew up was similar to upstate New York and sometimes I miss the nature.

Q Tell me about your family.

A I'm the oldest of four with three younger brothers. In New York, my family is made up of good friends and my dog, who might be Cocker Spaniel, part Poodle and part Monster!

Q Where have you traveled?

A I haven't really traveled since law school, but before law school I spent a month in Beijing, which was culturally eye-opening. More recently I learned that Puerto Rico is a great, quick trip that's so much further than Florida.

Q What do you like most about your work as a solo practitioner?

A I like working on the edge of law and social work. I first started out doing Medicaid, and then transitioned to legal services doing housing and benefits. In 2009, I hung out a shingle. I like being able to choose most of my clients, as well as having the freedom and flexibility to incorporate pro bono as a regular part of my practice. As a night owl, I also really like choosing my own office hours.

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

A A significant culmination of things was a CLE that I organized with the Brooklyn Bar's Elder Law Committee. It was a panel-led workshop on interim motions for relief in guardianship, and the attendees were a fantastic mix of private bar, DSS attorneys, and court attorneys. It convened the total ecosystem of guardianship practitioners. I think it's important for us to have good relationships with each other as colleagues, and bar associations and CLEs are critical to that.

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

A I wanted to be a doctor but I learned I did not like chemistry. Then I began to become obsessed with the glass ceiling concept so my aspirations turned to becoming a CEO.

Q What are your hobbies or special interests?

A I like walking my dog and hanging out in my neighborhood. I also like to attempt grand adventures in greater New York City, most recently exploring the Brooklyn Army Terminal. There's always something to do, so I try my best to overcome the urge to veg out. I've become involved in neighborhood politics, and I especially enjoy the art gallery Pioneer Works, which features exhibits in their backyard space with music. I also like biking and I both ski and snowboard.

Q Have you ever been given memorable advice?

A I've received advice that essentially distills down to "learn all you can, learn from the best and take it with you," and "it does not have to be finished, it just must be complete." I do my best to take this advice throughout life, as well as share it, particularly with other perfectionists, like my painter friend who obsesses prior to an exhibit opening, or my composer boyfriend who always has to keep tweaking one last note.

Digital Assets and Accounts—Can Life Get More Complex?

By Joseph A. Bollhofer

Passwords. Passwords. Passwords.

How many passwords do you have? It is amazing how quickly they have become a necessity. And don't forget user names.

Keeping track of these passwords and user names and managing digital assets and accounts can be hard enough. But if you become incapacitated or die, do you have any plan for access and management by someone you trust?

You probably have more digital assets and accounts than you think you do. "Assets" can include domain names, licenses, contents of blogs and websites, emails, social media content, photographs and stored credits for airlines, credit card and debit card companies, PayPal, Amazon and countless others.

Many of us have agreed to have "paperless" accounts with our banks, investment companies, creditors and others, often at their urging. Having account statements and records saved electronically is a nice, neat way to go through life. However, we are now at the mercy of our computers, third parties' computers and the internet. Additionally, cybersecurity is an increasingly significant concern that we all must deal with as best we can.

However, even if all assets and accounts are secure and accessible to us, if we become incapacitated or die, those who we leave in charge might have problems.

For example, a few years ago an owner of a building supply business suffered a stroke that affected his memory and physical well-being. He kept all his business records in a Yahoo! account—including accounts payable, accounts receivable, and inventory. His family attempted to get access to the account to continue operating the business. Yahoo! denied access. The business continued to receive deliveries and could not identify the customers or the sale prices for those products. The business rapidly declined.

Problems such as this can be avoided or minimized. As with any other delegation of authority to act, access to and control over digital assets and accounts can be authorized in a comprehensive power of attorney. Of course, the agent appointed under a power of attorney should be someone that you trust completely. The specific scope of authority should be spelled out as clearly as possible.

Since the authority under a power of attorney automatically ends when the principal dies, authority to access and control all digital assets and accounts should also be given to an executor under a last will and testament.

Joseph A. Bollhofer

Last year New York's Estate, Powers and Trusts Law was amended to add a new Article 13-A.[1] This law details the rules regarding the circumstances under which fiduciaries, including agents under powers of attorney and executors under wills, may have access to and control over digital assets[2] and digital communications. The law is complex and, in my opinion, in some parts poorly worded. What is clear is that, first, a "user" (a person who has an account with a "custodian") may use an online tool to direct the custodian to disclose, or not to disclose, some or all of the user's digital assets, including content of electronic communications.[3] Those directions will override any contrary direction in a will, power of attorney or other document.

This law also states that the custodian may, "at its sole discretion," (1) grant a fiduciary full access or (2) grant access "sufficient to perform the tasks" necessary or (3) provide a "copy in a record of any digital asset that . . . the user could have accessed . . .."[4] Aside from the rather nebulous language regarding sufficiency, this provision does not make it clear what I believe the law's intent is: that the custodian must do one of those things.

Another section of the law states that "if a deceased user consented" (presumably in a will or trust), the custodian "shall" disclose to the estate's representative the content of the user's "electronic communications."[5]

Still another section of the law states that, unless the user directed otherwise before death, the custodian "shall" disclose to the estate's representative a "catalogue of electronic communications"[6] sent or received by the user "and digital assets, other than the content of electronic communications" if the custodian is given certain proof of authority and an affidavit ("if requested by the custodian") stating that disclosure of digital assets "is reasonably necessary for administration of the estate."[7]

The statute also requires disclosure of the content of electronic communications to an agent, but only if the power of attorney expressly grants that authority, and only to the extent granted.[8]

Section 13-A-3.4 is where it gets particularly interesting, and confusing, and warrants full quotation:

> Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian: [appropriate proof of authority].[9]

This section requires disclosure of "digital assets" even if the power of attorney does not specifically authorize disclosure. However, the concept of control is not addressed. Therefore, if an agent does not have specific authority, control of, for example, a domain name or software license (including perhaps authority to renew them) could be lacking, possibly resulting in loss of the name or license. The exact results of "disclosure" remain to be seen. Suffice it to say, a power of attorney granting specific authority over digital assets is wise, if that is what is intended.

Similar provisions deal with the rights and authority of trustees and guardians. Virtually every one of these provisions permits the custodian to first require "evidence linking the account to the user" or "a number, username, address, or other unique subscriber or account identifier assigned by the custodian."

Confused? You bet. There are provisions throughout the statute for courts to get involved, to direct or prohibit disclosure. And they will. There is a lot potentially at stake, monetarily and emotionally. This new law, and the concepts of legal rights to digital assets and accounts in general, is sure to be hashed out during the coming years.

This is a complicated and intensely personal subject. Some people might not want anyone to have access to every email account, blog or other type of digital asset. However, careful consideration should be given to how digital assets and accounts are to be handled in the event of incapacity or death. The best we can do is prepare for the inevitable, and give clear, written instructions to custodians, and in powers of attorney and wills.

Endnotes

1. 2016 N.Y. Laws 354, eff. Sept. 29, 2016.
2. "Digital asset" is defined as "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record." EPTL 13-A-1(i).
3. EPTL 13-A-2.2.
4. EPTL 13-A-2.4.
5. EPTL 13-A-3.1. The statute gives "electronic communications" the same meaning as in 18 U.S.C. § 2510(12)

   > (any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—(A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds).
6. "Catalogue of electronic communications" is defined as "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person." EPTL 13-A-1(d).
7. EPTL 13-A-3.2.
8. EPTL 13-A-3.3.
9. EPTL 13-A-3.4 (emphasis added).

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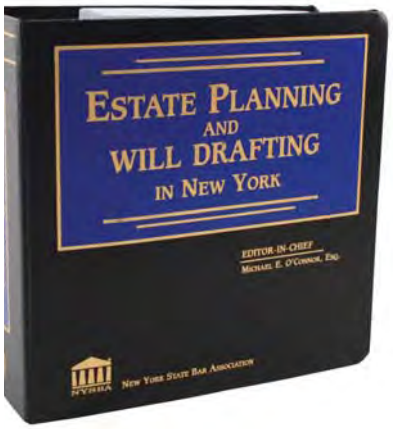

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