NYSBA WINTER 2018 | VOL. 28 | NO. 1

Elder and Special Needs Law Journal

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

www.nysba.org/ElderJournal

Message from the Chair

It seems like only yesterday that my term as Chair started. Our Summer Meeting in Lake Placid, co-chaired by **Deborah Ball** and **Michael Dezik**, was a terrific success. Our recent Fall Meeting in Tarrytown exceeded my expectations. Not only was it a sell out, but everyone that I've heard from has given it rave reviews. I wish to thank both **Lisa Friedman** and **Miles Zatkowsky**, the two co-chairs of the meeting, for putting on such a substantive and educational program. Our plenary sessions were informative and well presented, and the break out and roundtable sessions allowed participants to pick and choose the topics that they wanted to hear about.

Martin Hersh

Our Annual Meeting is just around the corner. It will be at the New York Hilton on January 23, 2018. There is a huge amount of relevant content that is being squeezed into this half-day program. Former Section chair **Fran Pantaleo** and **Scott Silverberg** are the co-chairs for this program. It will begin with the New York State Elder Law Update from former Chair of the Elder Law and Special Needs Section, **JulieAnn Calareso**. This will include the latest developments, including updates on eligibility thresholds, analysis of recent New York cases, as well as administrative and legislative changes affecting the practice of elder law and special needs planning in New York State. Next will be a national update from **Michael Amoruso**, former Chair of our Section and President-Elect of NAELA. Mike will provide an update on proposed federal legislation which may substantially change the underpinnings of the Medicaid statute, the new tax law, and recent federal and state case law that may present challenges to our clients, as well as the future practice of elder law and special needs planning.

The next presentation will be titled "Do This, Not That" and will have attorneys experienced in both estate planning and elder law discussing common estate planning mistakes. **Judy Nolfo** and **Jeffrey Asher** will be presenting, and **Scott Silverberg** will moderate. Lastly, Professor **Rebecca Flowers**, Chair of the NAELA committee that issued revisions to the NAELA Aspirational Standards for the Practice of Elder Law and Special Needs Law, will give an ethics presentation on these Aspirational Standards. These standards provide guidance to attorneys in navigating the difficult ethical issues that often arise when representing elderly individuals and individuals with disabilities. Professor Flowers will provide an overview of the revisions with a focus on how these standards apply in day-to-day practice. Afterwards there will be an off site Section Networking Reception at the Murals 54 Room, Warwick Hotel. Reserve early for the reception, as this will sell out quickly.

On April 19-20, 2018, our UnProgram will be held at the Desmond Hotel in Albany. Co-Chairs **Shari Hubner** and **Antony Eminowicz** have been working hard to make this a fantastic program. For those of you who are unfamiliar with the UnProgram, there will be 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. The UnProgram offers a fantastic opportunity to learn from, engage with, and meet other practitioners with similar interests.

On the legislative front, NYSBA has again adopted, as one of its legislative priorities, the Power of Attorney bill that would greatly simplify the New York statutory form. Kudos go out to immediate past Chair **David Goldfarb** for spearheading the change to this legislation. Last year, the bill passed the Assembly unanimously, and hopefully, can make it out of the Senate this year and then signed by Governor Cuomo.

In early 2018 Governor Cuomo's budget bill will be unveiled. As we have done every year, our Section Officers and members of the Legislation Committee will be meeting with key legislative leaders to lobby on behalf of our members and our clients in an attempt to avoid cuts to programs that benefit our clients (such as the elimination of spousal refusal).

On the federal level, we have, to date, weathered the storm as it pertains to the repeal and replacement of the Affordable Care Act (Obamacare). The push for its repeal will not go away and I am sure that it will rear its ugly head next year, and if changes are made they could deeply impact the Medicaid system as we know it.

On December 22, 2017 President Trump signed the Republican-backed tax bill. The new law will significantly impact many of our clients, many of us, as well as our practices. There will be a $10,000 cap on state income and local real property tax deductions. The federal estate tax exemption doubles to $11.2 million. Fortunately, the medical expense deduction that many of our clients rely on and that had been on the chopping block has, in essence, remained, as has the exclusion for capital gains on the sale of a primary residence. Our Officers, Executive Committee, and members of our standing committees will remain vigilant, and will do our part in keeping our members informed of potential changes, how they will affect our clients and our practices, and what we can do to continue to advocate for our clients.

continued on page 4

Table of Contents

For younger members to our Section I have recently appointed Lauren Sharkey (LSharkey@cswlawfirm.com) and Katy Carpenter (kcarpenter@wplawny.com) as Young Lawyer Engagement subcommittee co-chairs. If any of our young members want to become more involved with Section membership, such as writing an article for our *Journal*, organizing a district event or help in choosing a committee to join, please reach out to either Lauren or Katy.

For Section members who have been in the practice of Elder Law and Special Needs for five years or less, our 2018 Mentorship Initiative is now under way. Please visit the Mentorship Committee web page to download and complete your mentoring request form so our Mentoring Committee can match you up with a mentor. This program has proven to be an excellent way for members who are relatively new to the field of Elder Law and Special Needs to communicate with and learn from more seasoned practitioners.

I keep harping on this, but it is vital to the health of our Section that we 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 express 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.

Martin Hersh

~~~~~~

Message from the Co-Editors-in-Chief

Judith Nolfo McKenna

We are pleased to publish the Winter 2018 edition of the *Journal* for our Section members. We are again fortunate to have several excellent articles and other news from our Section.

Our Elder Abuse Committee has submitted a timely and relevant article, "Predatory Marriages: A Growing Concern." The article accurately describes the all too common scenario of the vulnerable client with assets and the caretaker or new friend who quickly enters into a relationship with the vulnerable person. We should all be watchful of these relationships, as they may go undetected and major financial abuse may ensue. One such victim in the article was fortunate to be placed in the Harry and Jeanette Weinberg Center for Elder Justice, an elder abuse shelter in Riverdale, New York. Judy had the honor of touring the Center, meeting staff and management and some of the residents, who are placed within the existing community without the designation as abuse victim. Again, our many thanks to the Elder Abuse Committee for their frequent and excellent articles.

Edward V. Wilcenski has submitted a thorough and comprehensive article regarding First Party Supplemental Needs Trusts, "Establishment and Administration of First Party Supplemental Needs Trusts: The Framework for an Improved Approach." This is a wonderful article both for experienced Special Needs attorneys, and those who wish to know more about First Party Supplemental Needs Trusts and suggested best practices for administration and oversight.

Tara Anne Pleat

Our Committee Spotlight this issue is on the Special Needs Planning Committee. Adrienne J. Arknotaky and Joan Lensky Robert are the Co-Chairs of this wonderful committee. If you are interested in joining this committee, please visit their NYSBA committee page for contact information.

Our Member Profile shines the spotlight on JulieAnn Calareso, past chair of the Section. JulieAnn is currently Co-chair of the Legal Education committee and is extremely active in our Section. You may all be surprised to learn JulieAnn once was employed in the entertainment industry in Hollywood! Our New Member Profile is Lauren Sharkey, a fellow Capital District attorney. Lauren is working with NYSBA to update all of our Section's committee pages to attract new and interested members as well as working on the Section's Young Lawyer Initiative.

This issue introduces a new column designed for the newly admitted attorney. Stephen Donaldson has written an excellent introduction to the practice of Guardianship Law for our newer members. Finally, this edition is rounded out by Richard Shapiro, who provides some wonderful insight on the Certified Elder Law Attorney Exam (CELA) and his experience in becoming one of New York State's Certified Elder Law Attorneys.

As always, we appreciate and welcome your many submissions; please keep them coming!

Judy & Tara
~~~~~~

Establishment and Administration of First Party Supplemental Needs Trusts: The Framework for an Improved Approach

By Edward V. Wilcenski

Introduction

Supplemental Needs Trust (SNT) practice has matured since 1993, the year the New York State Legislature enacted Section 7-1.12 of New York's Estates Powers & Trusts Law (EPTL), New York's third party trust statute, and 1994, the year that statute was amended to incorporate the introduction of self-funded trusts, commonly referred to as first party trusts.[1]

In the nearly quarter century since, Elder Law and Special Needs Planning attorneys have developed a level of comfort with the use of third party trusts in clients' estate plans. The same cannot be said for the law and practice involving first party trusts.

For the attorney in search of a simple legal document and a fairly well settled body of law governing its use, first party trust practice will surely disappoint. But for the attorney who acknowledges its complexity, who can tolerate a level of uncertainty, and who is prepared to advocate, opportunities abound.

First Party Trusts as 'Hybrid' Planning Documents

Soon after Congress carved out an exception for first party trusts in the federal Medicaid program's transfer of asset penalty provisions,[2] the New York State Legislature amended what was then a recently enacted third party trust statute—Section 7-1.12 of the EPTL—to allow the language of 7-1.12 to be used as the drafting template for both types of trusts. The result is something of a hybrid: a trust born of federal Medicaid law governing asset transfers and framed within a state trust statute that codified the holding of a watershed decision on third party trusts.[3]

While on the one hand practitioners are fortunate to have statutory guidance for drafting both types of trusts, the use of a single statutory template tends to blur the line of demarcation between the two. Whereas third party trusts represent a variation on traditional estate planning and are easier for court and counsel to digest, first party trusts offer no such comfort.

The very nature of first party trusts defy efforts to create a uniform practice for their drafting and establishment. By definition they are funded with the property of individuals with disabilities (as opposed to their parents or other benefactors), leading to practice variations based on:

Edward V. Wilcenski

- disability, which can be cognitive, physical, or some combination thereof;
- property interest, which can involve the proceeds of a personal injury settlement, marital property, inherited assets, accumulated earnings, and federal and state entitlement benefits;
- procedural context, which can be governed by the rules of Article 81 of the Mental Hygiene Law, Article 17A of the Surrogate's Court Procedure Act, Article 12 of the Civil Practice Law and Rules, and other State court proceedings where the interests of a person with a disability are at issue; and
- program rules for public benefits like Supplemental Security Income, Medicaid, Section 8, SNAP and many, many others.

Some courts—especially in the early years after the enactment of OBRA '93—attempted to create drafting and administration standards.[4] Yet these early decisions remain inherently fact specific and have led to as much confusion as clarity. At best, they establish little pockets of common law applicable in identical proceedings involving cases with nearly identical facts.

In fact, a survey of case law[5] involving first party trusts will show that:

- statutory and regulatory guidance is limited;
- lacking guidance, courts give excessive deference to public welfare officials and program administrators; and
- the law continues to wrestle with the concept of disability, retaining vestiges of the outdated idea that all disabilities are alike and that every individual with a disability, regardless of the nature of the disability or the existence of informal supports, requires micromanagement and paternalistic oversight.[6]

The Statutes

The Federal Statute

The federal Medicaid statute provides the underlying foundation for first party trusts.[7] The statute includes four basic requirements:

1. The trust must be established by a parent, grandparent, guardian or court (as originally enacted) or by an individual with a disability (as amended by the Special Needs Trust Fairness Act[8]);
2. The beneficiary must meet the disability criteria under the Social Security Act;
3. The beneficiary must be under the age of 65 years at the time the trust is funded with the beneficiary's assets; and
4. The trust must provide that upon the beneficiary's death, the State Medicaid program be repaid for medical assistance provided during the course of the beneficiary's life.

Stated simply, for a trust to qualify as a first party trust and receive the protection afforded such trusts under federal Medicaid law it must satisfy only these four criteria. Nothing more.

The State Statutes

The language of the federal statute allowing for first party trusts was later incorporated nearly verbatim into New York's Social Services Law, New York's Medicaid statute.[9]

In addition, New York's third party trust statute[10] (referred to herein as "7-1.12") was amended to allow first party trusts to be drafted using third party trust language as a foundation. The amendment to 7-1.12 was very limited; it simply cross referenced the Social Services Law section governing first party trusts, which in turn cross referenced the federal statute.[11] Aside from that change—which inserted the payback to the State Medicaid program upon the beneficiary's death—the other provisions and protections of 7-1.12 remained unchanged.[12]

The Regulations

No federal regulations were ever issued in connection with the first party trust provisions of the federal statute.

At the State level, shortly after it amended the Social Services law to incorporate the federal changes, New York State amended its Social Services regulations to provide rules that a trustee of a first party trust must follow in order to protect the State's "remainder interest" in such trusts.[13]

While some of these regulations can be difficult to apply in practice, they do provide a framework for the trustee and a baseline measurement to be used by the social services district in determining whether a trustee is acting in accordance with the law.

Many trustees and practitioners are familiar with these regulations, as social services districts often demand that they be reproduced in the language of the trust document. They may not know that the regulations include a provision which gives the local social services district the right to file a proceeding under Section 63 of New York's State Executive Law should the district determine that a first party trust is not being administered in accordance with the law.[14] This issue will be revisited below.

The Administrative Guidelines

Federal Guidelines

The Health Care Financing Administration (HCFA, now the Center for Medicare and Medicaid Services or CMS) modified the State Medicaid Manual shortly after the enactment of OBRA '93 in order to provide guidance to the states in implementing the changes to federal Medicaid law.[15] As it relates to first party trusts, this federal guidance—commonly referred to as Transmittal 64 or HCFA 64—deals primarily with the impact of funding first party trusts on Medicaid eligibility.

New York State issued its own Administrative Directive, or ADM, as a result of OBRA '93.[16] The ADM includes a section which refers to first party trusts as "exception trusts," referencing the idea that a person with a disability could transfer assets to a first party trust and be "excepted" from the transfer of asset penalty rules which would otherwise apply.[17] New York's Directive incorporated many of the provisions of HCFA 64 and also focused primarily on the changes to the transfer of asset rules of the federal Medicaid program.

96 ADM 8 does include a few references to the oversight and review of first and third party supplemental needs trusts. Specifically, the ADM provides that:

1. The local social services district has an affirmative obligation to inform trustees of their responsibilities; and
2. Distributions from supplemental needs trusts are to be made for the **primary benefit** of the beneficiary.[18]

This latter concept—primary benefit—is of particular importance to a trustee, because it acknowledges the fact that certain distributions will inevitably provide some derivative benefit to individuals other than the beneficiary, especially when trust funds are used to support a beneficiary who resides in a home with other family members.

Practitioners in this area are well advised to keep this section of 96 ADM 8 close at hand when representing fiduciaries, as we commonly hear that distributions from trusts of this type must be for the "sole benefit" of the beneficiary. That term—sole benefit—derives from the federal statute, and is most appropriately used in the

context of transfer penalties, i.e., that a transfer to a trust established for the "sole benefit" of a person with a disability will not subject the transferor to penalty. However, the term does resurface regularly in administrative guidance from benefit agencies, and has been the subject of considerable controversy in its application.[19] In the author's opinion, the "primary benefit" standard is the only sensible standard, and should be the controlling standard for proceedings in New York State.

The Cases

As mentioned above, cases involving first party trusts are varied and wideranging. They involve personal injury settlements, guardianship proceedings, miscellaneous proceedings, and more.[20] Because of the inherently fact specific nature of the cases, they do not provide a reliable and broadly applicable precedent for the drafting, establishment and administration of first party trusts.

Indeed, the overwhelming majority are trial level cases. The lack of appellate law makes sense.[21] As a practical matter, most clients will choose to accept additional rules and restrictions on first party trusts and trustees rather than pay for an appeal. Yet the lack of advocacy by practitioners in this area has allowed for overreaching by the public welfare agencies and the development of a number of misconceptions about what is required as a matter of law and what is not.

Addressing the Misconceptions

There is no statutory, regulatory or administrative requirement that a court approve the establishment of a first party trust.

In certain cases, court involvement is necessary because of the nature of the property interest being protected, such as guardianship property or personal injury settlements for minors or individuals with court appointed guardians. However, nothing in the statutory language of the federal and state Medicaid statutes and nothing in New York's supplemental needs statute requires court involvement in the establishment of a first party trust.

Quite to the contrary, first party trusts are regularly established and funded by competent individuals with disabilities and their families without court approval. These privately established trusts can include tailored planning provisions, including but not limited to:

- retained powers of appointment;
- comprehensive trustee resignation, succession and protector provisions; and
- expanded trustee's powers, including provisions specifically authorizing the purchase of residential real estate, the payment of transportation expenses, and the hiring of case managers and other professionals.

None of these provisions affect the validity, interpretation or exempt status of a first party trust under federal Medicaid law. These first party trusts are regularly established without fanfare, reported to and reviewed by social services districts overseeing the Medicaid program, and administered successfully by their private and professional trustees alike. These trusts aren't the subject of case law because they are established, administered and settled without court involvement, just like most intervivos trusts.

Case law in this area derives primarily from guardianship proceedings under 17A of the Surrogate Court Procedure Act, Article 81 of the Mental Hygiene Law, and Article 12 of the Civil Practice Law and Rules, situations where court involvement is necessary **because of the nature of the property interest or because the matter is already before a court for other reasons.**

The cases can be misleading. What are often referred to as drafting "requirements" are in fact modifications upon which an individual judge conditions judicial approval, and have nothing to do with ensuring that a proposed trust qualifies as a supplemental needs trust under federal and state law. Instead, the decisions reflect the courts' efforts to protect the interests of parties who, by reason of age or disability, were unable to participate.[22] They should not be read as establishing mandatory drafting requirements for all first party trusts.

There is no statutory, regulatory or administrative requirement that a local social services district or any other Medicaid program representative approve the terms of a first party trust in advance of its establishment.

Nothing in the language of the federal and state Medicaid statutes and nothing in the state supplemental needs trust statute requires a social services district to approve the terms of a trust in advance. The statutory role of the public welfare agency is one of assessment and determination. In other words, once the trust is established, the regulations require that notice be provided to the social services district, and the social services district then determines if the trust is drafted in conformance with the federal and state Medicaid statutes. If so, the assets in the trust are disregarded in determining financial eligibility for Medicaid.

In some cases court involvement is necessary, primarily those involving the establishment of first party trusts for minors or adults with cognitive disabilities, but in reformation and other more 'typical' proceedings as well. In these proceedings courts will typically require that the social services district be put on notice. Problems arise when representatives of the social services district demand changes to the language of a proposed trust

document or limitations on the exercise of a trustee's discretion which are not required as a matter of law, and which have nothing to do with the assessment and determination of Medicaid eligibility.

One of the most striking examples of excessive deference can be found in a very early Supreme Court case, *In re McMullen*.[23] Initially, the decision includes a good explanation of the court's responsibility to ensure that a proposed trust document meets the statutory criteria for first party trusts such that the beneficiary's eligibility for Medicaid would be protected.

However, in trying to reconcile a disagreement between a petitioner and a social services district on the terms of the proposed trust the court announced a "prophylactic" remedy that would be applied prospectively in all proceedings brought before that court. The "remedy" was to require a petitioner to secure written approval for the terms of a first party trust from the local social services district. In other words, the court would require a petitioning party to concede to the demands of the social services district in advance and without the right to be heard, **just for the matter to be accepted for consideration.**

It is unlikely that such a position would be upheld on appeal (none was taken in the case), and one can understand why a court with little statutory guidance and without competent advocacy by special needs trust counsel would try to fashion a remedy to streamline future proceedings. But the case sets a dangerous precedent.

This issue—the phenomenon of Medicaid program representatives trying to expand their reach beyond Medicaid issues and into areas of state trust law never delegated to the agencies by Congress—was directly addressed by the Third Circuit Court of Appeals in a recent federal case involving the interplay between state trust law and federal Medicaid law.[24] In *Lewis*, the State of Pennsylvania enacted legislation which would have imposed a number of limits on pooled special needs trusts[25] that were not contained in the federal Medicaid statute, including a limit on the trustees' discretion to make various types of distributions.

In striking down all of the State's restrictions other than the one which subjected the trusts to the ongoing oversight of the State Attorney General, the court addressed the State's attempts to regulate areas involving state trust law which were not delegated to the Medicaid agencies. In the words of the court:

> There is no reason to believe [Congress] abrogated States' general laws of trusts or their inherent powers under those laws…. We reject the conclusion that application of these traditional powers is contrary to the will of Congress. After all, Congress did not pass a federal body of trust law, estate law, or property law when enacting Medicaid. It relied and continues to rely on state laws governing such issues.[26]

This is a concept which has been recognized and applied in varying ways by a number of judges in New York. *In re of Kaidirmouglou*,[27] Surrogate Czygier refused to require certain modifications to the terms of a supplemental needs trust that were demanded by the local Medicaid agency, stating:

> The undersigned has opined on a number of occasions that a supplemental needs trust trustee should not be treated differently than a testamentary or inter vivos trustee. There are safeguards in place to protect the lifetime beneficiary and DSS…

A recent decision of the Saratoga County Surrogate's Court includes a comprehensive discussion of the role that a local social services district should play in proceedings involving supplemental needs trusts.[28] The matter involved a petition to reform a provision of a pre-existing first party trust which contained language that would render the trust a countable asset for Supplemental Security Income (SSI) purposes under current law. The local social services district[29] asked the court to make other modifications to the document that were not related to the beneficiary's eligibility for Medicaid benefits, and the petitioners objected. In refusing to modify the terms of the trust beyond what was minimally necessary to allow the beneficiary to apply for SSI, Surrogate Kupferman specifically addressed the district's demand for changes in the language of a trust that was otherwise in full compliance with federal and state Medicaid law:

> The statutory safeguards outline the responsibilities and procedural remedies of the State in its review of proposed SNTs. The role of the State is clearly defined and relates specifically to the review of proposed SNTs for its comport to the relevant statutes, Medicaid eligibility and protection of the State's remainder interest…the State and its social services departments are responsible for the *review* of a SNT and have not been granted any formal authority in the *drafting* of the SNT, as such responsibility is left with the creators of the SNT [emphasis in original].[30]

While the court did not modify the trust to comply with the demands of the social services district, it did exercise its equitable powers and require that the language of the trust document be modified so as to require that annual accountings of trust activity be provided to the local social services district, **based on evidence in the record that the trust document as originally written required**

that accountings be filed with the clerk of a different county (a county where no proceeding was open and where no party resided).

In the end, the court approved one modification to the language of the trust based on a change in the law subsequent to the trust's creation, and another modification based on a set of facts that were clearly documented in the record.[31]

Citation Versus Notice

The fact that the social services district does not have to approve a first party trust in advance has practical implications in the commencement of proceedings to establish them. In cases where court approval is being sought to establish a first party trust, the social services district is not a necessary party to the proceeding unless the law applicable to the proceeding requires it. In cases where the social services district must be notified (either under the rules of the proceeding or if required by the judge) practitioners should consider whether the social services district is to be served with process or simply be provided with notice.

For example, Section 81.07 of the Mental Hygiene Law requires notice to the social services district if the AIP is in receipt of public benefits. The agency is not served with process, and presumably would not have the right to appeal an order with which it may disagree.

Article 17A makes no reference to the social services district, and in guardianship proceedings brought under that Article the social services district does not need to be notified of a proceeding to establish and fund a first party trust with guardianship property. The author recognizes that as a matter of practice courts can (and do) seek the input of the social services district in these proceedings, but counsel should ensure that the district receives notice (such that it can offer its opinion to the court) versus citation (which is jurisdictional in nature). The guardianship statute does not contemplate a greater role for the local Medicaid agency.

The law is not as clear in cases that request court intervention for existing trusts. If the Medicaid program is considered a potential creditor because of its recovery right upon the death of the beneficiary, then one must look to the rights of creditors in that particular type of proceeding in determining the nature of the agency's interest. On the other hand, Section 366(2)(b)(2)(v) of New York's Social Services Law makes reference to the State's right to protect its remainder interest in first party trusts, and as a remainderman the district would be a necessary party in a proceeding involving an **existing** intervivos trust.[32]

There is no statutory, regulatory or administrative requirement that annual accountings of trust activity be prepared by the trustee.

Courts will often demand that a first party trust include a requirement that the trustee prepare annual accountings of trust activity, but the requirement derives from the court's interest in protecting the beneficiary and has nothing to do with federal and state statutory law in this area. The mandatory accounting requirement has not been uniformly followed by all courts.[33]

Every trustee should be prepared to comprehensively account at all times, and it is this author's practice to require annual accountings of trustees when drafting both first and third party trusts. On the other hand, practitioners should know what is required as a matter of law and what is recommended as a matter of practice. Annual accountings are not required in order for a trust to qualify as a supplemental needs trust as a matter of law. Many privately drafted supplemental needs trusts do not include mandatory accounting language, and they are administered successfully and without issue.

Many existing court-approved first party trusts do not require accountings, including trusts established in personal injury and medical malpractice settlements for minor plaintiffs in Supreme Court. In these cases, stipulations of discontinuance were signed and filed by all parties, and the litigation was concluded. Because the plaintiff was a minor and still under the care of her parents and natural guardians, there was no need for a corresponding guardianship proceeding. The litigation settlement was incorporated into an order under CPLR 1206 and included payment of the minor plaintiff's share to a first party supplemental needs trust (an unenumerated option under CPLR 1206[34]). The trustees continue to administer the trusts without any additional and ongoing court oversight.

There is nothing wrong with this result. The law of trusts and the concomitant obligations of fiduciary oversight bind the trustee to a course of conduct, and the administrative infrastructure of Medicaid (and other benefit programs) allows for the review, assessment and oversight of trust activity in order to ensure compliance with the program rules and continuing exemption of the trust for Medicaid eligibility purposes.

The author acknowledges that practice in this area varies across the State, and many of the trusts approved in personal injury and medical malpractice cases (or the orders approving them) require annual accountings be filed. However, the practice is not uniform—some orders require filing with the County Clerk, others with the Supreme Court—and there is often no judicial infrastructure in place for regular review and audit. In this area of practice, the accounting requirement seems to get recycled and reproduced more as a matter of habit than as the result of considered deliberation by court and counsel in crafting the terms of the settlement and the best management arrangement for the plaintiff.

There is no statutory, regulatory or administrative requirement that annual budgets be prepared by trustees in advance.

This requirement can be traced back to the decision in *Goldblatt*,[35] and seems to have taken on a life of its own.

Supplemental needs trusts are discretionary trusts,[36] and nothing in federal or state Medicaid law restricts this discretion. New York's supplemental needs trust statute qualifies the exercise of discretion by requiring a trustee to consider the availability of public benefits before trust dollars are spent (discussed below), but the statutory language of 7-1.12 contemplates that the trustee of a supplemental needs trust will have the right to respond to changes in need when and if necessary.

Courts certainly have the authority to restrict this discretion in the exercise of their equitable powers, but a requirement that a trustee prepare and file a proposed budget each year should be supported by a finding that the trustee requires this level of micromanagement and oversight. Often the requirement is included with a general statement of the court's need to protect the "best interest" of the beneficiary, and the seemingly obligatory reference to *Goldblatt*.

The annual budget requirement is based on an assumption that the rules of fiduciary conduct are insufficient to prevent a trustee from spending trust assets with reckless abandon, and that a court is better equipped than a trustee to determine whether an emergent situation requires an expenditure that might otherwise be considered out of the ordinary. The assumption is erroneous. Recent case law has shown that trustees of supplemental needs trusts will be held to account for a failure carry out their fiduciary responsibilities,[37] and there is well established case law that courts will not substitute their judgement for the trustee of a discretionary trust.[38]

As a practical matter, courts are often unable to hear requests of this nature on short notice. The resulting delay limits a trustee's ability to act in the best interest of its beneficiary in those situations where a distribution may be necessary because of a change in circumstances, but the distribution was not contemplated in the budget developed a year earlier.

As such, deviation from the discretionary standard contemplated by Section 7-1.12 of the EPTL should be done sparingly, and should be accompanied by a finding that the trust beneficiary's circumstances so warrant.

There is no statutory, regulatory or administrative requirement that a court approve expenditures from a first party trust in advance.

The derivation of this requirement is more difficult to trace. It is likely the result of courts inadvertently superimposing the restrictions for court-supervised accounts established under Article 12 of the CPLR and under Articles 17 and 17A of the SCPA into orders compromising personal injury and medical malpractice cases. The default rule for Article 12 custodial accounts and guardianship accounts under Articles 17 and 17A is that funds cannot be withdrawn without prior court approval. The language requiring court approval for all withdrawals is based on the concept that a minor without a disability should have the ability to decide how to spend her money when she reaches the age of majority, and courts will limit withdrawals in the interim to those absolutely necessary.[39]

In the author's experience, personal injury counsel often use standard infant compromise templates when preparing proposed orders for settlement. The templates include this prior approval language, and in some cases the language is not removed even though the order directs payment of the plaintiff's award into a first party supplemental needs trust.

Prior approval language is unnecessary and inappropriate in settlements involving supplemental needs trusts. First party trusts are irrevocable discretionary trusts which will last for the lifetime of the individual with the disability and represent an unenumerated option for settlement under Section 1206 of the CPLR.[40] Prior approval language is neither necessary nor appropriate in any supplemental needs trust, *unless there is a finding of need based on the facts of that particular case.*

First Party Trust Administration: Uncertainty and Indecision

Perhaps the most challenging aspect of first party trust practice is the lack of clear and credible guidance in the area of administration, leaving the trustee unsure of the criteria being used to measure its conduct. Some courts are inclined to micromanage expenditures, others are not. Some rely heavily on the social services district's opinions, others do not. Some courts have the personnel to review regular accountings of trust activity, others do not.

This uncertainty is compounded by a blurred line of demarcation between what types of activities should be considered part of the trustee's fiduciary responsibility, and which activities can and should be delegated to outside counsel, private case managers and others.

It often seems as if the introduction of "disability" and the existence of government benefits causes many trustees and the courts overseeing such trusts to ignore the traditional rules of fiduciary conduct and oversight. Consider how the exercise of discretion is handled by the courts in the context of a "traditional" irrevocable trust, perhaps a trust established for a surviving spouse or a trust holding business interests. Trustees would not hesitate to seek outside counsel to answer a complex question involving taxation, litigation or other issues outside of the

trustee's area of expertise, and courts would not hesitate to approve the reasonable fees associated with that representation.[41]

And yet trustees of special needs trusts are often hesitant to seek out counsel to review government benefit program eligibility for a beneficiary. In some cases courts will restrict the trustees from doing so right in the language of the court order, and in others judges and court examiners will challenge those expenditures in review of an annual account as paying for advice that a trustee should have "in house." The same hesitation exists in the area of retaining private case managers and other professionals to provide advocacy and support when a beneficiary lacks a credible family member or other informal advocate to do so.

For their part, and given the ad hoc and inconsistent decisional law in this area, court examiners and judges will often default to a general and uncircumscribed "best interest" standard to pick and choose which expenditures are deemed appropriate and which should be disapproved and subject to surcharge. This leaves the trustee fearful of seeking out assistance and hesitant to make distributions for fear of being second-guessed by someone with little or no first-hand knowledge of the beneficiary's day-to-day circumstances.

It is important to acknowledge that banks and trust companies bear some responsibility for the current state of affairs. Over the years many entered the special needs trust market without giving much thought to how supplemental needs trusts differ from other discretionary trusts, and they applied the same administrative and oversight practices to supplemental needs trusts as they applied to other irrevocable trusts in the portfolio.

In cases where a beneficiary was incapable of self-advocacy and lacked any family support, supplemental needs trusts often sat dormant. This was the situation in *In re Matter of JP Morgan Chase*,[42] a well-publicized case where a professional fiduciary was chastised for failing to take affirmative steps to remain informed about the needs of its autistic beneficiary. In other cases, the trustees failed to take active steps to consider the availability of government benefits, a primary responsibility of a trustee of a supplemental needs trust. In *Liranzo*,[43] the result was a substantial surcharge.

These two well-publicized decisions do not present the professional trustee in a particularly favorable light, and perhaps justifiably so given the specific facts of the cases. But they have reinforced the perception among many corporate institutions that this area of administration is fraught with risk, and as a result many banks and trust companies are reluctant to provide administration services for supplemental needs trusts, especially smaller community and regional banks.

The practical implications are significant and far reaching. For better or for worse, the disability community needs credible, capable and competent professional trustees to administer special needs trusts, first party and third party alike. Parents and family caregivers are aging, and when they pass on, siblings and other family members will be unable to fill their shoes. Disability service providers will continue to face cuts in Medicaid and other sources of government funding. It is a simple matter of demographics and public finance: the safety net is not what it once was, and private dollars will be needed to fill in the gaps to ensure that individuals with disabilities do not suffer as a result.

An Improved Approach

In the author's opinion, the law already provides an infrastructure for improved standards of administration and review. What is required is a deconstruction of the of the body of law which currently mixes the concepts of guardianship, trusteeship, benefit eligibility and disability into one large and unmanageable mess. Remember: first party trusts are hybrid documents, one part federal Medicaid law and one part state trust law. Acknowledging this bifurcation is the first step in seeing one's way through the thicket.[44]

1. Follow the Administrative Process as It Already Exists

There are well established and long-standing rules which provide the Medicaid program with administration and oversight of all trusts, including supplemental needs trusts.[45] A trust reviewed as part of a Medicaid application or redetermination will be measured against the statutory language of the federal and state Medicaid program, and if the social services district believes that the document is out of compliance it can render the trust a countable resource and issue a denial or notice of discontinuance as appropriate. Should the Medicaid applicant/trust beneficiary disagree, the fair hearing and Article 78 process is available to resolve the disagreement.

For current Medicaid recipients, social services districts have the right to monitor trust activity, and the regulations at 18 NYCRR 360-4.5 were promulgated to protect the Medicaid program's interest. If the social services district believes that a distribution from the trust is considered income to the beneficiary under the applicable Medicaid program rule, eligibility is reassessed for the month of distribution. If the agency believes that the trustee is not following the terms of the trust or is in violation of its fiduciary responsibilities, it has an independent right to commence a proceeding under New York's Executive Law. Once again, disagreements at the administrative level can be resolved through the fair hearing and Article 78 processes.

This system of administration and oversight predates the enactment of OBRA '93 and is part of the fabric of our

public benefit system. It is precisely the role that the Congress and the State Legislature intended for the Medicaid agencies, and nothing in the supplemental needs trust statute or in the law of the federal Medicaid program or state trust law modified this infrastructure.

2. Apply the Existing and Well-Established Standards of Fiduciary Conduct

New York has a well-developed body of trust law, including a statute which provides drafting guidance for first and third party supplemental needs trusts. New York's Supplemental Needs Trust statute clearly states that supplemental needs trusts are discretionary trusts, and as such the body of New York law governing the review of discretionary trustees should be applied to first party and third party trusts just as it is applied to other discretionary trusts.

The language of the statute (if used in drafting the trust document) does not provide *unlimited and unreviewable discretion*. Rather, it directs the trustee to consider benefit eligibility in making a distribution. If the optional language of section 7-1.12 (e)(2)(i)(5) is included, the trustee can make a distribution which impacts benefits upon the condition that it has made a determination that the beneficiary is in a better position as a result.

With this in mind, *when and how* should a court review distributions from a supplemental needs trust?

When to Account?

Traditionally, judicial review of a trustee's decisions on distributions would occur at the time it seeks settlement of its accounts. More frequent accountings may be required in the trust document or in a court order approving the trust, but as discussed above, they are not required by the supplemental needs trust statute or by the federal or state Medicaid statutes, regulations and administrative guidelines.

In some situations a trustee might seek court review and approval for certain (typically significant) transactions in advance, but a court does not have to entertain the application, and there is well established precedent that a court will not relieve a fiduciary of its obligation to exercise discretion based on the facts and circumstances surrounding the proposed distribution.[46]

What Is the Standard of Review for Trust Distributions?

As a preliminary matter, if the administrative machinery of the Medicaid program (or the SSI program, or other public benefit program) is functioning correctly, distributions from the trust will be reviewed upon application or redetermination for benefits. If a distribution is considered "countable income" under the applicable program rules, the program can assess an overpayment or seek recovery as appropriate. And in cases of clear abuse, the Medicaid program can treat the entire trust corpus as a "countable resource" (i.e., the trust will lose its exempt status) and issue a notice of discontinuance, and can commence an independent proceeding under New York's Executive Law for surcharge, removal or other remedy it deems appropriate.

If the social services district and other benefit programs will be reviewing the trustee's activities for the purpose of assessing ongoing eligibility for benefits, what standard of review should apply to the trustee's actions in a proceeding for settlement of its accounts or in an annual filing with a court? It is in this area where decisional law appears ad hoc, arbitrary and inconsistent, and where all trustees—individual and professional—remain most vulnerable.

For an answer to the question we need look no further than the seminal decision on supplemental needs trusts in New York,[47] wherein Surrogate Gelfand applied the *abuse of discretion* standard in refusing to compel the trustee of a testamentary trust to invade principal to pay for services which were otherwise available to the disabled beneficiary under the public benefit system in existence at the time. The later enactment of 7-1.12 of the EPTL—the direct descendant of the *Escher* case—retained the discretionary nature of supplemental needs trusts (see EPTL 7-1.12(a)(5)), and did not suggest any intention to change the standard of review. Rather, the statute included a set of additional criteria related to government benefit eligibility which can be used as a measure in applying the standard.

In practice the analysis would work as follows:

- Was the distribution for the primary benefit[48] of the lifetime beneficiary?
- Did the trustee consider whether the distribution involved an expense that could have been paid by a benefit program?
- If the trustee made a distribution despite the availability of a publicly funded option, did the trustee make an informed determination that the privately paid option put the beneficiary in a better position?

Each of these questions involves issues of fact and law which are capable of documentation and verification. Correspondence and case notes from family members, advocates and disability service providers would document the needs/desires of the beneficiary, and statements of benefit, notices of coverage or other written assessments of eligibility will document access to publicly funded options as alternatives to private purchases.

Otherwise, all of the other rules governing fiduciary conduct in New York should continue to apply, either by default or by specific reference in the language of the trust document: the obligation to invest prudently, the obligation to account, the right to retain outside professionals as necessary to carry out the terms of the trust as necessary, the prohibition against self-dealing, etc.[49]

As explained earlier in this article, many—*and perhaps most*—first party trusts are created without court order, and are not subject to continuing judicial review and examination. For example:

- A physically disabled but mentally competent beneficiary is free to establish and fund a first party supplemental needs trust without court involvement using the language of 7-1.12 of the EPTL as guidance and relying on the other protections afforded by New York's rules of fiduciary conduct. He applies for Medicaid, and with the trustee's assistance provides information to the local social services district on the establishment and administration of the trust in order to maintain eligibility.
- A personal injury settlement for a minor may be directed into a first party trust in the settlement order, after which the litigation is discontinued by stipulation. There is no guardianship because the child remains under the parents' wing, and as such there is no annual reporting by the trustee other than to the local Medicaid district which reviews distributions for the purpose of confirming ongoing eligibility. The trustee—typically a professional trustee—manages the trust in accordance with its terms, and communicates regularly with the parents of the minor to remain informed and ascertain need.

In both of these situations state trust law has and will continue to provide an infrastructure for fiduciary conduct and a remedy for its breach. But a reasonable and well supported exercise of discretion should be disturbed only if there is evidence of abuse, in accordance with well-established law and practice in the State of New York:

> [t]he ultimate issue for determination… is whether the trustee's discretionary power was exercised reasonably and in good faith. It is not the task of the court to decide whether we agree with the trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion.[50]

3. Impose Additional Restrictions Upon a Finding of Need

Do courts have the authority to require additional language restricting the exercise of discretion or imposing other controls and oversight if the circumstances warrant? Absolutely, but in doing so the record should include a determination that the existing and traditional safeguards in the fiduciary process were inadequate. A survey of the landscape of case law in New York governing the establishment of first party trusts shows that too often courts will recite early cases like *Goldblatt* or refer to a general and undefined "best interest" standard as a basis for writing restrictions into a trust document or accompanying order, without any credible analysis of whether that particular beneficiary's circumstances warrant the oversight.

Adding requirements to the administration of a first party trust above and beyond what the federal Medicaid statute requires and what state trust law allows has the effect of treating beneficiaries with cognitive disabilities—those who need court approval to create the trust—differently from beneficiaries who have the capacity to create supplemental needs trusts on their own and without additional restriction.

When courts require the language of a trust or a controlling order to restrict certain purchases, limit distributions to some pre-set and arbitrary amount, or require budgets to be approved in advance, they impose additional costs and deprive the beneficiary of the more liberal exercise of a trustee's discretion contemplated in the language of the supplemental needs trust statute.

The simple fact that someone has a disability does not mean that the trustee's discretion should be limited. The trustee of a trust established for a physically disabled but mentally competent beneficiary should not limit the trustee's discretion beyond what the statute requires. Similarly, a cognitively disabled beneficiary with two active parents or court-appointed guardians may have the informal network of support to ensure that there is a method of communicating with a trustee. That advocacy, combined with the traditional obligations of fiduciary conduct and regular review of trust activity by the Medicaid program, may be adequate to protect the beneficiary. In both cases, micromanagement by the court would subject the administration of the trust to delay and expense without any resulting benefit for the beneficiary.

Conclusion

It is time for the next step in the evolution of first party trust practice, which continues to reflect outdated notions of disability and where courts often impose restrictions based on a beneficiary's diagnosis rather than a factual analysis and functional assessment of the beneficiary's options for oversight and support. The often-inconsistent and arbitrary nature of case law in this area has led to substantial uncertainty in how the actions of trustees—individual, corporate and pooled—will be measured by courts reviewing their accounts. The result is that many banks and financial institutions are reluctant to embrace this area of fiduciary practice.

The disability community cannot afford to lose qualified and capable fiduciaries at a time when it faces the loss of a generation of family providers and is experiencing continued cuts in programs and services for individuals with disabilities across the spectrum. The stakes are simply too high.

It doesn't have to be this way. Traditional rules of fiduciary oversight provide adequate guidance to trustees, and the well-established administrative system of administrative review for public entitlements will continue to protect the beneficiaries and the agencies serving them. It is the responsibility of practitioners in this area to advocate for their use and application in first party trust practice.

Endnotes

1. This article assumes that the reader has a basic understanding of the law and practice involving first party supplemental (special) needs trusts established with the assets of a person with a disability, and third party supplemental (special) needs trusts established by others for the person's benefit. Throughout the article the two will be referred to as "first party trusts" and "third party trusts" respectively.
2. 42 USC § 1396p(d)(4)(A), enacted as part of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) (OBRA '93).
3. *In re Escher*, 94 Misc 2d 952 (Sur. Ct. Bronx Co. 1978), *aff'd* 75 AD2d 531 (1st Dept. 1980), aff'd 52 NY2d 1006 (1981); *see also,* Goldfarb, David, *Historical Background of Supplemental Needs Trusts*, Warren's Heaton on Surrogate's Court Practice, 12-211.02 (Lexis 2017).
4. *See, for example, In re Morales*, N.Y.L.J., July 28, 1995, at 25 (Sup. Ct. Kings County).
5. Former Elder Law Section Chair David Goldfarb's chapter on supplemental needs trust practice in Warren's Heaton on Surrogate's Court Practice, *supra* n. 3, includes a subchapter entitled *Court-Added Criteria for Supplemental Needs Trusts*. No credible reading of the cases cited and commentary provided in the chapter would leave a practitioner with the impression that there is any uniformity of practice and procedure in this area.
6. Whatever one may think of the recent lawsuit involving the constitutionality of Article 17A of New York's Surrogate's Court Procedure Act, *Disability Rights N.Y. v. New York State et al*., Case: 1:16-cv-07363-AKH, S.D.N.Y. (2016), available at http://www.new.drny.org/docs/art-17a-lawsuit.pdf (last visited September 29, 2017), it has focused considerable attention on this issue.
7. 42 USC § 1396p(d)(4)(A).
8. 21st Century Cures Act, Pub. L. No.114-255 (2015), Section 5007.
9. N.Y. Social Serv. Law § 366(2)(b)(2)(iii)(A).
10. New York's Estates Powers & Trusts Law (EPTL) 7-1.12.
11. EPTL 7-1.12(a)(5)(v).
12. The amendment also made reference to the treatment of certain retroactive payments under the SSI program, not relevant here.
13. 18 NYCRR 360-4.5(b)(5).
14. 18 NYCRR 360-4.5(b)(5)(iv).
15. State Medicaid Manual, *Transmittal 64, General and Categorical Eligibility Requirements*, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last visited September 7, 2017) (see, specifically, section 3259.7).
16. *OBRA '93 Provisions on Transfers and Trusts*, Administrative Directive 96-ADM-8 (March 29, 1996) (referred to herein as 96 ADM-8).
17. 96 ADM-8(IV)(F). At the time, the transfer of asset provisions applied to both nursing facility Medicaid- and Medicaid-funded "waiver" programs. At the time of this writing, the penalty provisions no longer apply to community-based waiver programs. *See Transfer of Assets and Medicaid Waiver Applicants/Recipients*, NYS Office of Health Insurance Programs General Information Service (GIS) Message 07 MA/18 (September 24, 2007).
18. 96 ADM 8 (IV)(7)(b)(ii).
19. For an excellent discussion of the misapplication of the term by public welfare agencies, see Landsman, Ronald, Esq., *When Worlds Collide: State Trust Law and Federal Welfare Programs*, NAELA Journal Volume 10, No. 1 (Spring 2014). And for a particularly scathing critique of the application of the sole benefit rule to forbid an ancillary benefit to anyone other than the trust beneficiary, see the decision of the North Carolina Court of Appeals in *In re Estate of Skinner*, 787 S.E.2d 440 (N.C. Ct. App. 2016).
20. *See* Goldfarb, David, *Court-Added Criteria for Supplemental Needs Trusts*, *supra* n. 5, and the cases cited therein.
21. By the author's count, the cases included in the Goldfarb compendium referenced in n. 5 above represent a total of 34 trial level decisions and only two appellate decisions.
22. *See, for example,* In re Goldblatt, 162 Misc. 2d 855 (Surr. Ct. Nassau Co. 1994).
23. *In re Matter of McMullen*, 166 Misc. 2d 117 (Sup. Ct. Suffolk Co. 1995).
24. *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied,* 133 S. Ct. 933 (2013).
25. "Pooled" supplemental needs trusts are authorized under 42 USC § 1396p(d)(4)(C), a statutory alternative to privately drafted supplemental needs trusts drafted under 42 USC § 1396p (d)(4)(A).
26. Lewis at 347.
27. *In re* Kaidirmouglou, NYLJ, Nov. 5, 2004, at page 28 (Sur. Ct. Suffolk Co.).
28. *In re Matter of the Application of KeyBank National Association*, Kenneth F. Tyrrell and Polly E. Tyrrell, Saratoga County Surrogate's Court Index No. 2016-769 (Decision and Order dated September 25, 2017) (referred to herein as *In re Tyrrell*). The Decision is unreported as of the date of this writing, and as such a copy is included in the appendix.
29. The social services district was an interested party in the proceeding as a result of its remainder interest under the terms of the statute and regulations. Query whether this is a vested remainder interest or a contingent remainder interest, and whether the answer to that question might affect the district's standing in a proceeding involving an existing trust.
30. Tyrrell, *supra* n. 28 at p. 12.
31. As a matter of full disclosure, the author represented the petitioners in the Tyrrell matter and the decision was consistent with the position taken by the petitioners in the proceeding.
32. Consider whether the Medicaid program holds a *vested* remainder interest or a *contingent* remainder interest (in some cases there may be no liability to the Medicaid program upon the beneficiary's death, such as when a disabled beneficiary received only special education services while in school before passing), and whether the answer to that question would impact the social services district's rights of participation.
33. *Kaidirmouglou*, *supra* n. 24. *See also In re Berke*, 2006 N.Y. Misc. LEXIS 4505 (Sur. Ct. N.Y. Co.), wherein the court required accountings to DSS and to the competent beneficiary rather than to the court.
34. *Angeline DeSantis, as Guardian ad Litem for Valentine Qualtiere, Plaintiff v. Kevin Bruen*, et.al., *Defendants*, 165 Misc. 2d 291 (Sup. Ct. Suffolk Co. 1995); *DiGennaro v. Community Hospital*, 204 A.D. 2d 259 (2d Dept.1994); *Dinnegan v. ABC Corp.*, 35 Misc. 3d 1216(A) (Sup. Ct. N.Y. Co. 2012).
35. *Supra* n. 19
36. The term is specifically included in the language of the statute. NY EPTL 7-1.12(a)(5).
37. *In re the Accounting of J.P. Morgan Chase Bank, N.A, and H.J.P. as co-Trustees of the Mark C.H. Discretionary Trust of 1995 v. Marie H.* ,

956 N.Y.S.2d 856 (Sur. Ct. N.Y. Co. 2012) (hereinafter referred to as *Matter of J.P. Morgan Chase*); *Liranzo v. LI Jewish Education/Research* (Sup. Ct., Kings Co., No. 28863/1996, June 25, 2013) (hereinafter *Liranzo*).

38. *See* Restatement [Third] of Trusts § 50(1)(b); see also *In re Estate of T. Harry Glick*, 2005 N.Y. Misc. LEXIS 7336 (Sur. Ct. Kings Co. 2005) at page 9, citing *In re* Gilbert, 156 Misc. 2d 379 (Sur. Ct. N.Y. Co. 1992) and *Leigh v. Estate of Leigh*, 55 Misc.2d 294 (Sup Ct. N.Y. Co. 1967).
39. See, for example, *In re* Sigal M., 42 Misc. 3d 379 (County Court Nassau Co. 2013), and the cases cited therein.
40. *Supra* n. 34.
41. *In re U.S. Bank, NA*, 51 Misc. 3d 273 (Sup. Ct. NY Cty 2015), citing *In re Bank of NY Mellon*, 127 AD3d 120 (1st Dept. 2015).
42. *Supra* n. 37.
43. *Id.*
44. The author feels compelled to once again recognize the forward thinking and comprehensive writing of NAELA Fellow Ronald Landsman, Esq. on this issue (*supra* n. 19).
45. See the discussion of this issue in the Saratoga County Surrogate's Court decision in *In re Tyrrell*, *supra* n. 28.
46. *In re William M. Kline Revocable Trust*, 196 Misc. 2d 66 (Sur. Ct. Fulton Co. 2003) and the cases cited therein; *In re Lovell*, 23 A.D. 3d 386 (2d Dept. 2005).
47. *In re Estate of Escher, supra* n. 3.
48. *Supra* n. 18.
49. Tyrrell, *supra* n. 28, at page 19.
50. *In re U.S. Bank, NA, supra* n. 41.

Edward V. Wilcenski, Esq., is a co-owner and co-manager of the law firm of Wilcenski & Pleat, PLLC, with offices in Clifton Park and Glens Falls, New York. He practices in the areas of Elder Law, Special Needs Planning, and Trust and Estate Planning.

Ed is a Trustee of the NYSARC Pooled Trust, and serves as a Trustee of the Wildwood Programs Pooled Trust, a trust program serving individuals with developmental and learning disabilities. In 2009 and again in 2013, he received the Marie Ivancich Memorial Award from the Brain Injury Association of New York State for professional commitment to the organization's mission of advocacy for individuals living with brain injuries.

His professional affiliations include membership in the National Academy of Elder Law Attorneys, and the New York State Bar Association's Elder and Special Needs Law and Trusts and Estates Sections. He is a member and former President of the Special Needs Alliance, www.specialneedsalliance.org, an invitation only, not for profit organization of leading disability attorneys who practice in the areas of Special Needs Trusts and public benefits.

Ed is a contributing author to various publications of the New York State Bar Association, including *Representing People with Disabilities*, and *Planning for Incapacity*, and *Guardianship Practice in New York State*.

Income Tax Refunds: Another Arrow in the Medicaid Planning Quiver

By Kameron Brooks and Jay William Frantz

An old Chinese proverb states "Crisis is an opportunity riding the dangerous wind." In the Medicaid world, so many times the winds are indeed dangerous, but every so often the government gives us a break. In 2010, federal law created a safer wind courtesy of section Sec. 728 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.[1] Section 728 provides that federal income tax refunds are not countable as income for "….any Federal program or under any State or local program financed in whole or in part with Federal funds." By its terms, this section applies to Medicaid. Additionally, refunds are also not countable as a resource for Medicaid qualifying purposes, when received and for a period of 12 months thereafter. And it gets better—if the income tax refunds are gifted or transferred away during the 12 months after received, no penalty period can be assessed for the transfer!

The provisions were to sunset in December, 2012; however, Congress made the winds calm again by making the provisions permanent by the American Taxpayer Relief Act of 2012.[2] In June of this year, the New York Department of Health issued GIS 17 MA/11 to give guidance on the new law to all local Medicaid districts.

Consider how the law interacts with clients. We generally encounter federal income tax withholding in three situations:

1) employment income where tax is withheld based on the amount we expect to earn and the size of our household;

2) taxes withheld (or paid by estimates) on retirement income (pensions, 401(k)s, IRAs and the like), and

3) tax withheld (or paid by estimates) when liquidating investments.

Situation #1

Consider a client whose husband is diagnosed with Huntington's Disease. For those who do not know, it is a diagnosis that virtually guarantees the need for long term care, and it is number 11.17 on the list of disabling conditions to qualify for Social Security Disability. To prepare for the inevitable long-term care for the husband, they could begin receiving their federal income tax refunds (assuming, of course, they had over withheld or overpaid by estimates) and within 12 months of receipt, transfer the refunds to a Medicaid Asset Protection Trust and not incur any penalty.

Kameron Brooks

Jay William Frantz

Situation #1A

Since Huntington's Disease is a dominantly inherited genetic disorder, one of the husband's adult working-age children was also tested and diagnosed with the condition. In this situation, the child may consider adjusting his federal income tax withholding upward in order to assist in planning for his inevitable long-term care situation. Increasing the child's federal income tax refund gives him the opportunity to fund a Medicaid Asset Protection Trust without penalty.

Additionally, in the husband's and son's cases, if either, or their spouses, were also receiving Social Security benefits, they could elect to have up to 25 percent of the payments withheld (IRS Form W-4V) for income tax purposes, thus increasing his ultimate refund and penalty-free transfers.

Situation #2

Many of our clients are receiving pension and/or mandatory required distributions from retirement accounts. In many cases these clients are already receiving federal income tax refunds yearly. What if these clients were to receive their refunds and within 12 months (why wait that long?) transfer the refunds to a Medicaid Asset Protection Trust, penalty free? Over a period of years, clients could protect additional funds for their and their families' future.

Situation #3

A large planning opportunity presents itself when liquidating assets. Consider the client of a financial advisor with whom we recently consulted. She owns a $400,000 annuity and she also is anticipating skilled nursing care soon. If she liquidates her annuity, she can elect to withhold a substantial portion to pay the income tax associated with surrender of the contract. Because her

cost basis in the annuity is only $182,000, she will have over $200,000 in taxable ordinary income. Let's presume she withholds 15 percent of the proceeds for a total of $60,000. Not an unreasonable withholding, given her total tax picture. But, if she waits to liquidate the annuity until after she is private paying for skilled nursing home care, she may be have a sizable income tax deduction of $100,000 or more at the end of the calendar year.

Assuming her taxable income consists only of the annuity interest, her total federal tax liability would be $21,947.75 ($200,000.00, less the Schedule A net deduction of $92,500.00, less personal exemption of $4,050.00, times the applicable tax rate). The result would entitle the client to a refund of $38,052.25. When received, the refund is not considered income for Medicaid qualifying purposes, and since it is also not considered a resource for the same purpose, she is free to gift the refund to anyone else, or contribute it to a Medicaid Asset Protection Trust, without incurring any penalty period.

For those who do not have withholding made at the source, how about quarterly estimate payments (IRS form 1040-ES)? Assume a client who has already incurred the taxable income and is anticipating the large Schedule A deduction did not arrange for withholding with the payor. What to do? Consider having the client make an estimated tax payment. The final federal estimate payment is due on January 15th of each year. So, to plan for 2017, the estimate should be paid by January 15th. Can't make it by then? The due dates for estimated payments only relate to the penalty provisions of the Internal Revenue Code. Make a payment late and have a tax liability… pay a penalty for late payment. But if no tax liability, then no penalty. Even if there were a late payment penalty, one can still make an estimated payment. The IRS will always cash the check.

The recent tax bill has since improved situation 3. It made medical expenses greater than 7.5% of adjusted gross income (AGI) deductible for two years. It will go back to the previous, smaller deduction for medical expenses above 10% of AGI after the two year period, however the proposal to remove the deduction entirely was not in the final bill.

What about New York State income tax refunds? The Medicaid Reference Guide (MRG), page 224, states "INCOME TAX REFUNDS—*Any* income tax refund or federal advance payment received by an A/R is disregarded as income in the month received" (emphasis added).[3] Although GIS 17 MA/11 is silent regarding state income tax refunds, GIS 11 MA/004 is not. The last sentence of that GIS states: "State income tax refunds continue to be disregarded as income in the month of receipt and disregarded as a resource the following month." Did the wind just get safer?

Kameron Brooks is a principal and Jay William Frantz a member of Brooks & Brooks, LLP, a Private Client Law Firm in Little Valley, NY. Both practice in higher level estate, asset protection, tax and business exiting planning, as well as trust and estate administration.

Endnotes

1. 26 USC §6409(a).
2. 26 USC §101(a).
3. The state regulations specifically exempt earned income tax credits and refunds of property and food taxes. 18 NYCRR 360-4.6(a)(1)(xxiii), 360-4.6(a)(2)(ix), and 360-4.6(a)(9). The authors did not find any references to any other tax refunds.

Thinking of Sitting for the CELA Exam? What You May Want to Know Before Taking the Plunge

By Richard J. Shapiro

Richard J. Shapiro

About three years ago I first considered taking the CELA exam administered by the National Elder Law Foundation (NELF). By then I had been practicing law for 25 years, with a primary concentration in elder law and estate planning for over 15 years. I realized that when I was searching for an elder law attorney in other states or communities I would typically seek an attorney with the CELA designation or a state-specific certification in states that offer that option, and adding the CELA credential to my name would enhance my credibility to both colleagues and the public. While I know many outstanding elder law attorneys who are not CELAs, I recognized that the CELA designation was meaningful.

When I first looked into the CELA process I learned that one requirement was for applicants to submit a "matrix" of 60 elder law-related matters over a three-year period preceding the date of application. The reported matters must include 40 matters within five "core" areas: health and personal care planning (i.e., medical directives, powers of attorney, and general counseling of older persons and persons with special needs); premortem legal planning (i.e., wills and trusts, lifetime and testamentary gifts, and the associated income, estate, generation-skipping, and gift tax implications); fiduciary representation; legal capacity planning; and public benefits advice (i.e., Medicare, Medicaid, VA benefits, and Social Security). Besides the core areas, the matrix must incorporate 10 "non-core" areas that include special needs counseling, advice on insurance matters, resident rights advocacy, housing counseling, employment and retirement advice, counseling regarding age, disability or housing discrimination, and litigation and administration advocacy. The remaining 10 matters can cover any of the previously described subject areas. The rules allow for a single client matter to cover multiple categories if the case so lends itself.

Dreading the work and time involved to go through my cases and complete the matrix, I nixed moving ahead with the process.

Fast-forward to the spring of 2017 when I was chatting with a colleague in New Jersey who had become a CELA a few years prior. She convinced me of the value of the CELA designation, and with her encouragement I again looked into the CELA qualification process. By happenstance, this past May I stumbled across a post by Arizona CELA Robert Fleming in the community forum on the NAELA website promoting a CELA review course being offered to prepare for the September 2017 exam. To learn more, I signed up for a webinar to be held a few days later.

The first of what would be nine webinar classes was held in late May. Fleming and Rebecca Morgan, a prominent elder law professor at Stetson Law School, described the CELA qualification criteria and what their course was intended to cover. Among the requirements mentioned was that applicants must have "substantial involvement" in elder law that requires, at minimum, an average of 16 hours a week in the associated practice areas for the three year period preceding the application. Applicants must also have completed at least 45 hours of continuing legal education in the same three-year period, and must obtain references from at least five attorneys familiar with the applicant's competence and qualifications in elder law. Of those five attorneys, at least three must have themselves devoted at least 800 hours practicing elder law over the preceding three years.

Fleming and Morgan next described the CELA exam itself. The test is a 5½-hour marathon, with three hours in the morning and 2 ½ hours after an hour lunch break. The test totals 300 points, with 50 two-point multiple choice questions, and 200 points for essays ranging from 10-pointers to lengthier 40-point essays. Two-thirds of the points must cover core areas, while the remaining one-third covers non-core areas. A score of 210 (or 70 percent) is required to pass, and the exam is not curved.

I figured scoring 70 percent was not too daunting a threshold, as I have been actively practicing elder law for almost 18 years and have always been a strong test taker. But Fleming and Morgan then reviewed the recent historical passage rates, ranging from a low of 30 percent for the March 2017 exam, to a high of 75 percent for the September 2016 exam. The latter exam was an outlier, as the average passage rate is in the 35-40 percent range. Those numbers caught my attention.

Fleming and Morgan next recommended resources to prepare for the exam. Besides their course, educational options included NAELA's advanced elder law review course, as well as Masters in Elder Law programs offered at Stetson, Western New England, and Seattle University Law Schools. The recommended texts included David M. English, John J. Regan and Rebecca C. Morgan, *Tax, Estate & Financial Planning for the Elderly* (Matthew Bender); Robert B. Fleming and Lisa Nachmias Davis, *Elder Law Answer Book* (Aspen); Lawrence Frolik and Richard Kaplan, *Elder*

Law in a Nutshell, 6th Ed. (West Academic); and Ralph C. Brashier, *Mastering Elder Law* (Carolina Academic Press).

I already owned the *Elder Law Answer Book*, which is a lengthy treatise. After research I also purchased *Mastering Elder Law*, which provided another perspective on the relevant topics in a more portable paperback format.

During the initial webinar Fleming and Morgan emphasized the importance of beginning to study immediately for the September exam, which was still three-and-a-half months off. While the test date still seemed distant, their recommendation was sound given the voluminous amount of material covered on the exam.

Also emphasized was the need to master the ethics rules involved in an elder law and special needs practice. Among the study materials provided to course participants was the NAELA *Aspirational Standards* (2nd Edition 2017) and the *ACTEC Commentaries on the Model Rules of Professional Conduct* (5th Edition 2016). Fleming urged prospective test takers to read these materials at least twice, and I am glad I took his recommendation to heart, as ethics issues were integrated throughout the exam.

Each subsequent webinar focused on one or more of the 12 elder law modules comprising the exam. From the outset I decided the best approach was to go back to the ways from my law school days 30 years previous and prepare an outline from the relevant sections of the *Elder Law Answer Book*. The instructors provided an exam study guide referencing the chapters in that book that corresponded to the categories to be tested. Beginning right after Memorial Day I began constructing my outline, starting with health and personal care planning, and concluding with a section on ethics. Preparing the outline was painstaking. Initially I worked on the outline at my office between appointments, phone calls, e-mails, document drafting and other parts of my normal office routine. By early August I was pushing to complete the outline, so I came to the office on weekends to work undisturbed. Finally around the third week of August I completed the outline, which had ballooned to almost 89 single-spaced pages. Although during the process I often questioned my sanity for creating such a detailed outline, in the end the act of writing down the key material was essential in helping me get a handle on the information.

After the second review session we were provided the first of three 90-minute practice exams. The first exam consisted of 12 multiple choice questions and three essays—a 10-point essay, a second 20-point essay, and finally a 30-point essay. I parked myself in a conference room, set a timer and took the test on my laptop. Because I was still in the early stages of the review, several multiple choice questions proved daunting, but I thought I had handled the essays well. However, when I received my "graded" test, I was dismayed that I answered correctly only six of the 12 multiple choice questions, and my essay scores were barely over 50 percent. It was a discouraging wakeup call.

A challenge is that the exam focuses on "national" practice, which in many instances differs—often significantly—from what we routinely handle in a New York elder law practice. In most of the country, for example, spousal refusal is not a recognized technique for spousal Medicaid planning, so I had to brush up on planning techniques not typically used in my practice.

In mid-August I set aside a Saturday morning to spend the time to complete the "long-form" application that included completing the dreaded case grid. I created a spreadsheet of my applicable matters from our firm's practice management program and filled in the grid over a period of a few hours. Completing that long-form application itself seemed like half the battle.

Grinding through the passing days and weeks I sensed that the studying was paying off. I performed better on the second practice test taken in mid-July, and better still on the final practice test at the end of August. But on each exam I found several lost opportunities for points, as I failed to take sufficient time to create a brief outline and spot the key issues. I recognized on the actual exam every point would be precious and that I would need to avoid the temptation to jump right into my answer but instead would need to spend at least a few minutes creating a brief outline to identify each key issue. Achieving the 70 percent score still seemed like a daunting objective.

With the September 15 test date fast approaching, my studying intensified. I spent most of Labor Day weekend and the following weekend in the office reviewing my outline and other study materials. I also set aside blocks of time in my weekly schedule to shut myself in a conference room and study with limited distraction. My staff and colleagues were advised that I was to be disturbed only if necessary, and as grumpy as I was, no one in the office was in the mood to bother me.

I took off the entire day before the exam and hunkered down in my home office with my trusty dog Midnight by my side. For a good 11 hours I reread my outline, reviewed the practice exams and brushed up on the NAELA *Aspirational Standards.* Bleary-eyed, I shut my notebook around 10:30 that night and headed to bed.

After a sleepless night, the next morning I headed down to my colleague Irina Shea's office in Ramsey, New Jersey where the exam was to be administered. The exam must be taken at the office of an existing CELA, and Irina graciously agreed to serve as my host and proctor. Irina set me up in a conference room and I got my laptop ready to go. While the exam can be handwritten, given that all my work these days is on a keyboard it only made sense to use my computer for the exam. Earlier in the week I had downloaded the ExamSoft program and had tested the system to make sure I knew how it worked. After

Irina read me the instructions she left the room and at 9:00 a.m. I took a deep breath and got started.

The first part of the exam consisted of 25 multiple choice questions. About 15 of the questions were straightforward, but the other 10 seemed to have at least two equally correct answers. While the rule of thumb was to spend about two minutes on each multiple choice question, I spent no more than 25 minutes on the entire section. I figured I would have a few minutes after completing the essays to review the multiple choice questions. That was to prove a pipe dream, as I used every second of my allotted time to complete the morning essay questions.

I do not remember the specifics of the questions, but as I recall the essays included a traditional estate planning scenario that incorporated sub-questions regarding tax planning issues and asset protection concerns for the heirs. Another question focused on the hypothetical client's capacity and ethical concerns regarding her attorney's later filing of a guardianship proceeding against his client. Yet another question centered on Medicaid planning strategies for a married couple.

What became immediately apparent as I delved into the essays was how virtually every question required analysis of one of more ethical issues. I am glad my course instructors urged us to spend time reviewing the Model Rules and the NAELA *Aspirational Standards,* and I would urge anyone planning on taking the exam to do the same.

While on the practice exams I dove right into each essay answer without creating an outline, on the actual test I spent a few moments to jot down the key issues in each question. As my instructors repeatedly advised us, I did my best to answer the question actually asked, and not what I thought the question *should* be.

One nerve-wracking moment occurred when, as I was completing one essay, my screen went blank and I thought I lost my entire answer. Hearing my panic, Irina ran into the room. Calmly she helped me figure out that I had accidently hit the "next question" arrow, and I was able to then get back to the prior screen and complete my question.

As the noon hour approached I saw I was running short on time and raced to complete the final morning essay. I finished just in time and exhaustedly hit the "upload" button to ensure my morning portion was sent to the testing center. I then had an hour lunch break and spent a few minutes outside on what was a beautiful late summer day. I had packed a lunch but was such a jumble of nerves and adrenalin I had no real appetite and just nibbled at my food.

A few minutes before 1 p.m. I headed back to the conference room. Irina read the afternoon session instructions and then I plowed into the remainder of the exam. The first part again consisted of the multiple choice section, and to my recollection there were 20 questions rather than the anticipated 25 questions. As with the morning session I breezed through the multiple choice questions and moved onto the afternoon essays. As time raced ahead I again was concerned that I was falling behind and picked up the pace. The last question was a 10- or 15-point essay and I had left myself with less than 10 minutes. I frantically typed away, and with eight seconds left before the 3:30 deadline I hit the upload button—I was done!

Drained, I thanked Irina for getting me through the day and headed home. I thought I handled the exam well, but based on the results of the practice exams and the historically low pass rate I still had my doubts I would meet the 70 percent threshold. Regardless, I was thrilled to have my "normal" life back, able to again enjoy my free time and focus on my family and the regular routine of my practice.

We were told it would take at least a month before the results were announced, and as the weeks passed my anxiety mounted. In my mind I wrestled with the question: "If I do not pass will I be willing to go through this again?" But in late October I received the phone call from NELF headquarters that I had passed the exam. Consistent with most recent exams, I was told that the pass rate for the September 2017 exam was just 36 percent.

While it has been almost 30 years since I sat for the Bar exam, in my estimation the CELA exam is a more difficult test, as the depth of knowledge expected of the test-takers is far higher than on the Bar exam. For those considering taking the exam, I hope my experience described in this article provides guidance on the steps you should consider taking to prepare for that endeavor. I am grateful that I made it through the process and will not for a moment take for granted what it took to achieve my goal.

Richard J. Shapiro is Head Partner in the Elder Law Department at Blustein, Shapiro, Rich & Barone, LLP, with offices in Goshen, Warwick, Poughkeepsie and Monticello. He concentrates his practice in estate and business planning, Medicaid planning, special needs planning, and estate administration. He can be reached at rshapiro@mid-hudsonlaw.com.

MORTGAGE FINANCING

for homes in

IRREVOCABLE TRUSTS

LEARN ABOUT TRUST LENDING OPTIONS

CALL NOW TO SCHEDULE YOUR 15-MINUTE GOTOMEETING!

888-954-7463

MORTGAGE LENDING IN ALL 50 STATES

For more information call:

FRANK MELIA, CMPS®
Certified Mortgage Planner
NMLS ID: 62591
fmelia@quonticbank.com

MICHAEL BOCELLI, CMPS®
Certified Mortgage Planner
NMLS ID: 38416
mbocelli@quonticbank.com

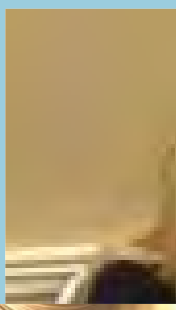
Member FDIC · Equal Housing Lender · NRMLA

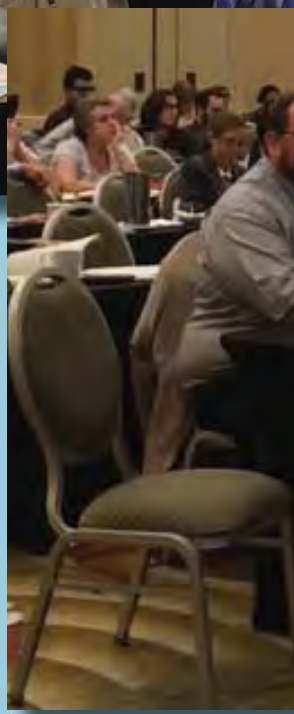
Quontic Bank™ • 425 Broadhollow Rd, Suit 302, Melville, NY 111747 • 888-954-7463 • QuonticBank.com

Disclosure: Ask for details. All lending products are subject to credit & property approval. Not all products are available in all states or for all amounts

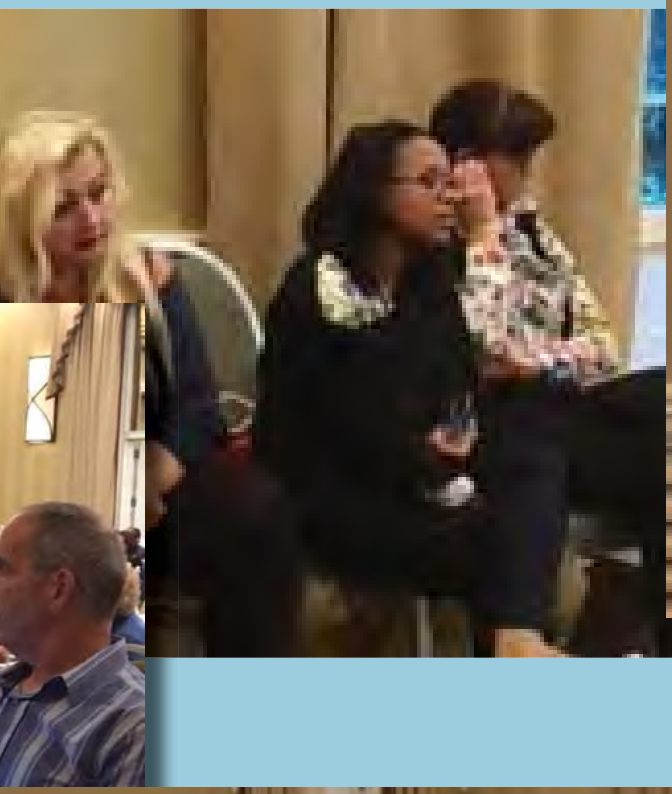
Paid Advertisement

Elder L
Special Ne
2017 Fal

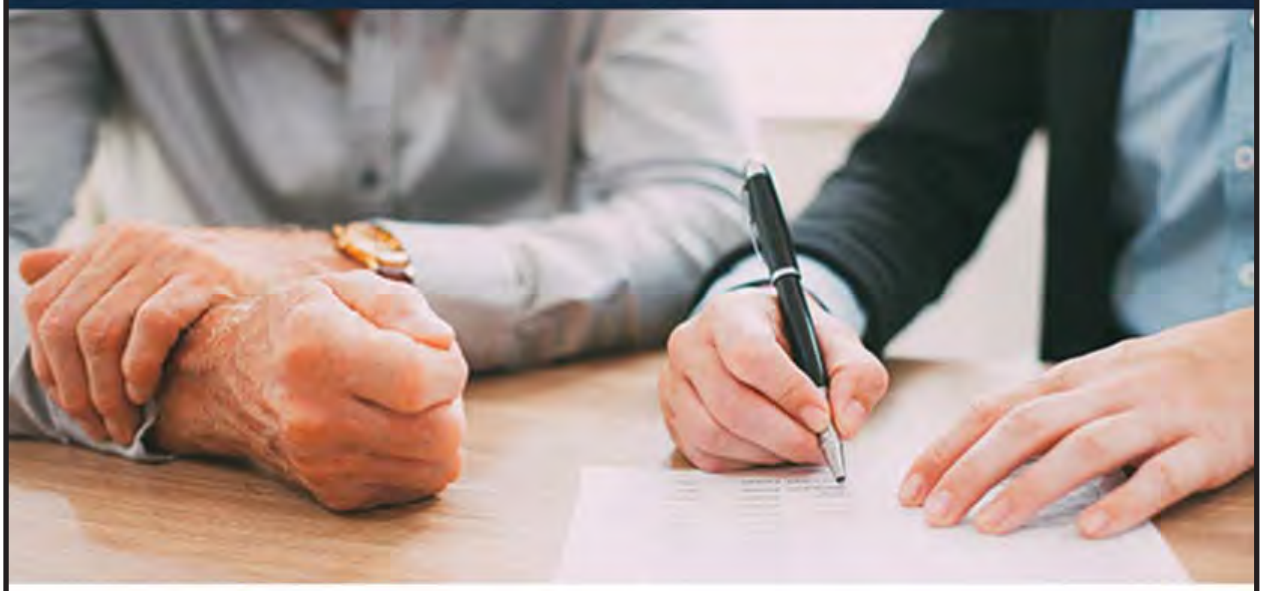




aw and eds Section l Meeting



Introduction to Elder Law & Starting an Elder Law Practice



1.5
MCLE
Credits

Friday, February 9, 2018
2:00 p.m. - 3:30 p.m. | Live and Webcast
CFA Society New York | 1540 Broadway | New York, NY 10036

In this basic-level program, the faculty will present a nuts and bolts overview of how to establish an elder law practice including coverage of key terms and basic concepts, practical tips for focusing a practice on elder law, resources and relationships for the novice elder law attorney, variations on how to start and manage an elder law practice as well as considerations for building a practice and gaining experience/knowledge in the area of elder law. Whether you are new to the practice area or an experienced practitioner preparing to go out on your own for the first time, this program will provide valuable and practical tips about establishing and successfully managing a thriving elder law practice.

Upcoming Elder Law & Special Needs CLE Programs:

Real Property and Tax Issues for the Elder Law Attorney
Thursday, March 1, 2018 | 10:00 a.m. - 11:30 a.m. | NYC & Webcast

Aging and Longevity Law
Tuesday, March 6, 2018 | 9:00 a.m. - 4:00 p.m. | NYC & Webcast

Home Care in New York State
NYC & Webcast | Albany

The Marriage of Elder Law and Family Law
Thursday, April 26, 2018 | 1:00 p.m. - 2:30 p.m. | NYC & Webcast

Mitigating Bias: A Focus on Clients with Capacity Concerns
Tuesday, May 15, 2018 | 3:00 p.m. - 4:30 p.m. | NYC & Webcast

Special Education Law Update 2018
Albany | Buffalo | NYC & Webcast | Long Island

Senior Member Spotlight: JulieAnn Calareso

Interview by Katy Carpenter

Q Where are you from?

A I was born in Teaneck, New Jersey. My dad's job moved us to Buffalo and then to Clifton Park when I was in junior high. I consider upstate New York my home.

Q What do you like about the Capital District?

A When my husband and I were considering moving from our place in Brooklyn, we looked at all usual options for suburban living, but had always loved the quality of life in upstate New York, so we chose to come home! We're close enough to New York City to enjoy it when we want, and close enough to Boston and Montreal to make travel easy, but we wanted to grow our family upstate.

Q Tell me about your family.

A I'm married with two children—a 13-year-old daughter and an 11-year-old son. I met Jack, my husband and fellow lawyer, when we were both in high school. He went right on to law school while I got waylaid with my first career in TV and movies. It wasn't until I moved back from Los Angeles that we met back up and we were married before I began law school.

Q Tell me more about your TV and movie career!

A I have a degree from Fordham in communications, and had three amazing internships while an undergrad: CBS Evening News, the casting department at *As the World Turns*, and with Paramount Pictures in their motion picture publicity department. After college, I was lucky to get work "in the business" but all the rumors about Hollywood are true! I did exciting things like fetching lattes at 2 p.m. each afternoon from the coffee truck. I got the producer's car washed. I even had to find a farm so that my boss's sheepherding dogs had sheep to herd! There definitely is a superficial hierarchy in that industry and I came to the realization I would never be fulfilled doing that.

Q Have you had any turning points in your life?

A The most significant turning point was when I realized that to climb the ladder in the entertainment business meant I might have to compromise my beliefs and values. Not being willing to sell myself out to move up, I knew I had to leave. I left L.A. and moved back to New York. I got a job as a legal secretary for a large law firm, and that was a great experience because I learned what kind of law I didn't want to practice. Having been a secretary in a law firm has also given me a lot of perspective as I have made my way throughout my career. I then began law school in New York City, but transferred to Albany Law School after the first year.

Q Where have you traveled?

A Not as many places as I would like! I've seen a lot of the US, and had a great trip to Ireland with my college marching band, and then my husband and I were also able to travel to Italy before we had kids. I'm looking forward to discovering the world with my kids now that they are older.

Q What do you like most about your work in the area of Elder Law?

A I like making a difference in people's lives. I like the collaboration and cooperation that has to occur as we age and as we care for our elders. I chose elder law early on in law school. As a non-traditional student, as soon as I knew what I wanted, I was focused on achieving it. I was smitten with Professor John Welsh's Trusts and Estates class, and fell in love with elder law as Rose Mary Bailly and David Pratt introduced me to that niche. I reflected on my own personal family experiences with my grandmothers, and I knew that elder law was right for me!

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

A As any working mom will tell you, it is no small feat to work full-time and be a mom! It's also an accomplishment that my husband still loves me after all of this. Professionally, there was one guardianship matter early on in my career that really struck a chord with me. It was a dangerous situation where a young AIP with early onset Alzheimer's was in danger of being taken out of the country by her paramour, and we overcame crazy obstacles to protect her. I was impressed by how attentive the judge was to the situation, and was gratified by the intense level of care all parties involved took to ensure her safety. She is now safe and living with her daughter out of state, and it was one of the moments when I was most proud to be a part of the legal profession.

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

A I always thought I would be a screenwriter. I have a horrible VHS tape of my first movie made from a screenplay I wrote in college. I should have taken the hint right then and there!

Q What are your hobbies or special interests?

A I'm a hockey mom, which means I've become an avid hockey fan. I love being a hockey mom, and have become a fan of ECAC hockey and the Boston Bruins. Jack brought sports to the marriage (it came with the wedding vows!) and despite being a lifelong NY/NJ girl, I'm a full-fledged member of Patriots, Bruins, Celtics and RedSox Nation. I am also a barn mother, as my daughter has been riding horses for several years now. I surprised myself by enjoying being around the stables. I also do some volunteer work, focusing on caregivers.

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

A My favorite people, places and things are those that make me laugh!

NEW YORK STATE BAR ASSOCIATION

NYSBA 2018 Membership Application

Please check the appropriate box: ☐ **I wish to join the New York State Bar Association** ☐ **I wish to reactivate my membership**
☐ **I wish to join the Sections checked below *(NYSBA membership required)***

ENROLLMENT INFORMATION

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

E-mail address _____

Fax number (_____) _____

Date of birth _____ /_____ /_____

Law school _____ Graduation date _____

States and dates of admission to Bar: _____

DUES PAYMENT

Association Membership Dues	
Section Dues *(Optional)*	$
TOTAL ENCLOSED :	$

METHOD OF PAYMENT: ☐ Check (payable in U.S. dollars) ☐ AIP (see reverse)

☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number | | | | | | | | | | | | | | | | |

Expiration Date _____ Date _____

Signature _____

New members: Please include proof of your admission to the practice of law.

Please return this application to: **MEMBER RESOURCE CENTER**
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

ANNUAL MEMBERSHIP DUES *(check One)*

Class based on first year of admission to bar of any state.
Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2010 and prior	$275
☐ Attorneys admitted 2011-2012	185
☐ Attorneys admitted 2013-2014	125
☐ Attorneys admitted 2015 - 3.31.2017	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2010 and prior	$180
☐ Attorneys admitted 2011-2012	150
☐ Attorneys admitted 2013-2014	120
☐ Attorneys admitted 2015 - 3.31.2017	60

OTHER

☐ Sustaining Member	$400
☐ Affiliate Member	185
☐ Newly Admitted Member*	FREE
☐ Law Student Member	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS

Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS

Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association

Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association

*Newly admitted = Attorneys admitted on or after April 1, 2017

Law Students = Person(s) enrolled in an ABA accredited law school (includes law graduate students, within 2 years of graduation only, awaiting admission)

SECTIONS — I WISH TO JOIN THE FOLLOWING SECTION(S):

☐ Antitrust*	$30.	☐ Judicial	25.
☐ Business Law**	25.	☐ Labor & Employment Law**	35.
☐ Commercial & Federal Litigation*	40.	☐ Local & State Government Law*	30.
☐ Corporate Counsel*	30.	☐ Real Property Law+ *(Attorneys admitted 5 years or less are $10)*	40.
☐ Criminal Justice+	35.		
☐ Dispute Resolution***	35.	☐ Senior Lawyers *(Focus on Attorneys age 55 and over)*	20.
☐ Elder Law & Special Needs*	30.		
☐ Entertainment, Arts & Sports Law*	35.	☐ Tax*	25.
☐ Environmental & Energy Law*	35.	☐ Torts, Insurance, & Compensation Law**	40.
☐ Family Law*	35.		
☐ Food, Drug & Cosmetic Law*	25.	☐ Trial Lawyers****	40.
☐ General Practice**	25.	☐ Trusts & Estates Law**	40.
☐ Health Law**	30.	☐ Young Lawyers *(Law Students, and attorneys admitted less than 10 years)*	20.
☐ Intellectual Property Law*	30.		
☐ International†	35.		

Section Dues Total $ _____

* Law Student Rate: half price** Law Student Rate: $5 *** Law Student Rate: $10
**** Law Student Rate: $15 † Law Student Rate: $12.50 +Law Student Rate: FREE

Automated Installment Plan (AIP) Enrollment Form

Save Time with AIP

Now New York State Bar Association (NYSBA) members can save time with direct dues payment. An alternative to writing checks and mailing your membership dues, with AIP you can authorize NYSBA to withdraw payments electronically from your credit card account. Go to **www.nysba.org/AIP** for more information. You can conveniently sign up for AIP on the enrollment form below. It's safe, easy and convenient!

AUTOMATED INSTALLMENT PLAN (AIP) ENROLLMENT AUTHORIZATION I hereby authorize NYSBA to instruct my financial institution to deduct directly from my account the amount necessary for my annual membership, per the payment schedule selected below: 1, 2, 3 or 4 payments on or about the 25th of the relative month(s). **All installment payments must be completed by April 30, 2018.** Those opting into the installment payment program in Dec, Jan, Feb or March of the current dues billing year may have their payments consolidated and accelerated to meet this requirement. By selecting the AIP method **I understand this agreement will remain in effect for future membership years, unless I request cancellation in writing to:** NYSBA, Dues Processing, One Elk Street, Albany, NY 12207.

Total to be debited: $ ☐☐☐.☐☐

Signature:_____ Date:_____

6/17

Member Information

Name: _____ NYSBA Membership ID # : _____

Address: _____

Address: _____

City, State, Zip: _____

Phone Number: _____ E-mail: _____

Payment Schedule

☐ **1** Full Payment ☐ **2** Payments ☐ **3** Payments ☐ **4** Payments

☐ **AIP — Credit/Debit Card Authorization**

Credit Card ☐ AMEX ☐ DISC ☐ MC ☐ VISA

Credit Card Number: ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐ Exp. Date: ☐☐/☐☐

Authorized Signature: _____

Please return this form to: NYSBA, Member Resource Center, One Elk Street, Albany, NY 12207
Phone 800.582.2452/518.463.3200 FAX 518.463.5993
E-mail mrc@nysba.org

IMPORTANT NOTICE: Membership dues to the New York State Bar Association are not tax deductible as charitable contributions for income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying activities. The NYSBA estimates that the non-deductible portion of your 2018 dues which is allocated to lobbying is approximately 2.0%. Portions of your dues payment are allocated toward the annual publication subscriptions for the following: *NYSBA Journal*, $14.75; *New York State Law Digest* $6.25; *State Bar News* $7.25.

Predatory Marriages: A Growing Concern

By Deborah S. Ball and Malya Kurzweil Levin

Introduction

For many Americans today, older adulthood is a time of increased financial security. According to the Centers for Disease Control, people 65 and older have the lowest poverty rate of all demographics. There are a number of reasons for this phenomenon. Older adults can take advantage of government entitlements such as Medicare and Social Security to buoy their financial security. They may have saved money, often utilizing financial services like IRA or 401(k) accounts, through which funds may only be accessed penalty-free once the individual is a certain age. Additionally, many large expenses like raising children or paying off mortgages have been concluded, leaving older adults with increased disposable income.

This enviable financial situation, coupled with the isolation and loneliness that can sometimes accompany aging as family members and friends pass away and scatter, makes older adults increasingly vulnerable to financial abuse with an emotional component. One such gambit, the predatory or secret marriage, has been seen increasingly by attorneys and the courts in recent years. In this scheme, a man or woman enters into a relationship with an older adult for the purpose of gaining access to the victim's assets or estate. The victim may believe that the relationship is romantic, but the perpetrator, who is often significantly younger and commonly plays some type of caretaker role in the victim's life, is motivated solely by financial gain. Some cases may also involve a long-standing relationship that never resulted in marriage while both parties were in good health, but then a marriage is secretly and hastily obtained once one of the parties has become cognitively impaired. The perpetrator swiftly and secretly marries the victim in a courthouse ceremony, often taking advantage of a period when other family supports are away or unavailable. The victim may misguidedly believe he or she has found love and companionship, or alternatively, due to cognitive impairment, may not even realize the marriage has occurred.

Once the marriage has been performed, the perpetrator typically moves quickly, becoming a joint owner of bank accounts that had belonged to the victim and draining large sums of money; transferring real property; or arranging to inherit significant amounts from the victim's estate, either through a new will, changing the beneficiary designations, or even via elective share.

Case Study: Predatory Marriage: Jack's Story

Jack was a lifelong bachelor in his late 60s. A car accident is his youth had left him with a traumatic brain injury, which impaired his judgment and impulse control. He had always lived with his mother, and upon her death he inherited her sizable estate. One day, shortly after his mother's death, Jack was approached on the street outside his bank by Rae, a woman in her 30s, who said she'd seem

Deborah S. Ball

Malya K. Levin

him around the neighborhood and would like to get to know him better. Jack, living alone for the first time in his life, was eager for companionship. Jack and Rae began spending time together, and Jack was happy to sponsor their lavish dinners. Just a few weeks after they had met, Rae brought Jack to City Hall, where they were married. They went directly from the ceremony to the bank, where Jack listed her as a joint owner on all of his accounts. Jack was thrilled, believing he had at last found the love of his life. Once they had married, though, Jack saw Rae much less. She claimed she couldn't move in with him because of her work schedule, but sometimes he didn't see her for weeks at a time. When she appeared, she often wanted things from the apartment, like the television or pieces of his mother's jewelry. Mysterious bills began to arrive at the house. Jack got a call from his bank inquiring about suspicious activity, a pattern of large withdrawals. Confused and agitated, Jack hung up on the bank. Concerned about the possibility of financial exploitation, the bank referred the case to Adult Protective Services.

A caseworker visited Jack. She found him alone in an unkempt apartment, his clothes hanging on him from all the weight he had lost. Though he was highly defensive, the caseworker gathered enough information to realize that a call to the District Attorney was appropriate. When the Elder Abuse Unit reviewed the case, the details sounded familiar. They had been investigating the same woman for perpetrating the same scheme with another man simultaneous to Jack's case. The District Attorney's Office ultimately entered into a plea agreement with Rae which included restitution and jail time. Jack was transferred to the Harry and Jeanette Weinberg Center for Elder Justice, an elder abuse shelter located within the Hebrew Home at Riverdale, where he was able to receive medical care, counseling to process the true nature of his relationship with Rae, therapeutic activities to engage him in a new community, and legal advocacy to stabilize his finances. An Article 81 guardianship proceeding was initiated, and Jack was found to lack capacity. A cousin who had known Jack since childhood was appointed. The guardianship court was also able to annul Jack and Rae's marriage, thus ensuring Rae would no longer be able to access Jack's finances or assets and, eventually, would not have any rights to his estate.

Predatory Marriage: Case Study Analysis

Unfortunately, Jack's story is atypical in two critical ways. First, the existence of multiple victims made it pos-

sible for the local District Attorney's office to successfully secure a guilty plea from the perpetrator and some justice for the victim. Often, this is not the case. For example, in *In re Application of Doar v. LS*, an Article 81 guardianship proceeding with a predatory marriage at its center, the court noted that, although the AIP's close friend had reported the suspicious relationship to the District Attorney's office, the investigation had ceased once the perpetrator, a woman nearly 40 years younger than the AIP who had served as his home attendant, had married the AIP.[1]

Second, in Jack's case, an observant professional at his bank took the appropriate precautions and reported the institution's concerns to Adult Protective Services. Ultimately, this action allowed Jack to receive the assistance he needed. There is currently no mandated reporting for financial institutions in New York State. In many cases, privacy or liability concerns prevent financial institutions from making these sorts of reports to institutions like Adult Protective Services. This is true despite the federal interagency guidance issued in 2013 advising financial institutions to make these reports, and indicating that doing so is not a violation of the Gramm-Leach-Bliley Act.[2] Therefore, these predatory marriages are often only discovered when a victim's money is irreparably lost or even after the victim has died.

In one such case, *Campbell v. Thomas*,[3] the court took notice of the fact that New York has no statute which specifically addresses a situation in which a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage.[4] It call[ed] upon the Legislature to reexamine the relevant EPTL and the Domestic Relations Law…to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and unjustly enrich themselves at the expense of such victims and their rightful heirs.[5]

NY Domestic Relations Law, Article 2, Section 7, provides that a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is 18 years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;
2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consent to such marriage by reason of force, duress or fraud;
5. Has been incurably mentally ill for a period of five years or more.[6]

It is important to understand that there is a distinction between "void" marriages and "voidable" marriages. Under the Domestic Relations Law, a "void" marriage is one which is defined as incestuous (DRL § 5)[7] or bigamous (DRL §6).[8] A void marriage is considered nonexistent from the beginning. However, a voidable marriage, as defined above, is still considered valid until the point in which a court has declared otherwise.[9] This means that in order to eradicate the marriage, it must have been annulled during the lifetime of the spouses. This is especially problematic because if the marriage was made in secret, it would not likely become known until after the death of the incapacitated spouse. Unfortunately, EPTL § 5-1.2 recognizes the surviving spouse's right to the elective share of the decedent's estate where there has not been pre-death annulment.[10] The court in *Campbell v. Thomas* noted that since the marriage was not declared a nullity until several years after the decedent's death, his surviving spouse "technically had a legal right to her elective share."[11] But since the Supreme Court is one of equity as well as law, it applied the principle that no one has a right to profit from fraudulent activity, and denied the living spouse's petition for an elective share.[12]

Recognizing the gravity of situations where one person is incapable of consenting to a marriage due to lack of capacity, the court in *Campbell v. Thomas* began its opinion with a discussion about elder abuse. Specifically, the court referred to financial exploitation of vulnerable elderly individuals.[13] The court was conscious of the fact that financial exploitation of the elderly most often involves someone who, as in Jack's case, has a relationship with the victim. In that case, the decedent, Howard Nolan Thomas, had an ongoing relationship with Nidia Campbell that spanned over two decades. Based upon the circumstances evinced, the Court determined that Nidia Campbell had knowledge of the decedent's lack of capacity (even without a judicial determination) and, nonetheless, waited until his primary caregiver was out of town to marry Mr. Thomas. The family was not informed until after the marriage occurred, and thereafter she substantially altered Mr. Thomas's estate plan and present ownership of his assets by creating joint accounts and changing beneficiary designations. The court found that she was entitled to remain as beneficiary on the decedent's retirement account because that designation occurred prior to the marriage.

Citing the seminal case, *Riggs v. Palmer,*[14] which holds that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to fund any claim upon his own iniquity, or to acquire property by his own crime," the court found "ample support" that Ms. Campbell was aware of the decedent's "lack of capacity to consent to the marriage, and took unfair advantage of his condition for her own pecuniary gain…."[15] The court upheld the Supreme Court decision declaring that Nidia Campbell had no rights of a surviving spouse.[16]

Remedy is also available in the context of a guardianship proceeding. Mental Hygiene Law § 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, 5-1505, or 5-1506 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 or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.[17]

In the case of *In Re Kaminester*, the court reviewed Domestic Relations Law § 7.2 and Mental Hygiene Law § 81.29(d).[18] The court found that, where a guardian has been appointed, the court can make a determination that a marriage entered into by an incapacitated person, which is defined as contract, can be annulled or revoked.[19] In this case (and the numerous related cases, both in the states of New York and Texas), Richard Kaminester was determined by clear and convincing evidence to require a guardian. Inalee Foldes secretly married Richard Kaminester following the appointment of a temporary guardian. Mr. Kaminester died two-and-half months later. One of the issues raised was to disqualify Ms. Foldes from asserting her right of election as a surviving spouse. The marriage was subsequently revoked and voided pursuant to Mental Hygiene Law §81.29(d). In the decision, the court discussed the fact that under DRL §7, a marriage becomes a nullity as of the date it was annulled.

As seen in the *Campbell v. Thomas* case, the court acknowledged that since there was no pre-death annulment, Ms. Campbell was considered a surviving spouse. Ultimately, however, the court would not allow her to benefit from her fraudulent activities. The court in *In Re Kaminester* pointed out that under Mental Hygiene Law §81.29(d), if there has been a determination of incapacity, a guardian under Article 81 can revoke a marriage and that such revocation is "*void ab initio*." As a result, there can be no legal interest claimed as a surviving spouse.[20] This is the action that was taken in Jack's case to avoid further exploitation during his life, as well as potential estate administration issues.

A court-appointed guardian also retains certain types of authority even after the death of the incapacitated person. In the *In re Dandridge*, the court found it proper to annul the marriage between the incapacitated person and his wife. In this case, the court directed the temporary guardian to investigate the circumstances of the marriage between the alleged incapacitated person and his wife. The alleged incapacitated person, Aldo G., attended his brother's funeral in Georgia during the pendency of the guardianship proceeding, and during that time, he and Ann G-D, who was Aldo G.'s long-time caregiver, were married. The lower court held that "Aldo G. was incapacitated, lacked the capacity to enter into a marriage, and, as a result, annulled the marriage."[21] Although Aldo G. died while the matter was being appealed, the Appellate Court reasoned that "a guardian's powers and the guardianship court's supervision may continue even after the incapacitated person's death."[22]

Predatory Marriages: A Call to Action

Civil attorneys can play a critical role in identifying and intervening in cases of predatory marriages. Attorneys may see red flags such as: a new relationship that has progressed very quickly, particularly one in which:

- One spouse is significantly younger and/or had been in a paid caregiver role for the older spouse;
- The client seems confused about the nature of the relationship;
- The new spouse seems to be directing a significant change to the client's finances or estate plan;
- Client's family or longtime friends seem possibly unaware of the marriage.

In such cases, attorneys should, prior to executing any documents, meet with the client alone to assess the client's capacity to execute whatever transaction has been requested, the client's understanding of the rights conferred by marriage, and whether the client is being threatened or coerced. The attorney can then proceed with assisting the client based upon the knowledge gained from this interview. Additionally, attorneys should be aware of the court's authority to annul a marriage in the context of a guardianship proceeding.

Predatory marriages are likely to become increasingly common and visible as life expectancy continues to rise. It is appropriate for attorneys to be aware of how to spot predatory marriages and how to investigate them effectively and efficiently.

Endnotes

1. *In re Application of Doar v. LS*, 2013 NY Slip Op. 50988. The facts of this case are significant because the victim, L.S. was still alive when the matter came to light. The IP testified in the guardianship proceeding and demonstrated confusion. He did refer to Vanessa T.S. as his wife, but the court found that he lacked capacity.
2. Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, 2013, at https://www.fdic.gov/news/

news/press/2013/interagency-guidance-on-privacy-laws-and-reporting-financial-abuse-of-older-adults.pdf?source=govdelivery.

3. *Campbell v. Thomas*, 72 A.D.3d 103; 897 N.Y.S.2d 460, 2010 N.Y. App. Div. LEXIS 2031, 2010 Slip Op. 2082.
4. *Campbell v. Thomas*, HN1.
5. *Campbell v. Thomas*, at 1.
6. DRL § 7.2.
7. DRL § 5.
8. DRL § 6.
9. *Campbell v. Thomas*, at 14,15.
10. EPTL § 5-1.2.
11. *Campbell v. Thomas*, at 24.
12. Campbell v. Thomas, citing N.Y. Const. art VI, § 7,[a]; *McCain v. Koch*, 70 NY2d 109, 116, 511 NE2d 62, 517 NYS2d 918 [1987], at 24.
13. *Campbell v. Thomas*, at 4.
14. *Riggs v. Palmer*, 115 NY 506, 511, 22 NE 188, 23 Abb N Cas 452 1889.
15. *Campbell v. Thomas*, at 28.
16. *Campbell v. Thomas*, at 36, citing *Kaminster v. Foldes*, 51 AD3d 528, 529, 859 NYS2d 412 [2008].
17. MHL § 81.26.
18. *In Re Kaminester*, 26 Misc. 3d 227, 888 N.Y.S.2d 385, 2009 N.Y. Misc. LEXIS 2916, 2009 N.Y. Slip Op. 29429.
19. In the related Supreme Court case, *Kaminister v. Foldes*, 51 A.D. 3d 528, 859 N.Y.S.2d 412, 2008 N.Y.App.Div. LEXIS 4315, 2008 NY Slip Op. 4557, the court found that revocations of a marriage contract it a remedy under MHL § 81.29(d) where it has been proven by clear and convincing evidence that the person executing the document (in this case, a marriage license) lacked the requisite mental capacity.
20. *In Re Kaminester,* at 16.
21. *In re Dandridge*, 120 A.D.3d, 1411, 993 N.Y.S.2d 125, 2014 N.Y.App. Div. LEXIS 6272; 2014 NY Slip Op 06311, at 5.
22. *In re Dandridge*, at 7-8. It should be noted that while the Court reviewed the issue of capacity based upon the underlying case, it nevertheless, remanded the matter for a hearing to determine capacity because the appellant, Ann G-D, did not receive proper notice and was therefore, deprived of the opportunity to be heard before the Court annulled the marriage, at 7-8.

The Law Offices of Deborah S. Ball is a practice concentrating on elder law issues, matters affecting the developmentally disabled, trust and estate planning options, including will preparation, and estate administration. As a former Assistant District Attorney, Ms. Ball investigated financial exploitation against the elderly community. Ms. Ball is a member of the New York State Bar Association Elder Law Section where she is a member of the executive committee. She is the Co-Chair of the Elder Abuse Committee and serves on the Guardianship Committee, the Mental Health Law Committee and the Committee on Special Needs Planning. She has served on the Committee on Representing Developmentally Disabled Persons for over twenty years; and is a member of the Trusts and Estates Section. She is a member of the Brooklyn Bar Association Elder Law Section. Additionally, Ms. Ball presently serves as a member of the board of the Brandeis Association of Jewish Lawyers. Ms. Ball is also a member of the Attorney's Council of the New York Chapter of Hadassah and served as the co-chair for the Working Mother's Committee of the Women's Bar Association.

Malya Kurzweil Levin, Esq. is the Staff Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first emergency elder abuse shelter. In this role, she represents clients who are victims of acute abuse and speaks about the legal facets and ramifications of elder abuse to a variety of audiences. Malya received her JD cum laude from Brooklyn Law School in 2012. She has written for a variety of legal publications including the *NAELA Journal* and the *New York State Elder Law and Special Needs Journal*. She is a certified Reiki energy healer.

Pros and Cons of Practicing Guardianship Law

By Stephen Donaldson

While I was in law school, practicing elder law seemed like a good idea because the size of the aging population meant there would be a large pool of local clients to target. To get started, I took a guardianship course and qualified to act as court evaluator in Mental Hygiene Law Article 81 proceedings. This allowed me to get involved in court proceedings while I was still a student.

That was 2013. Since then, I've been appointed as court evaluator, attorney for alleged incapacitated person (AIP), and guardian. Based on my experience, here are what I see are the advantages and disadvantages of practicing guardianship law.

Advantage Number One—Altruism

I'm yet to meet a judge who appoints a guardian lightly. A guardian is only appointed for a person who is incapacitated and in need of help, and all professionals involved in a typical guardianship proceeding—petitioner, attorney for the incapacitated person, and the court evaluator—are genuinely providing a service for a person who is unable to help him or herself in some form.

When you practice guardianship law, some authentic good is being done. This may allow the attorneys involved to walk away from the proceeding knowing that the incapacitated person is now in a better position than they were before the appointment of a guardian. If an attorney's goal is to leverage the law in a manner that lends to building a career that involves improving the lives of those who can no longer help themselves, guardianship law is a good place to be.

Advantage Number Two—Opportunity

In all the proceedings in which I've participated, I haven't heard a single judge or court attorney complain of a lack of work due to dwindling Article 81 petitions.

Every well-informed professional with whom I've spoken about the population overall is aware that everyone is getting older because we're living longer than ever before. And assuming an ever-improving state of medicine and medical technology, it feels safe to conclude that this trend is only going to continue. So unless a treatment or cure is developed for dementia,[1] the available work in the realm of guardianship law will only grow.

Advantage Number Three—Ingenuity Trumps Experience

The first Article 81 appointment I received was that of court evaluator and it's been a role I've enjoyed filling since. Evaluators are tasked to investigate for the court.[2] This includes collecting as much information as possible, interviewing all interested parties, the petitioner and the AIP, trying to make sense of it, and then providing the court with a written report and recommendation as to whether the evaluator believes the appointment of a guardian is necessary.

One does not need 10 years of legal experience to excel as an evaluator. Rather, one needs to do two things. First, become familiar with the Mental Hygiene Law statute that lays out an evaluator's role.[3] The statute identifies what information the evaluator should seek out.

Second, try to leave no stone unturned, meaning the more diligent and creative one can be in terms of tracking down information, the more success one will achieve as an evaluator.

And here's one more practical tip. When receiving an appointment to act as evaluator from a judge for whom you've never appeared, call or fax chambers and ask for an example of a recent report that the court received that they felt was above-average. You might end up empty-handed if the court is busy or can't think of anything recent that they thought stood out as a model example of an evaluator report, but even if you don't get anything, at least the court will know that you're the type of evaluator who is planning on coming to court as prepared as possible.

Now, for the disadvantages of practicing guardianship law.

Disadvantage Number One—The Cap

Not long ago, the Chief Judge of New York State decided that regarding Article 81 appointments—anyone awarded more than $75,000 in fees in a calendar year—shall be ineligible to receive appointments the following calendar year.[4]

In plain English, if you are awarded $75,000.50 between January and December, you can't receive any

appointments the next year regardless of whether you collected a single dime.

The rationale for the cap is in regard to a report that was issued years ago where it was found that the majority of court appointments were being awarded to a limited number of attorneys. Our state judiciary's answer was to create the cap to make the appointment process more democratic.

I appreciate the idea behind this, but it overlooks a few realities of receiving appointments, the biggest of which is that the attorneys who do the best work usually get the most appointments.

I hit the cap in 2017. Am I miffed about this? Of course. The judiciary has essentially put their hands in my pockets or, to be more accurate, the chief judge has dictated how big my pockets can be regardless of the quality of my work.

Disadvantage Number Two—Judiciary Discretion

Speaking of people putting their hands in your pockets, Article 81 grants judges the discretion to set the fees of those attorneys involved in guardianship proceedings.[5] This is true even for parties who hire their own attorneys privately: all attorneys who appear must submit affirmations of legal services so the court can set the fees to be paid from the AIP's assets within the final order.

When I think of judicial discretion in relation to fees in Article 81 proceedings, the voice in my head says, *"The Court giveth, and the Court taketh away."* As an attorney who often acts as appointee in guardianship proceedings, the court gives me the opportunity to earn a fee but, after everything is said and done, the court has the opportunity to set my fee as it sees fit. While I don't raise this point as a complaint, I bring it up for the possible guardianship practitioner to be aware of when contemplating taking on Article 81 work. In my experience, depending on the county in which I've been appointed, I usually see 10 percent to 20 percent reduction in the fees I'm awarded compared to the fees requested. And, dear reader, take this for whatever it's worth, but I do *not* inflate my fee requests because I've never been willing to wade into the waters of grievance trouble over two-tenths of an hour in billing. Due to the discretion of the judge assigned to the case, if I do $300 worth of work based on accurate time keeping, it's likely I'll receive a final award of $250, give or take a few bucks.

Disadvantage Number Three—Paper Chase

While in law school, I interned at the Bronx Surrogate's Court. I've never forgotten the conference I sat in during which a personal injury action was being discussed in relation to an estate. The attorney for the plaintiff turned to me and said, "Personal injury is pretty good. You don't have to go chasing after people to get paid."

You can reach Stephen Donaldson at steve@nypractice.com or 516.385.2061. The Donaldson Law Firm focuses on litigation in the areas of elder abuse, personal injury, and estate contests.

At the time, not having experience with chasing after people to collect fees, I thought little of the comment. As an intern, I spent most of my time considering what area of law I would practice once admitted rather than the practicalities associated with any given specialty.

I get it now, though. The court's final order that appoints a guardian for an incapacitated person is the same document that sets the legal fees for the attorneys involved. After the order is entered, the guardian usually retains a bond, and then receives his or her certified commission. The guardian is then supposed to pay the court-approved fees from the AIP's assets.

There are exceptions, but I've found the general rule is that collecting a court-approved fee takes effort. In my experience, the majority of guardians don't break out the checkbook and start paying the fees. Rather, if I've spent 15 hours working as evaluator, I usually have to spend another 5% to 10% of that time following up with guardians and gently reminding them they've got bills to pay.

To that attorney in Surrogate's Court that day who warned me about having to chase after money? I could not agree with you more.

Disadvantage Number Four—Non-Delegable Duties

When acting as a court appointee, i.e., guardian, evaluator, attorney for the AIP, etc., most of the tasks involved can't be delegated so that the appointee must handle the majority of the work him or herself.

I understand why that's a good idea—the judge who makes the appointment wants the reassurance of knowing who specifically is going to do the work. And the judge wants that same person in his or her courtroom on the return date.

Conversely, two challenges arise. First, each appointee has a limited amount of time in which the work can be performed. More important, there are certain tasks when

acting as guardian that are not considered "legal" work. If an attorney acting as guardian usually bills in the realm of $300 per hour for tasks such as drafting and court appearances, that same attorney who spends three hours at the local social security administration office to marshal an AIP's income can't bill that $300 hourly rate because such a task is considered administrative rather than legal.

Why? Because the court examiner who will review the guardian's affirmation of services is going to recommend *against* the Court approving an hourly rate more than $125 or so for such administrative work which, again, the guardian can't delegate to a paralegal or administrative assistant.

Anecdotally, this is why many attorneys will not make themselves available for appointments to act as guardian. Why take on a role where there is not only a layer of judicial discretion over the final fee requested, but there's an interim layer that involves a court examiner recommending that any tasks that are not discretely legal in nature can only be billed at a rate at least half of what the attorney would customarily charge?

Summary

To practice guardianship law or not, that is the question.

I realize that my observations above likely paint a picture of this author as a greedy, money-hungry lawyer. However, dear reader, I respectfully disagree. I present you only with what I've found to be the realities of trying to make a living as a lawyer focused on guardianship law relying somewhat on court appointments as I've gone about trying to build a favorable reputation in the field. Again, the purpose of this writing is not to complain but to provide a brief overview of what I would have found to be resourceful when I was first thinking of targeting guardianship law as a practice area.

Endnotes

1. Based on this author's anecdotal evidence, the bulk of Article 81 petitions are brought due to respondents suffering from some form of dementia.
2. See MHL § 81.09(c).
3. Id.
4. 22 NYCRR § 36.2(d).
5. Rucciuti v. Lombardi, 256 A.D.2d 892 (3d Dep't 1998).

New Member Spotlight: Lauren Sharkey

Interview by Katy Carpenter

Q Where are you from?

A Niskayuna.

Q What do you like about the community you serve?

A I enjoy living in the community where I work because my clients could be my neighbors. It makes me feel connected to my community. I also like the location of Niskayuna, as it is close to both the Adirondacks and New York City.

Q Where have you traveled?

A Most recently I was a bridesmaid in a wedding in Australia and we had a three-day layover in Beijing! We also went to Europe on our honeymoon. For now, I'm done traveling that far because I have a one-and-a-half-year old daughter.

Q Why the choice to practice in the area of Elder Law?

A When I was in college, I lived with an 89 year old woman as part of a home sharing program offered by a non-profit who matched someone under the age of 65 with someone over the age of 65 so they could remain in their home. I saw her struggles and it motivated me to focus on elder law in law school. I continue to practice elder law today because I find it challenging and also rewarding; I like helping people when they need it.

Q What's your favorite part about your job?

A I enjoy the flexibility my firm provides, especially with my young family—that is critical, and as for the practice, I enjoy the transactional aspect and meeting with clients on a daily basis.

Q Tell me about an accomplishment that you consider to be the most significant in your career thus far.

A No awards yet, unfortunately! In truth, when clients are happy with the work I provide, that feels like an accomplishment to me, no matter how small the matter is.

Q Have you had any turning points in your life?

A Having my daughter has made me more focused and I feel more responsibility, yet confident at the same time.

Q Where do you see yourself in five years?

A As partner!

Q How is it working with family?

A It has been professional and easy, thankfully. Some may think it's hard to have your employer at every holiday but the flipside is that we have things in common outside of the family matters.

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

A A CEO or a lawyer.

Q What are your hobbies or special interests?

A I still play soccer—now I'm in an over 30 league! I also love running—I run 5ks and half marathons. I ran a full marathon in 2015 and I hope to compete in the Ironman 70.3 in Lake Placid in September of 2018. I plan to train with a friend who has two kids—it will be our "comeback event."

Q Have you ever been given advice that you remember?

A When I was in college and contemplating going to law school, I asked my business law professor what I could do to prepare and he said to "read…anything."

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

A I became involved in NYSBA leadership through the encouragement of my employer. I would encourage all employers reading this to consider doing the same for your new associates: it helps develop leadership skills, strengthens networks, provides speaking and educational opportunities, and more.

Committee Spotlight

Special Needs Planning Committee

The Special Needs Planning Committee addresses issues related to individuals with special needs including developmental disabilities, mental illness or physical limitations. We also address legislation, advocacy, guardianship, supplemental needs trusts as well as residential and other programmatic services. At current, the Committee is focusing on a number of important projects. They are as follows:

1. Updating the Pooled Trusts list as a resource for the Committee's webpage.
2. Completing the collection and compilation of county by county survey as to how to establish SNTs within a 17-A guardianship, which will be posted on the Committee's webpage.
3. Monitoring SCPA 17-A legislation and litigation.
4. Proposing and coordinating Special Needs Planning Pro Bono Legal Clinics with the Section's District Delegates.
5. Exploring group housing models with first party and third party SNTS.
6. Updating the Waiver list that is currently on the Committee's website.

In addition to these ongoing projects the Committee holds monthly conference calls wherein guest speakers present on relevant topics and legislative initiatives that impact individuals with special needs and their families.

If you are interested in helping out with any of these projects and joining the Special Needs Planning Committee, please contact co-chair Joan Robert at joanlenrob@krllaw.com or co-chair Adrienne Arkontaky at aarkontaky@cuddylawfirm.com.

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date_____

States and dates of admission to Bar:_____

Please return this application to:
MEMBER RESOURCE CENTER
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

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

The Elder Law and Special Needs Section Welcomes New Members *(November 2017 through December 2017)*

First District
Peter V. Arcese
David P. Callahan
Michael Ryan Connors
Kenneth V. Gomez
Aileen Gutierrez-Glennon
Rebecca Hanus
Joan D. Hogarth
Mitchell Lapidus
Barbara H Urbach Lissner
Stephen J. Lusthaus
Andrew F. Troia

Second District
Theodore Alatsas
Renata Landskind
Stephen R. Larocca
Patricia Anne Taylor

Third District
Kim Elaine Bode
Deanna Cucharale
Nicholas J. Orecki
Lance R. Plunkett
Anthony A. Prizio
Charles H. Schaefer

Fourth District
Catherine A. Burkly

Fourth District *(continued)*
Ann J. Casey
Maria G. Nowotny

Fifth District
Thomas G. Babcock
Robert F. Himmelman
Kathleen McGivern

Sixth District
Timothy R. Johnson
Sara Rolls

Seventh District
Gregory E. Enos
Geoffrey Arthur Hale
James A. Kaffenbarger, Jr.
Kelly Meyer Lewis
Mario Roque

Eighth District
Timothy P. Bridge
Catherine E. Nagel

Ninth District
Barbara J. Banks Schwam
Farah Khakee
Suhee Kim
Rebecka Palm, III

Ninth District *(continued)*
Kevin Francis Pendergast
Danna M. Wood

Tenth District
Edward A. Andrews
Jeffrey Blankstein
James F. Corcoran
Stephen Donaldson
William R. Garbarino
Arthur J. Golder, III
David S. Green
Laura Elizabeth Johnson
Jacqueline J. Kmiotek-Welsh
Christina Lamm
Wendy L. Lipsky
Ivette X. Matos
Sarah C. Moskowitz
Elie Schulman
Adam Solomon
Bernard Stimler
Orly Taber
Kathleen M. Thompson
Lisa Valente
Kristen Walsh
Elisha Wellerstein
Kathleen Wright

Eleventh District
Bessie Bazile
John J. Darcy
Mul Kyul Kim
Jeanne Kramer

Twelfth District
Kyle S. Edmonds
Kenneth M. Leibowitz

Thirteenth District
Daniel C. Marotta

Out of State
Lynn D. Barsamian
Erica R. Berger-Hausthor
Carole P. Burley
Cirong Kang
Maria Cristina Leria Sirvent
Peter Manda
Stephen J. Murray
Eileen Napolitano
Doug J. Yoon

Section Committees and Chairs

Client and Consumer Issues
Linda A. Redlisky
Rafferty & Redlisky, LLP
438 Fifth Avenue
1st Floor
Pelham, NY 10803
redlisky@randrlegal.com

Diversity
Veronica Escobar
The Law Offices of Veronica Escobar
118-35 Queens Boulevard
Suite 1220
Forest Hills, NY 11375
vescobar@veronicaescobarlaw.com

Elder Abuse
Deborah S. Ball
Law Offices of Deborah S. Ball
880 Third Avenue
13th Floor
New York, NY 10022
dball@ballnyelderlaw.com

Julie Stoil Fernandez
Finkel & Fernandez LLP
16 Court Street
Suite 1007
Brooklyn, NY 11241-1010
jstoilfernandez@ffelderlaw.com

Estates, Trusts and Tax Issues
Patricia A. Powis
The Law Office of Patricia A. Powis
600 Old Country Road
Suite 530
Garden City, NY 11530
patricia@powislaw.com

Judith Nolfo McKenna
Law Office of Judith Nolfo McKenna
1659 Central Avenue
Suite 104
Albany, NY 12205-4039
judy@mckennalawny.com

Ethics
Phillip M. Tribble
Tribble Law
3 Tallow Wood Drive
Suite H-1
PO Box 1411
Clifton Park, NY 12065
ptribble@ptribblelaw.com

Financial Planning and Investments
Amy L. Earing
Lavelle & Finn, LLP
29 British American Boulevard
Latham, NY 12110-1405
amy@lavelleandfinn.com

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

Robin N. Goeman
26 Court Street
Suite 913
Brooklyn, NY 11242
robin@goemanlaw.com

Health Care Issues
Deborah A. Slezak
Cioffi Slezak Wildgrube P.C.
1473 Erie Boulevard
1st Floor
Schenectady, NY 12305
dslezak@cswlawfirm.com

Glenn J. Witecki
Witecki Law Office
8 South Church Street
Schenectady, NY 12305-1734
witeckilawoffice@aol.com

Legal Education
JulieAnn Calareso
The Shevy Law Firm, LLC
7 Executive Centre Drive
Albany, NY 12203
julieshevylaw@gmail.com

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

Legislation
Deepankar Mukerji
Goldfarb Abrandt Salzman
& Kutzin LLP
350 Fifth Avenue, Suite 4310
New York, NY 10118
mukerji@seniorlaw.com

Legislation (continued)
Jeffrey A. Asher
Law Offices of Jeffrey A. Asher, PLLC
43 West 43rd Street
Suite 72
New York, NY 10036
jasher@asherlawfirm.com

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

Denise P. Marzano-Doty
Touro College Law Center
225 Eastview Drive
Central Islip, NY 11722
dmdesq94@msn.com

Joseph A. Rosenberg
CUNY School of Law
2 Court Square
Long Island City, NY 11101-4356
joe.rosenberg@law.cuny.edu

Peter J. Strauss
Drinker Biddle & Reath LLP
1177 Avenue of the Americas
New York, NY 10036
advocator66@gmail.com

Mediation
Irene V. Villacci
Irene V. Villacci, Esq., P.C.
74 North Village Avenue
Rockville Centre, NY 11570-4606
irene@ivelderlaw.com

Medicaid
Michael D. Dezik
Wilcenski & Pleat PLLC
11 South Street
Suite 202
Glens Falls, NY 12801
mdezik@wplawny.com

Kim F. Trigoboff
Law Offices of Kim F. Trigoboff
67-123 Dartmouth Street
Forest Hills, NY 11375
kimtrigoboff@gmail.com

Membership Services
James R. Barnes
Burke & Casserly, P.C.
255 Washington Avenue Extension
Albany, NY 12205
jbarnes@burkecasserly.com

Amy L. Earing
Lavelle & Finn, LLP
29 British American Boulevard
Latham, NY 12110-1405
amy@lavelleandfinn.com

Mental Health Law
Moira Schneider Laidlaw
Shamberg Marwell Hollis
Andreycak & Laidlaw, P.C.
55 Smith Avenue
Mount Kisco, NY 10549-2813
mlaidlaw@smhal.com

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

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

Practice Management
Anne E. Dello-Iacono
The Dello-Iacono Law Group, P.C.
105 Maxess Road
Suite 205
Melville, NY 11747
anne@dellolaw.com

Publications
Judith Nolfo McKenna
Law Office of Judith Nolfo McKenna
1659 Central Avenue
Suite 104
Albany, NY 12205-4039
judy@mckennalawny.com

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

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

Special Education
Tracey Spencer Walsh
379 West Broadway
New York, NY 10012
tracey@spencerwalshlaw.com

Special Needs Planning
Joan Lensky Robert
Kassoff, Robert & Lerner LLP
Suite 508W
100 Merrick Road
Rockville Centre, NY 11570
joanlenrob@krllaw.com

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

Technology
Monica P. Ruela
Capell Barnett Matalon & Schoenfeld LLP
100 Jericho Quadrangle
Suite 233
Jericho, NY 11753
monica@makofskylaw.com

Scott B. Silverberg
Law Office of Stephen J. Silverberg, PC
185 Roslyn Road
Roslyn Heights, NY 11577
sbsilverberg@sjslawpc.com

Veteran's Benefits
Sarah Amy Steckler
Keane & Beane, PC
445 Hamilton Ave.
15th Floor
White Plains, NY 10601
ssteckler@kblaw.com

The *Elder and Special Needs Law Journal* is published by the Elder Law and Special Needs Section of the New York State Bar Association. Members of the Section receive a subscription to the publication without a charge.

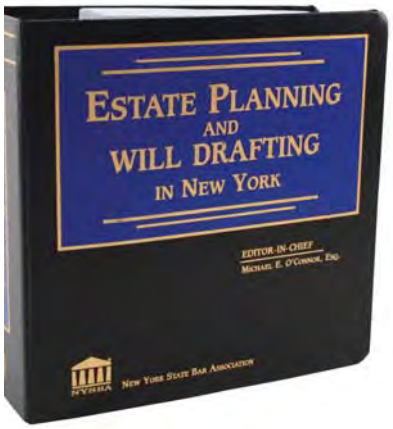
Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 2161-5292 (print) ISSN 2161-5306 (online)

Elder and Special Needs Law Journal

NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York



Editor-in-Chief

Michael E. O'Connor, Esq.
Costello Cooney Fearnon PLCC
Syracuse, NY

2017 Revision

Product Description

Each chapter of the 2017 Revision has been reviewed and updated, including major changes to the chapters on IRAs and Tax-Qualified Plans and New York Estate and Gift Taxes.

This comprehensive text provides an excellent overview of the complex rules and considerations involved in estate planning in New York State. Whether your practice incorporates issues surrounding minors, marriage, the elderly, federal and state taxes, this text provides comprehensive guidance to attorneys. With useful practice comments, real-world examples and sample forms this text is also an invaluable practice guide for practitioners who are just entering this growing area.

PN: 4095C | Book w/2017 revision | loose-leaf
NYSBA Members $185 Non-Members $220

PN: 50957 | 2017 revision for past purchasers | loose-leaf
NYSBA Members $130 Non-Members $150

Section Members get 20% discount* with coupon code PUB8863N

Contents at a Glance

To order call **1.800.582.2452** or visit us online at **www.nysba.org/pubs**

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total. Prices do not include applicable sales tax.

Mention code: PUB8863N when ordering. Discount valid until 2/8/2018.

NYSBA

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

NEW YORK STATE BAR ASSOCIATION

ELDER LAW AND SPECIAL NEEDS SECTION