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Elder and Special Needs Law Journal

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

Message from the Chair

Judith D. Grimaldi

Dear Colleagues:

The Elder Law and Special Needs Section had a busy season. The Section held its Fall Meeting in early October organized by the able team of **Mary Fern Breheney** and **Moriah Adamo**, which covered some thought-provoking topics on the new economics of aging. The meeting was well attended and set the stage for innovation and creativity in addressing the needs of our elder law and special needs clients.

Later in October the Section spearheaded a housing symposium featuring the one of the founders of the famed "Dementia Village" in the Netherlands, **Eloy van Hal**, who provided an interactive presentation on this unique residence for individuals with dementia. The program was sponsored by NYSBA's Elder Law and Special Needs Section, New York NAELA and the Association of the Bar of the City of New York (ABCNY), and was attended by 120 attorneys from these three bar associations as well as aging advocates, housing administrators and health care providers.

The village is funded as a regular nursing home by the Dutch medical system … but that is where the term "regular" ends. The village, De Hogeweyk, located in Weesp, Netherlands, outside of Amsterdam, houses over 200 residents who live in cluster homes of seven residents and two care workers. The residents are grouped by lifestyle choices and the interiors are furnished to reflect the designated style. The lifestyle theme is carried out in the music and activities of the household as well as the food served. For example, the "city" folks' home is furnished formally with fine china, tablecloths, and formal meals are served with classical music playing in the background. The home with former "farmer" residents who lead a more rural life will be decorated more casually with vinyl table coverings, folk and handcrafted decorations, hearty meals , outdoor activities and Dutch folk music playing. The cosmopolitan house will have an art focus and information about travel and lectures will be stocked on the bookshelf with more avant-garde décor used and more adventuresome international foods on the menu. This concept allows the residents to feel comfortable in their surroundings and they are likely to be paired with people of like interests. The residents are encouraged to self-care as much as they can and help with the household chores and maintenance as they are able. One resident sweeps the entire village every day. The residents plan and choose their daily meals with the care workers and a small group is designated to shop for the meal ingredients at the village store. The village has a bakery area, a restaurant, a movie theater, a café and a music room. De Hogeweyk features inviting outdoor space, including an outdoor courtyard with a fountain for sitting in the sun and a small pastoral park area with a pond. Residents are encouraged to be outside and to walk independently to their clubs and activities. Assistance is available for those with wheelchairs or walkers. Having visited the village in 2015, I can attest that on a brisk November day the outdoor area was filled with people walking about and enjoying the fresh air. Mr. van Hal provided great detail about the village structure and philosophy and the financing. He encouraged us to work together to develop this alternative in our state.

Mr. Van Hal's presentation was followed by a panel discussion led by Mr. van Hal, me and aging and housing experts who explored translating this Hogeweyk concept into a New York reality. The panel consisted of an elder designer, an activist, a senior housing developer and a dementia specialist from a large assisted living company. The audience peppered the panelists with challenging questions on the possibility of making this type of housing happen in New York. We realized this would take a dedicated commitment to move this goal along. As a result we committed to form a task force to explore these housing options in our state. The Section's Housing Committee has been tasked to get this group together. If anyone is interested in joining this effort or wants to know more about the De Hogeweyk concept and our ongoing efforts, please contact me at jgrimaldi@gylawny.com. Attorney and aging advocates are welcome to join and several of our panelists have agreed to continue to work with us on this issue. Look for an announcement of our meetings on the ELSN list serve.

I would like to thank all those who helped me make the housing symposium such a success. First and foremost a special thank you to my partner representing The City Bar in this effort, Britt Burner, the current Chair of

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the New York City Bar's Committee on the Legal Problems of the Elderly. Also thank you to Ron Fatoullah, the current Chair of the New York NAELA, who supported our efforts as a program sponsor. A thank you also to New Jersey Bar Association's Jerry Rothkoff, who helped secure Mr. van Hal's attendance and shared the costs.

I look forward to seeing you all at the Annual Meeting in January 2019. Please spread the word about our Section and help us encourage new membership by introducing them to our committee work. One example is the Legislation Committee, which is gearing up for their ongoing good work on the Power of Attorney's proposed revisions. The NYSBA's Executive Committee voted this proposed legislation as the 2018-19 legislative priority. As a companion to this effort, the Elder Abuse Committee has proposed a new banking law to address potential financial abuse while balancing individual rights. The Special Needs Planning Committee produced a public series in Nassau County. The Client and Consumer Issues Committee updated the consumer brochures on senior benefits, and in preparing outreach efforts on health care decision-making. The Mental Health Law Committee is working on a health care proxy form to be used in the mental health arena. Finally, the Task Force Challenges to Medicaid Planning Practice Area Committee will research and review the proliferation of non-attorney Medicaid planning services and advocate for consumer education and protection in this area.

If you are interested in joining a committee please visit the NYSBA website and click on Our ELSN Section and join the committees of your choice, or contact our NYSBA liaison, Lisa Bataille at lbataille@NYSBA.org, to learn how to join a committee.

We welcome all new members. You can help us expand our mission.

Judith D. Grimaldi

Message from the Co-Editors-in-Chief

Welcome to the 2018 Winter Edition of the *Elder and Special Needs Law Journal.* We are excited to begin our journey as co-editors of the *Journal*. We thank Tara Anne Pleat and Judith Nolfo McKenna for their guidance during the transition, and appreciate their dedication to the Section during their tenure as co-editors.

Katy Carpenter

Patricia Shevy

The Fall meeting in Park Ridge, New Jersey was a success! The program provided the attendees with an overview of the "New Economics of Aging." Anthony Webb, Ph.D., started the program with an analysis of the social, legal and financial factors resulting in economic pressures for retirees. Howard S. Krooks presented the Elder Law Update, including the changes to the Program Operations Manual System (POMS) and Veterans' benefits. Deirdre R. Wheatley-Liss discussed how the changes to the tax laws will impact not only our clients, but our practices as well, including capital gains tax versus estate tax, the effect of the changing tax environment on grantor and non-grantor trusts, and taxation of small service and non-service businesses. There were so many fabulous presentations providing current, detailed and relevant information to our Section members. Special thanks to Co-chairs Moriah Adamo and Mary Fern Breheny for organizing such an excellent program.

Photographs from the Fall meeting conference are included in this issue on pages 22 and 23. When you see either of us wandering around with cameras during the Annual Meeting, please give us a smile and we'll do our best to include as many of our members in future issues.

In this issue, we feature Fern J. Finkel, a co-founding partner at Finkel & Fernandez, LLP. Fern is also the Co-chair of the Guardianship Committee of our Section, which is the featured committee in this *Journal*. Fern has helped thousands of seniors through her extensive community outreach and pro bono services on behalf of the indigent elderly of New York City and spearheaded the Legal Education and Assistance Project, known as LEAP, at the Brooklyn Bar Association Volunteer Lawyers Project, of which she is a Board Member. We hope you enjoy getting to know Fern through her Member Spotlight interview.

Our New Member Spotlight brings us Alexis Gruttadauria, of Schiff Hardin LLP. Alexis works with families and individuals to plan for the full range of life's circumstances, offering services and support through estate and trust planning and administration, benefits advocacy, elder law, and special needs planning.

We have included a timely article by David C. Leven, of End of Life Choices New York, about the ethical issues in Medical Aid in Dying, following his debate with Edward Mechmann, Counsel to Archdiocese in New York City, during our Fall meeting. Our members come from many walks of life and have differing opinions on this sensitive topic. We appreciate the opportunity to provide our members with this thoughtful article.

Anthony J. Enea addresses bank, brokerage and real property issues in an Article 81 Guardianship Proceedings, and discusses how the manner in which one holds title to property at the commencement of a guardianship proceeding has a critical impact upon the relief sought in the proceeding.

Our Section is sponsoring the Fifth Annual *Elder and Special Needs Law Journal* Writing Competition. The competition is open to all students attending an accredited ABA law school within New York State and recent law graduates seeking employment. Any law or legal issue affecting seniors and/or persons with disability, with a specific focus on historically underserved populations, is this year's topic. All submissions are due on or before March 15, 2019 to Kim Trigoboff and Joanne Seminara. Please share the details with current law students and recent graduates.

As co-editors, we appreciate the opportunity to work with our Section members. In upcoming *Journals*, we look forward to articles prepared by our Section committees and members. We look forward to seeing you at the Annual Meeting!

Katy and Tricia

The Basics of Advance Health Care Directives in New York: Health Care Proxies and Living Wills

By Kristen M. Casper

Kristen M. Casper

In recent years due to rapid advancements in medical technology, there has been an increased need for individuals to plan their future medical decisions, in the event they are incapacitated and unable to make health care decisions for themselves.[1] Individuals are not only living longer, but they are more commonly subjected to advanced life support systems and invasive medical treatments that only prolong the end-of-life phase. In order for these future medical plans to be effective for an individual, they not only need to be comprehensive, but also sufficiently detailed to provide proper direction to those making decisions on their behalf.

Health Care Advance Directives in New York

In New York, there are two basic documents that allow individuals to detail their future medical wishes in the event they are incapable of making their own decision: a Health Care Proxy and a Living Will. These two documents, also referred to as advance health care directives, allow the individual to appoint an agent to make health care decisions and provide specific instructions.[2] The Health Care Proxy and Living Will are documents that are sometimes undervalued in a client's estate plan, especially for those who are not yet in the stages of end-of-life planning and care; however, these documents play a crucial role in alleviating the stress from family members and/or friends who are involved in the health care decision-making for the individual.

The Health Care Proxy

The Health Care Proxy allows an individual (principal) to appoint an agent to make medical decisions on the principal's behalf if they are unable to do so themselves.[3] The New York legislature enacted Public Health Law (PHL) Article 29-C to provide for the requirements for a valid Health Care Proxy in New York and establish a mechanism for agents to choose or reject medical treatment on behalf of the principal.[4] In New York, hospitals and nursing homes are required to provide every individual with a Health Care Proxy form and information about choosing an agent.[5] The standard Health Care Proxy form is available for download on the New York State Bar Association's website.[6]

Young Lawyers Corner

For the Newly Admitted Attorney

Requirements of a Health Care Proxy

In order for a Health Care Proxy to be validly executed, it must be signed and dated by a competent adult (over 18 years old) in the presence of two adult witnesses, who must also sign and date the document.[7] Additionally, an agent may not also act as a witness to the proxy.[8] An individual is presumed competent unless they are declared or adjudged incompetent by a court to appoint an agent or unless a committee or guardian of the person has been appointed to make decisions on behalf of the individual.[9] In certain circumstances, if the individual is unable to sign and date the document, another person may do so on behalf of the individual at that individual's direction.[10]

The Agent's Authority

In New York, an agent's authority to make your health care decisions will come into effect upon an individual's loss of capacity, which is to be determined by the attending physician to a reasonable degree of medical certainty.[11] An individual is only allowed to appoint one agent at a time.[12] However, in the event the individual's primary agent is unable or unavailable to make decisions, they may appoint consecutive successor agents to make decisions on their behalf.[13] In rare circumstances, an individual may appoint two agents simultaneously with different decision-making powers.[14] For example, an individual could designate their child as the agent with decision-making power related to life-sustaining treatment matters and designate their spouse with decision-making power related to organ and tissue donation.[15] An appointed agent cannot be an individual's doctor or a hospital employee, operator, or administrator where that person was admitted for medical treatment, unless such person is a spouse or relative.[16]

Furthermore, New York's Public Health Law also provides for the powers given to the agent when making health care decisions. The agent will be given the ability to interpret the principal's wishes related to medical treatment as their condition and circumstances change,

unless expressly indicated by the principal.[17] Additionally, the agent will be able to make any and all medical and treatment decisions related to the principal's health care, unless the principal limits the agent's authority.[18] The principal can limit their Health Care Proxy to certain decision-making powers, medical situations, and time frame that the proxy is to be in effect.[19] The proxy can even be limited to take effect upon the occurrence of a certain condition.[20]

Organ and/or Tissue Donation

A Health Care Proxy may also provide for an individual's wishes related to organ and/or tissue donation which may include limitations.[21] If the individual is interested in organ donation it can be included in their Health Care Proxy and it is advisable that the individual register with the New York State through the Donate Life Registry[22] and/or the New York Department of Motor Vehicles[23] so as to conform their wishes. After the individual has registered, the form can be included and stored with their Health Care Proxy form to ensure that agents and physicians are aware.

Revocation of a Health Care Proxy

A competent adult may revoke a Health Care Proxy at any time by providing notification to their agent or health care provider, either orally, in writing, or by any act evidencing a specific intent to revoke the proxy.[24] Additionally, a Health Care Proxy is automatically revoked upon the individual's execution of a subsequent Health Care Proxy.[25] Furthermore, if a spouse is appointed as an agent, his or her power is automatically revoked upon legal separation or divorce, unless the principal specifically states otherwise.[26] Once a physician is informed of a revocation of a Health Care Proxy, the physician must immediately document this revocation in the principal's medical record and notify the agent and medical staff responsible for the care of the principal.[27]

What if There Is No Health Care Proxy?

In the event an individual has not executed a Health Care Proxy and has lost capacity to make their own medical decisions, the law provides for the individual who will have authority to make medical decisions on the individual's behalf. The Family Health Care Decisions Act enacted in 2010, amending the Public Health Law, provides an order of priority on who may make medical decisions on behalf of an incapacitated individual, i.e., an MHL Article 81 court-appointed guardian, a spouse or domestic partner, an adult child, a parent, a brother or sister, and lastly ... a close friend.[28]

Living Wills in New York

Incapacitated individuals may complete a Living Will in conjunction with a Health Care Proxy in order to detail their wishes regarding end-of-life decisions. In New York, there is no specified law governing the proper form of Living Wills; however, the New York Court of Appeals has given some direction regarding their legal significance.[29] In *In re Westchester County Medical Center*, the Court stated that Living Wills are valid as long as they state with "clear and convincing" evidence the wishes of an individual.[30] The Living Will may include treatments the incompetent individual may want or may want withdrawn in specific situations.[31]

General Requirements of a Living Will

When an individual is completing a Living Will in New York, the best practice is to have the individual sign and date their Living Will in the presence of two witnesses attesting that the document was signed willingly.[32] Additionally, in order for the Living Will to be valid in other states, the document can be notarized, but is not required to be notarized in New York.[33]

A Living Will is intended to be used as evidence as to wishes regarding end-of-life decision making. It can be used to detail medical circumstances in which you would deny or accept certain forms of treatment. There is a general form that can be used by individuals in New York, which provides that in the event the individual is in an irreversible or incurable mental state with no reasonable expectation of recovery, that life-sustaining treatments should be withdrawn but that maximum pain relief should be continued.[34] However, in the event there are more specific medical situations that individuals feel strongly about, such as blood transfusions, dialysis, etc., an individual may request that these wishes be included in their Living Will.

Client Discussions

When advising clients regarding their Health Care Proxy and Living Will, attorneys should urge clients to have conversations with their agents regarding their wishes in order to ensure the agent is comfortable when making decisions on their behalf. Much of the stress that comes with an agent acting as a health care proxy for an individual is not knowing the principal's specific wishes. The attorney should provide the client with a sufficient amount of copies of their Health Care Proxy and Living Will, so that the client can share copies with their health care providers, as well as their agents. Remind your clients that a copy is as good as the original for health care directives. Furthermore, attorneys may choose to provide copies of the documents in an electronic format or recommend that the client carry a card indicating the existence and location of their documents.

Endnotes

1. http://www.pewforum.org/2013/08/06/to-count-our-days-the-scientific-and-ethical-dimensions-of-radical-life- extension/.
2. N.Y. Public Health Law, Article 29-C.

3. *Id*.
4. *Id*.
5. N.Y. Public Health Law § 2991.
6. http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=63499.
7. N.Y. Public Health Law § 2981.
8. N.Y. Public Health Law § 2981(2).
9. Mental Hygiene Law article 78 or SCPA article 78-A, and N.Y. Public Health Law § 2981(1)(b).
10. N.Y. Public Health Law § 2981(2).
11. N.Y. Public Health Law § 2981(4) § 2983(1).
12. N.Y. Public Health Law § 2981.
13. N.Y. Public Health Law § 2981(6).
14. N.Y. Public Health Law § 2982.
15. N.Y. Public Health Law § 2981(5)(f).
16. N.Y. Public Health Law § 2981(a).
17. N.Y. Public Health Law § 2982.
18. *Id*.
19. N.Y. Public Health Law § 2981.
20. N.Y. Public Health Law § 2981(4)(c).
21. N.Y. Public Health Law § 2981(5)(f).
22. https://donatelife.ny.gov/.
23. https://dmv.ny.gov/more-info/register-become-organ-eye-or-tissue-donor.
24. N.Y. Public Health Law § 2985.
25. N.Y. Public Health Law § 2985(1)(c).
26. N.Y. Public Health Law § 2985 (1)(e).
27. N.Y. Public Health Law § 2985(2).
28. Chapter 8 of the Laws of 2010 amends N.Y. Public Health Law to create Article 29-CC (known as the Family Health Care Decisions Act).
29. *In re Westchester County Medical Center*, 72 N.Y. 2d 517 (1988).
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/jones-memorial/patients-families/documents/living_will_nys.pdf.

Kristen Casper is currently a Partner with Law & Law, PLLC in East Greenbush, New York, focusing her practice primarily on Estate Planning, Estate Administration/Probate, and Real Estate. Kristen is a 2016 Graduate of Albany Law School, where she served as the Executive Director of the Moot Court Program as well as an Associate Editor for the *Journal of Science and Technology*. Kristen has been spending much of her time speaking to students at local colleges, as well as staying active as a member of the Capital District New and Growing Professionals and as a board member for the group Exceptional Connections in Albany, New York.

Preventing Financial Exploitation

By David A. Weintraub

"I know it when I see it." These words were made famous in Justice Potter Stewart's concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Justice Stewart was writing about "obscenity," and how to identify it. But is exploitation of the elderly as easy to detect? Sometimes yes, other times no. Can exploitation be limited? Yes, but only with significant effort to better educate professionals as well as the general population.

We have all seen the obvious, egregious cases—an adult child misappropriating a parent's funds is one common situation. Less obvious, but equally serious, is the financial exploitation of the senior as a consumer. Some of the documents in dubious transactions contain red flags which not only help identify a predatory situation, but which also might give an advocate leverage for resolution.

For example, many senior consumers fall prey to home solicitors who sell any number of goods and services, including home security systems, solar systems, air conditioning and other significant home improvements. In New York, home solicitations are governed by local municipal law. In Great Neck, on Long Island, it is "unlawful for any person to peddle by going to a house within the Village."[1] In Valley Stream, also on Long Island, peddling and soliciting are permitted upon issuance of a permit. However, a solicitor or peddler may not enter private property without having been invited.[2] In Hamburg, outside of Buffalo, most peddling is permitted upon the issuance of a permit. Hamburg residents may, however, obtain from the Village of Hamburg a sticker that can be placed on a front door, prohibiting solicitors from approaching.[3]

So why do these municipal laws exist? They exist not only because home solicitors are pests, but because society knows that the elderly are especially vulnerable to exploitation by unscrupulous salespeople. All lawyers representing the elderly should be on alert to their clients buying the products or services referenced in the preceding paragraph. The contracts presented to the vulnerable are often unconscionable, or provide for services or products that the person does not need. If your client has already signed a contract, try to review it. If you send a newsletter to existing or prospective clients, warn them.

A great example of elder abuse emanating from a consumer transaction involves the late Mary Anne Trottier. In December 2009 Ms. Trottier determined that she needed a complex home security system because of delusional beliefs about her neighbors. Between 2009 and 2010, Ms. Trottier was convinced by the home security salesman to spend $300,000 on a system. After spending $300,000, Ms. Trottier realized she may have been exploited and contacted the police. The salesperson was criminally charged, convicted, sentenced to three years in prison, and ordered to pay restitution. Ms. Trottier's estate was only able to recover $90,000 in restitution. To recover the balance of Ms. Trottier's losses, the estate sued Ms. Trottier's former financial advisors. The estate accused the financial advisors of having assisted the exploitation by knowingly permitting Ms. Trottier to withdraw money from her brokerage account for the home security system. That lawsuit was filed as an arbitration within the FINRA forum. In a 2017, 2-1 decision, which includes a robust dissenting opinion, both the individual financial advisor and his employer were found liable for $168,000 in compensatory damages, prejudgment interest of $98,623.00, and attorneys fees of $130,000.[4]

David A. Weintraub

So how could Ms. Trottier have avoided being exploited? First, this FINRA panel of arbitrators presumably determined that the brokers, who admitted knowing that Ms. Trottier was purchasing the system, could have contacted law enforcement or taken some affirmative action to have avoided the exploitation. Second, though not mentioned in the award, lawyers who may have been involved in Ms. Trottier's life could have stepped in if they knew of the suspected exploitation. The lesson for attorneys is to keep your eyes open. Ask questions. Warn your clients, again and again. The elderly are vulnerable. Exploitation occurs every day, whether through home solicitations, telephone solicitations, or even nursing home solicitations.

A second example of elder abuse for which a third party was ultimately responsible involved a case I recently handled. This case involved an 80-year-old whose daughter was systematically draining mom's brokerage accounts for years. Using what ultimately proved to be a defective power of attorney, the daughter, on at least a monthly basis, had checks issued from mom's brokerage accounts, payable to mom. The daughter intercepted the checks in the mail and deposited them in mom's bank account. The daughter, using mom's ATM card, stole more than $500,000 over many years. The brokerage firm settled this case because of the numerous red flags that should have been spotted by the broker. First, the power of attorney was technically defective because the mom's initials were forged in several places, and the notary did not sign on the same date that mom signed. Second, because one

of the accounts was an IRA, it should have been apparent that something was suspicious when mom withdrew more than $100,000 per year when required distributions were approximately $20,000. These large withdrawals led to large tax liabilities. Because mom was presumably competent to sign the power of attorney, the broker should have questioned mom about the withdrawals. Finally, it proved significant that mom and the broker lived on opposite sides of the country. The broker had not seen his client, in-person, in many years. Prudent business practice would have suggested having this client serviced by a broker who lived closer to the client. For those of you with clients retired outside New York, consider whether your clients would be better off if represented by attorneys based in the new state.

The types of red flags that this broker missed could as easily have been missed by a lawyer. When an elderly client comes in for estate planning, ask questions. Don't be so quick to assume that family members are placing the elderly relative's interests first. If you believe exploitation has already occurred, consider whether third parties may be liable. Those third parties include anyone who may have owed a fiduciary duty, such as lawyers, stockbrokers and accountants.

An example of a new type of elder abuse is that which will be the byproduct of FINRA's well intended rules designed to curb financial exploitation. Effective February 2018, FINRA Rule 4512 requires registered representatives to make reasonable efforts to obtain the name of and contact information for a "trusted contact person" (TCP) upon the opening of a retail account, or when updating account information for a retail account.[5] Pursuant to the Rule, "the member is authorized to contact the trusted contact person and disclose information about the customer's account to address possible financial exploitation, to confirm the specifics of the customer's current contact information, health status, or the identity of any legal guardian, executor, trustee or holder of a power of attorney…." The TCP is intended to be a resource for the FINRA member in administering the customer's account, protecting assets and responding to possible financial exploitation. Unfortunately, this Rule will serve to alert nefarious third parties that Aunt Betty or Uncle Bernie had significantly more assets than relatives may have believed. But for Rule 4512, certain people (the putative "villains") will be alerted to assets they did not know existed. Opportunity and motive to steal have been created by this new Rule. The Rule may also interfere with pre-existing estate plans.

Because FINRA Rule 4512 does not require the customer to identify the TCP, how should we as lawyers advise our clients? Do we tell them to refuse to identify TCPs? Do we encourage clients to identify TCPs, and if so, do we do it in writing? Should we explain to our clients the pros and cons of designating TCPs? Do we incorporate the TCP concept in estate planning documents? Do we revise Durable Powers of Attorney to address issues that will arise from a potentially conflicting TCP? Do we provide copies of Durable Powers of Attorney to financial advisors? Do we routinely write to financial advisors to find out if our clients have already designated a TCP? If our clients have designated a TCP, is the TCP consistent with the client's choices of personal representatives or trustees? Do we want to put into place mechanisms that prevent financial advisors from changing TCP's without attorney involvement?

It is clear that FINRA Rule 4512 creates a plethora of issues for the elder law or estate planning attorney to consider.

While detecting (or preventing) exploitation may not be as easy as spotting obscenity, peeling back the various layers of the transaction may bear unexpected fruit.

Endnotes

1. Section 416-2, Village of Great Neck, New York, adopted by the Board of Trustees of the Village of Great Neck as Ch. 138 of the 1976 Code; amended in its entirety 7-16-2013 by L.L. No. 9-2013.
2. Section 60-15, Village of Valley Stream, New York, adopted by the Board of Trustees of the Village of Valley Stream 3-13-1972.
3. Section 175-11, Village of Hamburg, New York, amended 10-19-1998 by L.L. No. 7-1998; 9-2-2003 by L.L. No. 2-2003.
4. *Ryan Peter Trottier, Executor of the Estate of Mary Anne Trottier vs. Morgan Stanley Smith Barney LLC*, FINRA Case Number 15-02910, June 9, 2017.
5. http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9958.

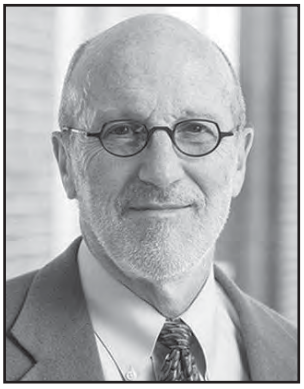
David Weintraub's securities litigation practice primarily consists of representing investors who have been victims of stockbroker misconduct. He is the Co-chair of the Florida Bar Elder Law Section's Abuse, Neglect and Exploitation Committee. David is admitted to practice in Florida, New York and Nebraska. David's website is www.stockbrokerlitigation.com.

The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York

By David C. Leven, JD and Timothy E. Quill., MD, MACP, FAAHPM

Introduction

David C. Leven



Timothy E. Quill

Palliative care and hospice should be standards of care for seriously ill and dying patients.[1] Most, but not all, suffering can be adequately addressed with the skillful addition of palliative measures to a patient's treatment plan. Therefore, the first place to go if a patient makes a request for medical aid in dying is to ensure that his or her suffering is thoroughly understood and addressed with state of the art and science palliative care.[2] To be clear, medical aid in dying is not part of usual palliative care or hospice practice. It is the process by which an adult, mentally competent, terminally ill patient, who doctors determine is likely to die within six months, self-consumes prescribed medicines to end suffering and achieve a peaceful death.

Some patients making requests for medical aid in dying have witnessed bad deaths in their life experience, and are worried about going through a similar process in their own future. Such patients can benefit from a thorough exploration of what they have seen and are afraid of from their own lives, followed by a frank discussion about how one's doctor proposes to address such circumstances should they occur to the patient him or herself. In the vast majority of cases (but not 100 percent) such suffering can be addressed with the skillful provision of palliative treatments without resorting to treatments that intentionally hasten death. Experienced palliative care experts are increasingly available to help address the most challenging problems, making the need for direct assistance in dying because of immediate, intractable suffering relatively rare. However, if you happen to be one of those infrequent cases with intractable, unrelievable, severe suffering, you have a real problem that requires a direct medical response.

Of course, not all patients who request medical aid in dying do so because of severe immediate physical suffering that is refractory to treatment. The majority of patients making these requests do so because the dying process is going on too long for them to tolerate, and they are "tired of dying" or intolerant of the debility, which is so often a central part of the late stages of the experience.[3] Such patients may be used to being in control of their own lives and of their own bodies, so becoming extremely dependent upon others is not something they want to accept or to which they can adjust. As a society we tend to admire similarly situated patients who choose to stop life supports to maintain their independence, but should there be no life support to stop in the presence of a similarly debilitating illness, we sometimes accuse patients of having an excessive "need to control" their future.

Every dying person should have a right to excellent palliative care and hospice no matter what other choices they make—be it requesting long shot, aggressive, disease-directed treatment, or treatment devoted entirely to palliation delivered with the help of a hospice program, or, if they are mentally competent and fully informed, treatments that might hasten death. As much as possible, given constraints imposed by one's disease process as well as limitations imposed by the law, patients should be able to die in a way that is consistent with their values and beliefs. Clinicians who care for seriously ill patients should facilitate palliative care for the dying, and they should also become aware of the full range of legally available "last resort" options to help address severe and intractable suffering.[4] Ideally, in our opinion, medical aid in dying should be one of those legally available options of last resort.

Hastening death by medical aid in dying is ethically similar to other legal means of hastening death, including the withholding or withdrawal of life-sustaining treatment, voluntarily stopping eating and drinking, or palliative sedation to unconsciousness.[4] Each of these options will result in death, and each requires some form of physician participation. Health care professionals are arguably more actively involved in the resulting deaths of their patients when withdrawing life-sustaining treatment such as a ventilator than when providing a potentially lethal medication that a patient can take at a time of his or her own choosing. If a clinician took someone off a life support without the permission of the patient or her surrogate decision maker and the patient died, the clinician would potentially be subject to murder charges. Similarly, pro-

viding palliative sedation to unconsciousness while not simultaneously providing life-sustaining treatment without permission from the patient or his surrogate decision maker would be both unethical and illegal. The intent and consent of terminally ill patients matter much more than the intent and willingness of health care professionals.

Medical Aid in Dying Should Not Be Considered "Assisted Suicide"

Patients who choose medical aid in dying determine the manner of their deaths just as do many patients who choose other last resort options. They should be carefully evaluated for their decision-making capacity, but they are not by definition "suicidal" unless their decision is distorted by associated mental illness. Stark differences exist between dying patients who are making a life-ending decision in the context of a severe, irreversible terminal illness, and those with primarily mental illnesses who die by suicide.[5] Mental illness-related suicide is committed by those who usually do not have a terminal illness and could continue to live but choose not to, usually because of some distortion in their thinking based on potentially treatable mental illness. Such suicides are usually done in isolation, often impulsively and violently, and are tragic. We should do everything in our power, including potentially involuntary hospitalization, to prevent them. To the contrary, in the U.S. states where medical aid in dying has been legalized, it is available only to terminally ill patients who will soon die; it is the result of a carefully thought out process that usually takes several weeks; and it requires consultation from two physicians who must document their findings and almost always includes support of immediate family. The term "assisted suicide" is rejected by the American Public Health Association, American Academy of Hospice and Palliative Medicine, American Medical Women's Association, among others, and in state laws which permit aid in dying. Most recently, the American Association of Suicidology issued a comprehensive statement, "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING" (http://www.suicidology.org/Portals/14/docs/Press%20Release/AAS%20PAD%20Statement%20Approved%2010.30.17%20ed%2010-30-17.pdf)

Medical Aid in Dying Laws Have Worked as Intended as an Ethical Practice in U.S. States Where It Has Been Legalized

There is a growing body of evidence, compiled over two decades from Oregon and Washington, which demonstrates that aid in dying is beneficial to some terminally ill patients by allowing them to escape unwanted suffering, and that it causes no significant harm to patients, families, or the medical profession. It has not undermined efforts to improve hospice and palliative care within these jurisdictions, and in some cases may even improve delivery of palliative care and hospice services.[6] No major problems have emerged as expected by opponents.

Medical aid in dying is thought about frequently but rarely used. In Oregon, one out of six terminally ill patients talk to their family members about the option, and one out of 50 talk to their doctors about it, but it accounts for only about one in 300 deaths.[7] Furthermore, one-third of patients who obtain the medications do not take them, but such dying patients are probably comforted knowing that this option is available.

In U.S. states where the practice is legal, there is no evidence of disproportionate impact on vulnerable populations, nor is there evidence of related coercion or abuse.[8]

There is evidence that family members of those who request aid in dying may feel better prepared and accepting of their loved one's death.[9] There is also evidence that patients who access aid in dying have at least as good, and in some cases better, deaths than others.[10] About 90 percent of those who end their lives by using aid in dying in Oregon are receiving hospice care, so the issue of more palliative care resolving the issue is irrelevant (https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year19.pdf). Almost all patients who choose aid in dying have health insurance and most are college educated, as indicated in the above report.

There is no evidence of any slippery slope in the US. Medical aid in dying is only for the terminally ill, mentally competent adults. There is no serious or concerted movement to extend medical aid in dying to those who are not terminally ill. And, there is no evidence that where medical aid in dying is permitted the reputation of the medical profession has suffered in any way.

Seventy-seven percent of New Yorkers support aid in dying, according to a 2015 poll, including large majorities of Democrats, Republicans, Conservatives, and Catholics. Physicians support aid in dying by an almost 2 to 1 margin, 57 percent to 29 percent per a 2016 Medscape poll, though some of those physicians who support the practice in general terms would not want to provide medical

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aid in dying themselves. Where legal, physicians who do not want to participate are not required to do so.

Medical Aid in Dying Legislation in New York

Legislative efforts to establish medical aid in dying as a right began in New York in 2015. The current bills, A. 2383 (Paulin) and S. 3151 (Savino), also called the Medical Aid in Dying Act, are comprehensive and patterned after laws in other states which permit aid in dying and which have worked as intended.

Note: This article was completed before the start of the new session of the New York State Legislature so the bills, which will be amended, will have different numbers.

Although there are no statutory safeguards and protections pertaining to other decisions by patients (or their agents or surrogates) where death results, such as withdrawing life-sustaining treatments, or voluntarily stopping eating and drinking, or palliative sedation, there are numerous safeguards and protections in the Medical Aid in Dying Act. Some of the key provisions are summarized below.

1. To legally request medical aid in dying (MAID), a patient must be at least 18 years of age and have a terminal illness as defined, confirmed by an attending physician and a consulting physician.
2. A patient must make an oral and a written request (on a form provided in the law) for MAID. The written request must be witnessed by 2 adults who attest that the patient: 1) has capacity; 2) is acting voluntarily; and 3) is not being coerced.
3. One witness shall NOT be: 1) a relative; 2) a person entitled to a portion of the patient's estate; 3) an owner, operator or employee of a health care facility where the patient resides or is being treated; or 4) the patient's attending physician, consulting physician or mental health professional, if applicable, who determines capacity.
4. If either the attending or consulting physician believes the patient lacks capacity, the physician must refer the patient for evaluation by a mental health professional. Only patients subsequently found to have capacity may proceed.
5. A patient may rescind his or her request for medication at any time without regard to capacity.
6. Patients must be able to self-administer the medication.
7. An attending physician must have primary responsibility for the care of the patient requesting MAID and the treatment of the patient's terminal illness.
8. Attending physician responsibilities: 1) determine that the patient has a terminal illness; 2) determine that the patient has capacity, made an informed decision, and made the request for aid in dying voluntarily and without coercion; 3) inform the patient of the need for a consulting physician's confirmation, and refer if requested; 4) refer the patient to a mental health professional for evaluation if the physician believes the patient lacks capacity; 5) provide information and counseling regarding palliative care; 6) ensure the patient is making an informed decision by discussing with the patient the patient's diagnosis and prognosis, the potential risks associated with taking the medication, the probable result of taking the medication, the possibility that the patient may choose to obtain the medication but not take it, the feasible alternatives or additional treatment options including hospice and palliative care; 7) discuss with the patient the importance of taking the medication with someone else present and not taking the medication in public; 8) inform the patient that he/she can rescind the request for medication at any time; 9) document in the patient's medical records all MAID actions as specified; 10) ensure that all appropriate steps have been carried out in accordance with the MAID act; 11) offer the patient an opportunity to rescind the patient's request prior to writing the MAID prescription.
9. The consulting physician must: 1) examine the patient and medical records; and 2) confirm in writing that the patient i) has a terminal illness, ii) has capacity, iii) is making an informed decision, and iv) is acting voluntarily and without coercion.
10. A mental health professional asked to determine the capacity of a patient must, in writing, report to the attending and consulting physicians his/her conclusions whether the patient has capacity. If the mental health professional determines that the patient lacks capacity, the patient may not receive MAID.
11. A patient requesting MAID shall not be considered "suicidal," and a patient who self-administers aid in dying medication shall not be deemed to have committed suicide.

Conclusion

The lessons from Oregon or Washington where medical aid in dying has now been legal for a combined total of almost 30 years are that their laws have functioned as intended, there have been no abuses, there is no evidence that such laws in any way undermine progress in promoting palliative care and hospice care as standards of care for seriously ill and dying patients, and there are currently no concerted efforts in those states to repeal or amend those laws. We are confident that the provisions, safeguards, protections and restrictions outlined above ensure that, if enacted, the Medical Aid in Dying Act will work well in New York and provide another needed, albeit infrequently used, last resort option for terminally ill New Yorkers.

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Featured Member Spotlight: Fern Finkel

Interview by Katy Carpenter

Q Where are you from?

A Brooklyn, New York. Originally I am from Canarsie (which I consider "real Brooklyn"). It's deeply ethnic with a sense of community where you know all of your neighbors. Now I live in Brooklyn Heights which is more like city living, where you know some of your neighbors and there's no real "block."

Q Tell me about your family.

A I've been married to a fantastic man, Tony Gentile, a trial lawyer, for 31 years. We have three children together: Scott, our classical pianist/conductor who is getting married to the beautiful Emily Kate Naydeck in June; Matthew, our filmmaker/director in L.A.; and Miriam—she just passed the Bar and is working at Brooklyn Defender Services! I have two stepchildren: Will, also a trial lawyer, and Katie, a mediator and mom. My brother is a lawyer, my sister is a professional organizer, my father is 90 and a retired lawyer. My mother was an artist and mom extraordinaire; she was the best person I have ever known.

Fern Finkel (second from right) and family

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Q Where is your favorite place you have traveled to?

A Gustavus, Alaska, an island off of Glacier Bay. We went twice and fished, hiked, biked. It's heaven on earth! It's a tiny town of less than 500 people. One year we sent 340 pounds of halibut and salmon back home; our friends and family ate it for a year.

Q How you did come about to practicing in the area of Elder Law?

A I began my career as a medical malpractice trial lawyer. Then I had three kids in five years and I didn't want to work full-time trying cases and taking verdicts at the pace I was going, so I opened a small home office to handle some per diem work and figure out my next steps. My dear friend and former office manager Marie Diresta recommended that I take classes in what was then emerging as a new field—"Elder Law"—so I took CLEs (before they were required) and volunteered through the Brooklyn Bar's Volunteer Lawyer's Project and Brooklyn Legal

Services to learn. Turn around and a few years later, I was an elder law attorney!

Q Have you had any turning points in your life?

A Besides becoming a mother, which was life altering, and becoming an elder law attorney, which I truly believe is my calling, I would have to say it was forming a partnership and starting a firm with Julie. I left the comfort of my home office after 25 years of solo practice and have never looked back. It's fantastic.

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

A My continuous commitment to pro bono service. I've spent almost 25 years doing presentations and community outreach and have helped countless people—probably in the tens of thousands—prepare and execute Health Care Proxies. I call it my never-ending commitment to the aging population.

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

A I knew I wanted to be a lawyer by the time I was seven. I would go with my father to work at his office, ironically in the building my office is now in, 16 Court Street, and play "lawyer." For a brief time I wanted to be a social worker for children with special needs; my work is a marriage of the two.

Q Do you have any memorable advice for young attorneys?

A So much! Learn from everyone around you—the good and the bad—learn what to do and how to be, and what not to do. Guard your reputation carefully; it's hard, if not impossible, to recover if harmed. Find your passion. If you don't love your field, look to where you'll be better suited—you spend so much of your life working so make it meaningful. Always act like a professional. Ask advice when you don't know the answer. As an attorney, the opportunities for your own life, and the ability to have an impact on others, are limitless. Use your gifts to make the world a better place.

Q What are your hobbies or special interests?

A I love our upstate house in Mount Tremper, New York, especially our fire pit, swings, long walks, lakes and hiking. I do yoga almost every day. Spending time with my husband, kids, family and friends—this is my heart!

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

A I would rather live in a tent with those I love nearby than be alone with all the riches in the world. I'm so grateful for the many gifts and blessings in my life. I'm committed to making this world a better place and to giving back!

Committee Spotlight: Guardianship Committee

The goal of the Guardianship Committee is to keep the Section apprised of important issues facing guardianship practitioners in the areas of Mental Hygiene Law Article 81 and to work toward the betterment of a system serving disabled individuals and their families. The Guardianship Committee provides a forum for practitioners to discuss issues that are of concern to them and keeps the Section apprised of actual changes as well as needed changes in guardianship law and guardianship practice. The Committee's primary legislative focus this year has been the drafting of a law that would permit guardianship courts to issue orders of protection and have those orders registered in the same way that orders of protection issued by the Family Court and the various criminal courts are registered. The hope is to submit a final draft of this legislation for approval by the Executive Committee at the Annual Meeting in January, 2019. The Committee will also continue to seek to improve the Part 36 compensation structure implemented through the Office of Court Administration that impacts all practitioners acting as Guardians, Trustees, Court-Appointed Attorneys and Court Evaluators.

Tales from the Trenches

By Christine Mooney and Linda Redlisky

Webster's dictionary defines a trench as "a long narrow ditch, channel, waterway or conduit."[1] We prefer to focus on the later meaning, conduit. A conduit is a mechanism through which something flows. As practitioners, we serve as conduits to effectuate the protections and needs of our clients and wards in our practices. More often than not, these roles provide stories from the front lines of our work.

This column is the first in a series of stories that share our "lessons learned" from the front lines. Frequently, these stories remain hidden in our individual discussions or a passing phone call. Instead, why not share these "lessons learned" to assist one another. Being in the trenches can be frustrating, particularly when you encounter another colleague who is belligerent or unwillingly to listen, or in the alternative a client who refuses to listen to your advice. These times are frequent but not unusual. Being a conduit requires patience and perseverance.

Perseverance effectuates positive change. Many times these stories also remain hidden. For example, Elizabeth Jennings remains unbeknownst to many of us, though the *NYSBA Journal* did write an article about her in the November/December 2017 edition. She was a New York City public school teacher who was hired by the New York City Board of Education in 1854.[2] In July of 1854, she was physically thrown to the ground from a trolley in New York City. Elizabeth and her companion were on their way to church. They were denied passage because they were African-American.

Jennings filed suit against the Third Avenue Railroad Co., *Jennings v. Third Avenue Railroad Corp. (1855, Brooklyn*) and was awarded damages. Her action of resistance against the segregation of the transportation system in New York City was brave at that time. The order of the court directed the desegregation of public transportation in New York City.

Christine Mooney

Linda Redlisky

Her courage has the capacity to teach others about respect, equality and dignity in oneself and represents the consummate role of practitioners in the field of elder law and special needs. Her leadership is best summarized by John H. Hewitt, "Her valiant resistance to segregation and discrimination in transportation in 1854, and her heroic willingness to stand up for her rights and the rights of all African Americans served to inspire others, black and white, to take up the cause."[3]

The cause, which so many of us so aptly fight for each day, has become harder and harder. These stories will become the continuing opportunity to share your lessons learned, or your tale from the trenches. Our inaugural column contains two great examples of how Ms. Jenning's perseverance and legal victory should be a model for us all.

Follow Your Instincts

It is unthinkable for we practitioners who serve as fiduciaries to enter into transactions of any significance relating to our ward's finances, without prior court approval. Not so for a Brooklyn property guardian-attorney,

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Linda Redlisky, Esq. is a partner at Rafferty & Redlisky, LLP concentrating in elder law, including Medicaid planning and guardianship matters. She routinely is appointed by the Court to serve as Court Evaluator, Guardian and Counsel to the Alleged Incapacitated Person in complex matters involving turnover and surcharge proceedings. She is a member of the Executive Committee of the Elder Law and Special Needs Section of the NYS Bar Association, Chair of the Client and Consumer Issues sub-committee, and an active member of the Section on Women in the Law. She can be reached at redlisky@randrlegal.com

who proclaimed that he had the authority to divest his profoundly disabled ward of 85 percent of her liquid assets in the form of two mortgages, without prior court approval, under the guise of the Prudent Investor Rule.[4]

The court examiner unremarkably noted these mortgages in his report, and concluded that the accounting should be approved. By the court's own motion, a new court examiner was appointed, who prepared a preliminary report, and as a result thereof, the prior guardian was suspended and I was appointed as interim guardian of the property. This court held a framed issue hearing regarding the propriety of the guardian's investment decisions for the two mortgages.

During the course of this four-day hearing, the suspended guardian invoked his right against self-incrimination to almost every question. I was puzzled, as *Marine Midland Bank v. John Russo Produce Co.*, 50 NY2d 31 (1980), squarely held that a fiduciary who filed an official oath to faithfully and honestly discharge the duties of the office waived the privilege against self-incrimination as to matters involving judicial accountings. Stymied, I quickly turned to serving so-ordered subpoenas on the financial institutions of the mortgagees, both of whom were individuals. We needed documentary evidence so the fact finder could draw an adverse inference. We resigned ourselves to the fact that the best result we could obtain was a surcharge and a judgment so as to make the ward whole financially.

But something gnawed at me. Why would the guardian go through all of this trouble to obtain mortgages that, by the way, were non-performing? Why would he attempt to conceal his efforts and not obtain court approval if he thought diversification of the portfolio was prudent? The examiner and I both viscerally knew there was a kickback involved, but after weeks of poring over the guardian's records, we resigned ourselves to it being a cash transaction that we would not be able to prove. The answer came the night before the final day of the hearing from a subpoena response from the bank.

The first round of subpoenaed bank statements and checks revealed that on the same date the mortgage loan was given on one property, the mortgagee purchased a bank check in the amount of two-hundred-thousand dollars ($200,000.00) made payable to the bank. The endorsement was simply "for deposit only," with an account number. With guarded optimism, I sent a second subpoena to obtain the identity of the account holder associated with the account number listed on the endorsement for the $200,000 check. The information obtained revealed that the check was used to pay off a home equity line of credit established in the name of the suspended property guardian's home, which was titled in his spouse's name. Not only did we recover the full amount of the mortgages, with interest, but also the Brooklyn District Attorney prosecuted him, and he served time in jail as a result of his crime.

Good lawyering fundamentally involves listening to your instincts. Pursue every lead or angle with diligence and purpose.

The Journey Back to New York

In 2005, the New York State Legislature amended Article 10-C of the Social Services Law, under Chapter 392 of the laws of the State of New York, to address the oversight and supervision of children placed in out of state residential programs.[5] Citing the increasing number of out-of-state placements between the years 1998 and 2004, the legislature noted that there had been an almost 200 percent increase in the number of children placed outside of New York State.[6]

Among the changes to the law were the creation of a multi-agency oversight committee to address supervision of out of state placements and a coordination of in state services. Today, more than 13 years after the amendment to the Social Services Law, some of these children, now adults, are returning to New York under the supervision of Article 81 guardianship proceedings. The challenges of coordinating the return for an incapacitated young adult who has resided outside the state of New York for multiple years presents unique and challenging circumstances for guardians.

As a court-appointed guardian for one of these individuals I would like to share with you the important lessons learned, or "growing pains" that his family and I have shared over the last 16 months. Looking back, I would begin to think about what we could have and should have done better. The answer is nothing. However, I would say that there are many things that we have learned that may help the next young adult's transition home a little easier.

Approaching repatriation for an incapacitated individual requires multi-layered coordination. What do I mean? If the young adult has lived outside of New York for several years, and is now returning to a new home or a residential placement, this presents a dramatic life change. One of the important things we learned is that our IP benefited from what I like to call "trial runs." We brought him to New York to meet his new care team, and see his new home, on two separate occasions. Although the weekend visits were quick, it afforded him an opportunity to see his new home before simply being dropped off to a set of unfamiliar circumstances. In retrospect this is one of the best things we did for him.

In planning ahead, we repeatedly insisted that his full medical history and records be transferred to the new care team in New York. Unfortunately, this did not happen. As a guardian or caregiver for an individual returning, particularly one with existing behavioral or medical issues, it is of the utmost importance that the guardians have a complete set of medical records. It is also imperative to have the treating primary care physician provide a "what's next" list as follow-up items for the transition. This ensures that the receiving medical team has a set of clear diagnostic directives to address any medical issues.

I cannot stress enough that routine is everything. My ward attended a regular day program at his out-of-state residential placement. It was a routine he followed for more than 12 years. The New York-based residential placement agency believed that a new approach might suit him best. A part of the Behavior Intervention Plan proposed to the Office for People With Developmental Disabilities (OPWDD) included a day program without walls to allow him the freedom to be active in the community each day. The family and I objected to the proposed plan, and requested the amendment of the proposed plan. We insisted that day programming, at least for the initial transition, was an important part of creating a stable and identifiable routine. We were right, he needed it, and it has worked. Never assume that what an agency or what is being proposed for the transition is the best programming. Follow your instincts!

Every day is a new adventure, a set of new challenges and more important, the need to continually advocate for his treatment and clinical care. We have learned that as conduits for his transition and well-being, we are continually navigating, challenging and looking for new alternatives to ensure that his homecoming continues to be safe, happy and allows him to succeed!

Endnotes

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2. Hewitt, John H., *The Search for Elizabeth Jennings, Heroine of a Sunday Afternoon in New York City*, New York History 71, no. 4 (1990): 386-415, http://www.jstor.org.ezproxy.snhu.edu/stable/23175309.
3. *Id.,* at page 415.
4. 23 Mass. 446 (1830).
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6. *Id.,* Chapter 392, 2005.

Fifth Annual *Elder and Special Needs Law Journal* Writing Competition

The Elder Law and Special Needs Section of the New York State Bar Association continues to strive to achieve a diverse membership body, in hopes of fostering a rich environment within which ideas are cultivated.

We are pleased to announce, the "Fifth Annual *Elder and Special Needs Law Journal Writing Competition*."

Topic: Any law or legal issue affecting seniors and/or persons with disabilities, with a specific focus on historically underserved populations. Examples include, but are not limited to, access to education, health care and housing.

Eligibility: All students attending an accredited ABA law school within New York State and recent law graduates seeking employment.

Awards: The winners of the "Fifth Annual *Elder and Special Needs Law Journal* Writing Competition" will be guaranteed publication within the New York State Bar Association's *Elder and Special Needs Law Journal* (ESNLJ). In addition, there will be two $1000 prizes and a complimentary one-year membership in the New York State Elder Law Section for the winners.

Format: Submit the article in the form of a Word document. Please do not use Word Perfect or .docx. The article should contain endnotes in Arabic numerals, and all sources should be attributed in *Bluebook* format. Contact the Co-Production Editor for further details or your Office of Student Life or its equivalent.

Judging: The articles will be judged by the *ESNLJ* Editorial Board. Even if one of your students' articles is not chosen as a winner, we may choose to publish it in the *ESNLJ*.

To Enter: Please send all submissions to the following email addresses:

kimtrigoboff@gmail.com &
jseminara@gylawny.com

Deadline: March 15, 2019 and no extensions will be granted.

Elder Law and Special Needs Section Events and Co-Sponsored Events

The Elder Law and Special Needs Section's Young Lawyer Event in Cooperstown

By Katy Carpenter

The Elder Law and Special Needs Section's Young Lawyer Committee held its third event on Sunday, October 21, 2018. The group of young attorneys traveled out to Cooperstown, New York to enjoy the Fall foliage and tour both the Fly Creek Cider Mill and Ommegang Brewery. This event is part of ongoing outreach to build a stronger foundation for the younger and newer members of the Section by offering opportunities to meet each other, network and build working relationships. The group also offers assistance for young lawyers who are interested in finding a mentor within the Section or committee placements.

For any questions, contact Lauren Sharkey (lsharkey@cswlawfirm.com) or Katy Carpenter (kcarpenter@wplawny.com), Young Lawyer liaisons —a subcommittee of the Elder Law and Special Needs Section's Membership Committee.

The Elder Law and Special Needs Section 2018 Fall Meeting

October 4-5, 2018

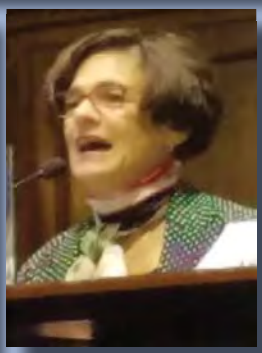
Addressing the New Economics of Aging

This one-and-a-half day program tackled complex policy and practice issues facing today's Elder Law and Special Needs Attorneys across New York State. Sessions offered a broad perspective on national socioeconomic trends in health care delivery, technology, housing, taxation, and wealth transfer—and a forum to develop adaptive practices to address these changes. The overarching theme of this conference was designed to promote forward thinking and opportunities to evaluate the practice of law in the broader context of our changing society.

Exploring Innovative Residential Options for Persons with Alzheimer's Disease

Monday, October 22, 2018

Eloy van Hal, Founder and Senior Managing Consultant of De Hogeweyk, Weesp, the Netherlands, provided an operational overview of the renowned Dementia Village facility created in 2009 as an alternative to traditional institutionalized care provided in nursing homes. This village, for individuals with Alzheimer's or other cognitive impairments, groups residents with shared interests and backgrounds in family-like settings in carefully designed environments emphasizing open, outdoor spaces and amenities like parks, a restaurant, grocery store and auditorium.
This event was co-sponsored by the Elder Law and Special Needs Section, New York City Bar and New York NEALA.



Not All Brokers/Advisors Are Created Equal—Make Sure Your Client Receives Investment Advice from a Fiduciary

By Ronald A. Fatoullah

When it comes to investments, there are two primary parties who are able to offer investment advice to individuals, investment advisors ('advisors') and investment brokers ('brokers') who work for broker-dealers. Most individuals think that the advice they receive from brokers and advisors is similar, but there is actually a huge difference in the standards that brokers and advisors must adhere to. Advisors must adhere to the 'fiduciary standard' and must put their clients' interests ahead of their own. Brokers only have to adhere to the 'suitability' standard, which is far less stringent. And to further complicate the situation, sometimes 'brokers' call themselves 'advisors'.

This is a dirty little secret that most of our clients, and their elder law, estate planning and special needs attorneys, may not be aware of. Brokers, who oftentimes manage the life savings of our clients, aren't automatically fiduciaries, and don't necessarily have to act in the best interests of our clients. Brokers can put their own needs before the needs their clients, as long as they abide by the 'suitability standard.' And, just because an investment is suitable, doesn't mean it's good for the client.

So, brokers can advise their clients to invest in certain investment products that might pay them a larger commission, even if their clients will receive a smaller return, as long as the investments are suitable. For example, assume a broker is deciding on advising a client to purchase Fund 'A' which pays her a 5% commission or Fund 'B' which pays her a 1% commission. If both investments are suitable and Fund 'B' would be best for the client, the broker can nevertheless advise her client to purchase Fund 'A' and still adhere to the suitability standard. It is imperative that you, the attorney, assist your clients by advising them to use advisors/brokers that will always put their clients first, and adhere to the fiduciary standard at all times.

A 2015 report by the White House Council of Economic Advisers found that hidden commissions and fees cost investors about $17 billion a year in retirement accounts alone.[1] Can you imagine the savings to our clients if they received conflict-free financial advice from a fiduciary who managed *all* of their assets, both retirement as well as non-retirement?

Also, one must be aware of the "hybrid advisor." A hybrid advisor is an individual who is both a broker (a registered representative associated with a broker-dealer), and an investment advisor representative of a registered investment advisor (RIA). This is where things get truly get confusing to the client. Hybrid advisors are both RIAs *and* broker dealers. The RIA/advisor is held to a fiduciary standard, while the broker is only held to the suitability standard. Therefore, the hybrid advisor might act with a fiduciary standard when managing certain assets and with a suitability standard when managing other assets. And, when asked if he or she is a fiduciary, the hybrid advisor might respond in the affirmative. Although this response may be technically correct, it may be misleading. Our clients need to be educated and should ask their advisors if they are fiduciaries on *all* of the investments being managed for them and at *all* times.

Ronald A. Fatoullah

I've witnessed too many brokers who were swayed by upfront commissions to the detriment of their clients. For example, we've all likely dealt with elderly clients who were sold inappropriate annuities. Annuities with surrender charge periods of up to 10 years sold a couple of months before the client wanted to transfer those funds into a Medicaid asset preservation trust!

The Department of Labor (DOL) Fiduciary Rule ("Rule"), was approved during the Obama Administration.[2] But unfortunately, the Rule was ultimately vacated by the Fifth Circuit Court of Appeals on March 15, 2018. The Rule sought to extend the existing fiduciary standard promulgated by ERISA to all financial professionals who work with retirement plans or provide retirement planning, including brokers. The Court of Appeals found that the Rule was "unreasonable" and was "an arbitrary and capricious exercise of administrative power."[3]

Predictably, when initially proposed, the Rule had been met with a significant amount of opposition from the financial planning industry. Many other groups representing broker-dealers claimed that the lost commissions and the added compliance burden made the Rule overly onerous. However, there were also many proponents of the Rule, arguing that the Rule would increase transparency in the industry and would prevent broker-dealers from abusing their position by charging their clients excessive front-loaded commissions without their client's knowledge. Advocates of the Rule felt that the duty of care owed by a broker should be no different than that of an attorney or accountant, both of which are held to the fiduciary standard.

Although the Rule is now effectively dead, there are those that posit that the all of the hype surrounding the Rule has left positive lingering effects on the industry. Investors have become more savvy with regards to fees and are now more aware that they should seek out conflict-free advice. Many brokers are taking a closer look at their compensation policies and investment strategies and embracing a more transparent and client-centric approach.

One additional advantage of this organic shift within the industry is that it applies to retirement and non-retirement products alike, as opposed to the actual Rule that was only applicable to retirement accounts. This new industry trend is of great importance to us as elder law, estate planning and special needs attorneys, who should advise their trustee/executor/fiduciary clients to only hire advisors who are fiduciaries themselves. This will more likely satisfy the client's own fiduciary duty as a trustee or executor, something that may be brought into doubt if they were to invest with a firm that owes them and their beneficiaries no fiduciary duty.

There is little hope of a revival of the Rule due to the current administration's overt aversion to added regulations, but there are several states, New York included, that are looking at implementing regulations similar to those of the Rule on the state level. There is also some hope that the SEC's Best Interest proposed regulation would accomplish many of the same goals that the Rule had attempted to accomplish. The Best Interest regulation, while stopping short of referring to it as a fiduciary standard, requires that advisers and broker-dealers adhere to a standard of care that is substantially similar.[4] This is good news for those who were proponents of the DOL Rule because this would extend to all securities as opposed to just retirement products. The SEC proposed regulation is likely to be met with fierce opposition (much like the DOL rule), so only time will tell if the SEC regulation will actually be implemented.

In the meantime, as advocates for the best interests of our clients, we must continue to raise awareness of the potential pitfalls of using brokers that are operating in a non-fiduciary capacity and we should recommend that they seek out advisors/brokers who are fiduciaries so that they may enjoy the transparency and accountability that the DOL rule sought to implement.

Endnotes

1. U.S. Department of Labor, White House Fact Sheet: Strengthening Retirement Security by Cracking Down on Conflicts of Interest in Retirement Savings, https://www.dol.gov/newsroom/releases/ebsa/ebsa20160406-0 (last visited Nov 7, 2018).
2. 81 F.R. 20945 (2016).
3. *Chamber of Commerce of the USA v. United States Department of Labor*, No. 17-10238 (5th Cir. 2018).
4. 83 F.R. 21574 (2018).

Ronald A. Fatoullah, Esq. is the principal of Ronald Fatoullah & Associates, elder law, estate planning and special needs attorneys in New York City and Long Island. Mr. Fatoullah is also a partner in AdvicePeriod along with his son, Josh. Thank you to Joseph Breningstall, JD from the offices of Ronald Fatoullah & Associates for his contribution to this article.

New Member Spotlight: Alexis R. Gruttadauria

Interview by Katy Carpenter

Q Where are you from?

A I'm from Rochester, specifically Fairport. I went to Oswego for undergrad for two years and then transferred to Pace (downtown New York City campus). When the time came to go to law school, I was not leaving New York City if I could help it and ended up at New York Law School.

Q What has kept you in the area?

A I love the fast pace and variety of activities that a city like New York City has to offer. It's also important to me to be close to my family.

Q Where is your favorite place you've traveled?

A My family owned a travel agency when I was younger so I have traveled a lot, but I don't remember most of it! Of my recent travels I truly enjoyed visiting Israel; in fact, had I not already been admitted to law school at the time, I might have stayed!

Q Why did you choose to practice in the areas of Estate Planning and Elder Law?

A I went to law school with the intention of focusing in entertainment because of my theater background. However, all that changed in my second year when I took Wills with Prof. LaPiana and Elder Law with Prof. Strauss. I appreciate the variety and combination of complex puzzles and human connections offered by this area of practice.

Q What's your favorite part about your job?

A If I had to pick a profession other than the law, I would have been a teacher. My favorite part of my job is being able to educate my clients, other practitioners and the community at large about the issues we face every day. It is also gratifying to be in a position to use my "day job" to, through education and advocacy, promote the welfare of the communities we serve.

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

A Ah; a hard question and one that I am not sure how to answer. I think in general my most significant accomplishment thus far is pushing myself to become involved in our legal community, which I feel as a young lawyer can be difficult to do.

Q Where do you see yourself in five years?

A Another hard one! Having only been in practice a short time, five years does not seem that long. I hope to continue on my current trajectory learning to be a better attorney and advocate.

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

A A lawyer. I was recently watching a baby video and my uncle, David Hoffman, Esq., had bought me a bib that said "future lawyer"… my family got a kick out of that! For me it was never a question of whether I would be a lawyer; it was a question of "what else" I wanted to be … a question I am still working on.

Q Tell me a little about your family.

A I met my husband in law school and he now works in operational compliance. My mom is a college professor at Bronx Community College, my dad is a project manager for pharmaceutical trials, and my sister is an OBGYN. I am also very close with both sides of my extended family, having been "raised by committee." I like to say I really have six siblings!

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

A Reading—mostly science-fiction and fantasy. I also like hiking, shopping, spending time with family and cooking.

Q Have you ever been given memorable advice or have advice to give?

A A little of both.

The best advice I've received about working in this area of law is that while it is important to have compassion for your clients and to approach your work from not only a legal, but also human perspective, it's important to remember it is not your emergency and by taking a step back from the emotion you can better serve your clients' interests.

As for advice I have to give, I firmly believe that you need to ask for help and find mentors that will guide you and help you grown into the attorney and the person that you want to be.

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

A I think we all have a responsibility to help those coming up behind us. I was on the dispute resolution team ("DRT") at New York Law School and it was one of the best experiences I had in law school partly because of the alumni and practicing attorneys who took the time away from their day-to-day to help us learn what it means to be an attorney. In that spirit I have remained involved in DRT as a resource for current students.

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This practice guide is currently divided into two parts.

Part One, written by Bernard A. Krooks, Esq., examines the scope and practice of elder law in New York State, covering areas such as Medicaid, long-term care insurance, powers of attorney and health care proxies. Elder law cuts across many distinct fields including benefits law, trusts and estates, personal injury, family law, real estate, taxation, guardianship law, insurance law and constitutional law.

Part Two, written by Jessica R. Amelar, Esq., gives the attorney a step-by-step overview of the drafting of a will, from the initial client interview to the will execution. This section provides a sample will, sample representation letters and numerous checklists, forms and exhibits.

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Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding

By Anthony J. Enea

In most Article 81 Guardianship proceedings the assets of the alleged incapacitated person (AIP), specifically title to said assets, is not the primary focus. Generally, the physical and mental incapacities of the AIP and the need for the appointment of an appropriate guardian of the person and property for the AIP is the center of attention. However, the attorney for the petitioner should carefully and thoroughly review all of the assets owned by the AIP and pay specific attention to how title to said assets is held and whether said assets are titled jointly with others and/or have named beneficiaries. The failure to do so may detrimentally impact the AIP as well as the individuals he or she intends to receive those assets.

Additionally, a thorough review of the AIP's assets is critical in formulating the relief to be requested in the petition with respect to how title of the AIP's assets is to be held once a guardian(s) is appointed, and with respect to the potential transfer of the AIP's assets for long-term care (Medicaid) and estate planning purposes.

The following is an example of the information and documents regarding the AIP's assets that should be gathered by the attorney before filing the petition:

(a) Copies of all deeds for real property owned by the AIP with the approximate present fair market value of said property. The attorney should pay particular attention to whether the real property is held jointly with a third party (family/non-family) and whether said joint ownership is with rights of survivorship or as a tenancy in common, the percentage of ownership interest and whether the property is owned in the name of a corporation or other legal entity. It may be necessary to obtain the specifics as to any corporation or other entity, such as copies of documents relevant to the formation of the entity and stock certificates and/or other documents establishing the ownership interest of the AIP and/or others;

(b) Copies of all recent account statements for all bank accounts and investment accounts stating the current value of the accounts. Again, particular attention should be paid as to whether the joint accounts are accounts that bestow rights upon the joint tenants during the life of the AIP (joint with rights of survivorship) or upon the death of a joint tenant, "in trust for" accounts, "for convenience only" accounts, "transfer on death" and/or "payable on death" accounts;

(c) Copies of all recent account statements for any IRAs, 401Ks, 403(b), annuities (whether they be qualified or non-qualified accounts) with copies of all beneficiary designations for said accounts. Remember, if the aforestated IRAs, 401Ks do not have a named beneficiary, upon the death of the account holder, the beneficiary will be his or her estate, thus necessitating the probate of his or her Last Will and Testament or the filing of an administration proceeding. It should also be ascertained as to whether or not the AIP is receiving the "minimum required distributions" from any of the aforestated retirement accounts;

Anthony J. Enea

(d) Copies of all life insurance policies owned by the AIP with proof of beneficiary designation for said policies. It is also important to determine if the policies have any cash value;

(e) Copies of all Trust Agreements executed by the AIP and documentary evidence (deeds/account statements) evidencing whether said Trust(s) have been funded with the AIP's assets or the assets of any third parties;

(f) Copies of any copyrights, trademarks and licensing agreements owned by the AIP;

(g) Copies of any mortgages and/or promissory notes due to the AIP with all amortization schedules. If there exists the possibility of recorded mortgages and/or UCC financing statements, it may be advisable to obtain copies of same.

(h) Obtain information as to the AIP's annual income. For example, obtain copies of any W-2's, social security statements and any pension statements if appropriate. If the AIP is receiving any government benefits such as "SSI," "SSD" or Medicaid, obtain the appropriate documentary proof. In order to ascertain the amount of interest and/or dividend income the AIP is receiving, it may be necessary to review the most recent income tax returns filed by the AIP, if available, and/or obtain copies of 1099s relevant to same.

Once the attorney has gathered the aforestated, the next step is to thoroughly analyze the information and documentary proof to ascertain what impact the assets and title to said assets will have upon the guardian-

ship proceeding and the ultimate relief requested in the petition.

In order to make this analysis pre-petition, it is imperative that the petitioner's attorney have a solid understanding of the relevant laws and legal principles with respect to the ownership of real and personal property and particularly, the impact of the joint ownership thereof.

Common Law Rules for Ownership of Property and Their Codification

The joint ownership of both real and personal property has been recognized for centuries as a valid legal doctrine. At common law three forms of joint ownership were recognized:

(a) tenancy in common, wherein the owner has a divisible fractional share with no right of survivorship in the other tenants' interest;

(b) tenancy by the entirety (applicable to husband and wife and ownership of real property only, wherein each owns an undivided interest with a right of survivorship, but, without the right to unilaterally sever or partition their interests); and

(c) joint tenancy (the joint tenants have an undivided interest which can be unilaterally severed or destroyed) and whereby the tenants have a right of survivorship.

These three common law forms of ownership have been codified in Section 6-2.2 of the New York Estates, Powers and Trusts Law (EPTL).[1] With respect to the authorization of conveyances of an interest in real property by one or more persons, the relevant statutory provisions are found in Section 240-b of the New York Real Property Law (RPL).[2] As to the severance of an interest(s) in jointly held real property the relevant statutory authority is found in Section 240-c of RPL.[3]

Relevant Statutory Provisions for Jointly Titled Bank and Brokerage Accounts

It is important to note that the right to receive assets by operation of law in a joint account upon the death of the joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated New York Banking Law § 678.[4] Section 678 provides that accounts held "for the convenience" shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.[5]

In order for the provision of Banking Law § 678 to apply, the words "for the convenience" or similarly "for convenience only" must appear in the title of the account.[6] If they do not appear, then the presumptions created by Banking Law § 675 will be applied.[7]

Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy. Under § 675 three rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (ii) that there has been a irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in the entire joint account upon the death of the other joint tenant.[8]

Section 675(b) of the Banking Law provides that the burden of proof is upon the person challenging the presumption of a joint tenancy.[9]

With respect to securities accounts or brokerage accounts in joint names, the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have.[10] The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL 13-4.1 through 13-4.12. Under EPTL 13-4.2 a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, however evidence of its creation is the usage of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" or "POD."[11] (EPTL 13-4.5) Under EPTL 13-4.4, evidence of the establishment of the account is the account opening documentation that indicates whether the beneficiary is to take ownership at the death of the other owner(s).[12]

The Pitfalls of Jointly Titled, "In Trust For" or Other Accounts Where Property Passes by Operation of Law

The manner in which one holds title to property at the time the commencement of a guardianship proceeding, and at the time of the AIP's demise will have a critical and significant impact upon the relief sought in the guardianship proceeding. With the exception of property (real and/or personal) held jointly as tenants in common, all other jointly held property, "in trust for" accounts, "transfer on death" accounts, IRAs, 401(k)s and life insurance policies that have a named beneficiary (other than one's estate) are accounts that pass by operation of law and are non-

probate assets. Thus, they are assets that are not controlled by one's Last Will and Testament. While for many individuals (those with relatively small estates), jointly titled property or having property passing by operation of law may be advisable, however, for many others it can have disastrous and unforeseen consequences if not properly addressed prior to death, and particularly in the guardianship petition.

Because the ownership of real and personal property jointly with another or in a manner that it will pass by operation of law upon the death of a joint tenant is very common, it is important that said joint accounts be specifically identified in the guardianship petition and the impact upon both the AIP and any joint tenant or account/property recipient upon the death of the AIP be specifically addressed.

It requires the attorney to undertake an assessment and review of how and why the joint account(s) was created and who is entitled to notice of the relief being sought, and his or her right to be heard in the guardianship proceeding. The survivorship rights of a joint tenants(s) cannot and should not be terminated or modified in a guardianship proceeding without the joint tenant being given notice of the proposed change and the opportunity to be heard. To accomplish this, it is necessary that the petitioner undertake a thorough investigation of the account(s) at issue and specifically delineate what is being proposed with respect to the joint account(s).

Identifying the Joint Accounts in the Petition

Section 81.08 of the MHL specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person in the petition for the appointment of a guardian. It is incumbent upon the petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his name alone or holds jointly with others and/or is the beneficiary of, and to disclose same in the Guardianship petition.[13]

In doing so with respect to any bank or brokerage accounts, the petitioner should specifically identify any jointly held bank or brokerage account(s), and whether said joint account(s) are joint accounts entitled to the presumptions of Banking Law § 675, or are "for the convenience" accounts under § 678 or "transfer on death" accounts with respect to any brokerage account pursuant to the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12. The petition should specifically identify any person who has an interest in the account, the extent of his or her interest, and whether he or she has a right of survivorship in the account.[14]

In most cases this is not problematic if the joint account holder is the spouse of the alleged incapacitated person (AIP), and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the petitioner should obtain copies of the account signature cards and any other bank or financial institution record which may describe whether or not the account is a joint account with rights of survivorship that is entitled to the presumptions of § 675 or is a "transfer on death" account under EPTL 13-4.1 through 13-4.12 or merely a "for the convenience" account under § 678.16.

Specifically Delineate Your Proposal as to Any Joint Account(s) or Jointly Held Real Property in the Guardianship Petition

The guardianship petition should contain a clear and concise description of the relief sought by the petitioner with respect to any joint bank or brokerage account(s) or real property. For example, if a transfer of the title of the joint account or real property from the AIP to the other named joint account holder or to a third party (not a joint tenant) is being sought, it is necessary that same be specifically requested in the petition and notice be given to the party or possible beneficiary under a will, trust or presumptive distribute, whose interest in said account(s) or property may be impacted by the transfer. The petition should also specifically identify the account by its account number, name of bank or brokerage firm as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the guardian, or whether an apportionment of the account or outright transfer to the other named account holder or any other party is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the petition, and the petitioner's proposal with respect thereto.[15]

If the potential exists that the AIP may need Medicaid (nursing home and/or home care services) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility), the court will usually approve a transfer of the AIP's interest in said account(s) to the other named title holder, without any apportionment to the AIP.[16] This is also true if no objection to the proposed transfer is made by any other interested party to the guardianship proceeding, and the AIP's testamentary scheme as reflected in his or her last will or trust is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether or not the child, family member or friend contributed any of the funds in the joint account(s), and whether the proposed transfer will create the five-year look back period for nursing home Medicaid purposes (or does it qualify as an exempt transfer to a spouse, blind or disabled child). There will also be the issue of whether or not the other interested parties to the guardianship will consent to the transfer, and if the account is to be apportioned by and between the account holders, how will title to each apportioned account be held, and what impact will the apportionment have on the survivorship interest

of each joint tenant? The protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be held "in trust for" the incapacitated person? This could be problematic if the incapacitated person is a candidate for Medicaid benefits, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event it would be appropriate to title the account of the non-incapacitated party "in trust for" the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder, it may be necessary that the account marshaled by the Guardianship be titled "X as Guardian of the property of Y in trust for Z" so as to protect Z's survivorship interest.

Clearly, the title of the asset held at the commencement of the guardianship proceeding and how they will be titled once a guardian has been appointed are important issues that need to be thoroughly analyzed and reviewed pre-petition by the attorney and the client.

Endnotes

1. Estates, Powers & Trusts Law (EPTL) 6-2.2.
2. Real Property Law (RPL) § 240-b.
3. RPL § 240-c.
4. Banking Law § 678.
5. *Id*.
6. *Id*.
7. Banking Law § 675.
8. *Id*.
9. Banking Law § 675.
10. EPTL 13-4.1–13.4.12.
11. EPTL 13-4.2.
12. EPTL 13-4.4.
13. MHL § 81.08.
14. Banking Law §§ 675 and 678; EPTL 13-4.1 and 13-4.12.
15. MHL §§ 81.07(d) and 81.21(c).
16. N.Y. Social Services Law § 366.

Anthony J. Enea is a member of Enea, Scanlan and Sirignano, LLP of White Plains, New York. Mr. Enea is the Past Chair of Elder Law Section of the New York State Bar Association (NYSBA). He is the Chair Elect of the Senior Lawyer Section of the NYSBA. Mr. Enea is the Past President and founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys. Mr. Enea is the President of the Westchester Bar Foundation and Past President of the Westchester County Bar Association. Mr. Enea can be reached at (914)948-1500 or A.enea@esslawfirm.com.

This article also appears in the Winter 2019 issue of* One on One, *a publication of the General Practice Section of the New York State Bar Association.

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The Elder Law and Special Needs Section Welcomes New Members *(October 2018 through Mid-November 2018)*

First District
Charles Michael Barbuti
Ann Marie Egan
Frances Ann Phelan Krische
Ellen M. Massey
Ron Lee Meyers
Stuart C. Sherman

Second District
Bret Cahn
Kelly Victoria Decker
Aron Gerstel

Third District
Michael Joseph Andreani
Kathryn Elizabeth Jerian
Victor A. Oberting, III
Barbara Lee Steigerwald

Fourth District
Kevin L. Peryer

Fifth District
Brittney Marie Hodnik

Sixth District
Christy A. Coe
Jo A. Fabrizio
Marvin Daube Parshall, Sr.

Eights
Umberto N. Angilletta
Kelly Marie Barrett
Paul Kenneth Isaac
Robert P. Merino
Erin Lynn Riker
Tyler J. Threehouse

Ninth District
Hon. Daniel D. Angiolillo
Laura M. Brancato
Susan Edwards Colson
William D. Eddy, Jr.
Prof. Linda C. Fentiman
Debra A. Fruendt
Rondi Kline Loganzo
Karen S. Sonn

Tenth District
Carrie Ann Arias
Stephen A. Bonfa
Michael J. Comerford
Jodi A. Donato
Adam Kahn
Amit Ochani
Samantha Persaud
Jessica Stoneburner
Lisa Volpe

Eleventh District
Kevin P. Kelly

Out of State/Country
Franckline Casimir-Benoit
Kayla Claire Champagne Ericuivel
Stanley H. Lieberstein
Steven Harris Linde
Nataliia Melko
Stephen Albert Unsworth

NEW YORK STATE BAR ASSOCIATION

NYSBA 2019 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

E-mail address _____

Office phone (____) _____

Home phone (____) _____

Date of birth _____ /_____ /_____

Law school _____ Graduation date____

States and dates of admission to Bar:_____

Annual Membership Dues *(check One)*

Class based on first year of admission to bar of any state.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2011 and prior	$275
☐ Attorneys admitted 2012-2013	185
☐ Attorneys admitted 2014-2015	125
☐ Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

☐ Attorneys admitted 2011 and prior	$180
☐ Attorneys admitted 2012-2013	150
☐ Attorneys admitted 2014-2015	120
☐ Attorneys admitted 2016 - 3.31.2018	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, 2018

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

Dues Payment

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

METHOD OF PAYMENT: ☐ Check (payable in U.S. dollars)
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number _____

Expiration Date _____ Date _____

Signature _____

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

A New, Simpler Way to Pay Your Dues: Auto-Renew

When you enroll in the Auto-Renew program, your credit card will be charged either annually or monthly based on your billing preference. This way your membership will always be current, so you'll receive your benefits uninterrupted. **We'll even renew your NYSBA membership each year without you needing to take action.**

Enrollment Instructions

Two payment options are available to members, annually and monthly. Go to www.nysba.org/autorenew to set up either of the options. Or, use the check box below and provide your signature to authorize payment.

☐ **Monthly | Installment Plan – Make your first payment today and spread the rest out over the remaining months in the term.**

☐ **Annually – You will pay the full dues bill now and will automatically be renewed on an annual basis.**

By joining the Auto-Renew Program we will automatically process your membership dues annually, and you understand that your credit card will be charged at the beginning of your month of expiration for your next year of membership at the then-current rate. If you have chosen the monthly payment option, your credit card will be charged at the beginning of each month without interruption. The program will continue until you cancel your participation. If you decide to cancel your membership prior to paying your dues in full for the entire year, then you will have to cover the remaining balance before renewing your membership again. If you wish to leave the program at any time, you can simply call 800.582.2452 in advance of your month of expiration.

METHOD OF PAYMENT:
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

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CLE Online All Access Pass $66.25 per month for a total of $795 annually

Access hundreds of programs online and satisfy your MCLE requirement for one low price. Over 1,700 programs currently available online. New programs will be added each month to the online library. (Includes unlimited access to all NYSBA CLE online programs including videos and course materials through December 31, 2019.)

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Billed monthly $66.25 per month.*

☐ Yes, I want to enroll in CLE online all access pass

*Non-member price $1,995 Billed monthly at $166.25 per month. NYSBA members save $100 a month.

METHOD OF PAYMENT:
☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number _____

Expiration Date _____ Date _____

Signature _____

Join online at www.nysbajoin.org

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

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☐ 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:
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New York State Bar Association, One Elk Street, Albany NY 12207
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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 Education** (ELD8000)
___ **Special Needs Planning** (ELD3800)
___ **Sponsorship** (ELD6500)
___ **Task Force Challenges to Medicaid Planning Practice Area** (ELD8100)
___ **Task Force on Unlawful Practice of Law** (ELD7700)
___ **Technology** (ELD7800)
___ **Veterans' Benefits** (ELD6700)

NYSBA

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Elder and Special Needs Law Journal

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