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Elder Law Attorney

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of the New York State Bar Association

Message from the Chair

Just when many practitioners were advising their clients that Medicaid planning was no longer viable post–DRA 2005, those practitioners who attended our Annual Meeting learned that Medicaid planning is alive and well, even in the eyes of the Department of Health and County Department of Social Services attorneys.

The 400 or so of us who attended the Elder Law Section Annual Meeting on January 29, 2008, at the New York Marriott Marquis enjoyed fantastic programming in a wide variety of Elder Law subjects; we learned immensely from the excellent speakers, and even received an ethics credit, the programming for which was actually enjoyable as well as educational. Additionally, two well-deserved awards were given out: (1) to **Tim Casserly**, our Chair-Elect, for his tireless advocacy and litigation, which has advanced the rights of the elderly and persons with disabilities, and (2) to **Kate Madigan,** President of the New York State Bar Association and former Chair of the Elder Law Section, for furthering the rights of the elderly and persons with disabilities and her tireless efforts in working on passage of the Compact in New York State and the other 49 states.

The Annual Meeting was chaired by **Judie Grimaldi** and was well received by all. **Bernie Krooks** gave us his ever-popular Elder Law Legislative update, which included 26 areas of new material, including a discussion of very recent GISs, fair hearings and cases. **Peter Strauss** moderated a panel discussing a real-life view of end-of-life decision making, including a panel discussion of legal and ethical issues. This panel included two physicians, one of whom explained the intricacies and benefits of the MOLST document currently being piloted in various counties around New York State. **Cora Alsante** gave us an update on what is happening with personal service contracts and the numerous recent fair hearing decisions in this regard. **Anthony Enea** discussed whether Medicaid planning can still be done in guardianship proceedings, and **Vincent Russo** discussed post-DRA Medicaid challenges in protecting the homestead and other post-DRA planning issues.

Finally, the last hour of the programming included a Medicaid panel discussion with the Department of Health and County DSS attorneys. This panel discussion has almost become a tradition at our Annual

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Meeting. The panel was moderated by **Judie Grimaldi** and **Lou Pierro**. The speakers included **Dan Tarantino**, the Deputy Director of the Bureau of Health Insurance Programs, Division of Legal Affairs at the New York State Department of Health; **Peter Glase,** Deputy General Counsel, MICSA Litigation and Programming Counseling Division, HRA Office of Legal Affairs in New York City; **Steve Rahmas,** an attorney in the Legal Division of the Albany County Department of Social Services; **Gary Samuels,** an attorney in the Legal Department of the Rockland County Department of Social Services; and **Morgan Thurston**, an attorney in the Legal Division of the Onondaga County Department of Social Services. The discussion was lively and covered how the State is interpreting and how the various counties are treating many Medicaid planning techniques, such as promissory notes, GRATs, personal service contracts and the use of single-premium annuities in increasing the community spouse resource allowance.

The spring Unprogram will be taking place on April 3rd and 4th in Syracuse and is being chaired by **Howard Krooks** and **Steve Silverberg.** The Unprogram is an innovative style of programming, wherein attendees can get specific questions answered through numerous different discussion groups involving all areas of our practice, substantive as well as administrative, and will also address practice management issues. There is always lively debate, which all enjoy and benefit from.

The Pro Bono Senior Clinic project, the brainchild of **Ellen Makofsky**, continues to be a success and gives us a great exposure as Elder Law attorneys helping the general public. **Dave Stapleton**, the Treasurer of our Section, chairs this project. Virtually all of the District Delegates have had their Fall clinics and are arranging for their Spring clinics. Additionally, **Gayle Eagan** was responsible for a very expansive article in the *Buffalo Law Journal* regarding the pro bono clinics. It was wonderful and positive public relations exposure for our Section, and we hope to continue with that type of exposure going forward with these clinics.

Many committees of our Section have been actively involved in numerous projects, some of which are described below:

1. Proposed Legislation

As discussed in my last message to you, **Sharon Gruer**, the Secretary of our Section, with the assistance of **Ellyn Kravitz** and **Steve Silverberg,** drafted proposed legislation to amend EPTL 5-1.1A(a)(4). The purpose of this proposed legislation is to preserve the right of a surviving spouse to benefit from the elective share of a predeceased spouse's estate, while being able to obtain governmental benefits so that his or her care is not interrupted or diminished by being removed from the Medicaid program or becoming ineligible for it. The proposed legislation provides that the elective share may be held in a qualifying special needs trust. Such legislation was sent to the Trusts and Estates Law Section for their review and has been received favorably by them. We hope to move this legislation forward in the near future.

2. Guardianship Committee

Anthony Enea and **Ira Miller,** as Co-chairs of this Committee, have prepared and disseminated to volunteers throughout the State a Guardianship Court Grid. The purpose of the grid is to provide attorneys practicing in various Guardianship Courts throughout the State with basic information as to the practices and procedures followed by a particular Guardianship Court. The grids have been completed for Westchester, Rockland and Putnam Counties.

The Committee has also finalized an updated version of *Guidelines for Guardians*, which has been sent to OCA for distribution to the courts and will be available online for our members.

The committee has continued to work with the Guardianship Court Committee created by Justice Pfau. **Anthony Enea** and **Robert Kruger** have been appointed to the committee. Justice Pfau is also in the process of considering Justices for appointment to the committee.

With respect to the proposed amendment to Article 81 relevant to the transition from a guardianship to an estate, that proposed legislative amendment has been approved by the Executive Committee of the State Bar Association and is part of the State Bar's legislative program for 2008. The legislative proposal is also on the upcoming agenda for the Surrogate's Court Association for approval.

Also, Anthony and Ira are working with **Walter Leinhardt** of the Trusts and Estates Law Section to prepare a detailed analysis of Article 81, including recommendations for additions and modifications thereto.

3. Medicaid Committee

The Medicaid Committee, co-chaired by **Valerie Bogart** and **Ira Salzman,** continues to be active. The Medicaid Committee has been working on the following:

A. Elimination of Spousal and Impoverishment Protections in Lombardi and Other Waivers

As has been reported in my prior message, CMS is adamantly refusing to alter its relatively new view that spousal and impoverishment protections do not apply to medically needy people in waiver programs.

For the new Nursing Home Transition & Diversion Waiver, now approved by CMS and to be implemented in the near future, the State agreed (in the 2007 budget) to drop the spousal protections in order to get the waiver approved. The concern now is for the renewal of the Lombardi and TBI waivers in 2008. Since the State's priority is to renew these waivers, the only way they can guarantee approval is to amend State law to eliminate spousal protections from these waivers. The Medicaid Committee urged the Spitzer administration not to do this in the upcoming budget proposal, or, at a minimum, to do this for only the TBI waiver (which has fewer married couples) and not for the Lombardi waiver, whose renewal is not due until later in 2008. The hope is that litigation will be commenced to challenge this policy.

B. NYSARC Trust

An ongoing question has been whether deposits of the spend down into a pooled trust would be considered a "transfer" that would trigger a penalty if the individual later entered a nursing home. In November 2007, Gregor MacMillan of DOH confirmed verbally that no penalty would apply, but this has not been confirmed in writing. At our Elder Law Section Annual Meeting in January 2007, Gregor MacMillan announced again that these deposits would not trigger a penalty. This was never confirmed in writing. Recently, a legal services attorney in Ithaca said her county informed her that the State was now saying these transfers would be penalized.

C. Medically Needy Income Level for Two

The Medicaid income level for a couple had been frozen for two years in 2005 and 2006, despite increases in income levels for singles. This freeze had occurred because State DOH, under the previous Pataki administration, said they were under pressure from CMS to reduce the levels to comply with a federal regulation. The *Blair* lawsuit was brought challenging this by the Empire Justice Center, Legal Services of Central New York, the law firm of Nixon, Peabody and the Legal Aid Society in New York City. The lawsuit is based on the fact that the Medicaid levels for couples have now fallen below the SSI levels, which are composed of a federally based rate and a State supplement, which is set by State legislation. The *Blair* lawsuit claimed that this disparity violated the State Constitution by failing to give to the needy the minimum amount determined by the State Legislature, using the State SSI supplement as a minimum benchmark.

When the Spitzer administration began, the parties agreed to settle the lawsuit with the State submitting a State Plan Amendment to exempt a certain amount of income, which would increase the couple's income level. As a result, the 2008 levels were announced, with couples' limit increasing from $900 to $1,067.

4. Compact for Long Term Care

By the time you read this message, **Kate Madigan,** New York State Bar Association President, will have traveled to Los Angeles to the ABA House of Delegates, presenting a proposal for the Compact for Long Term Care. The Compact is supported by many divisions of the House of Delegates, including the Senior Lawyers Division, Tax Division, the General Practice and Solo Practice Division and many state bar associations (including, obviously, the New York State Bar Association). The House is to vote on this proposal, and, if approved, the Compact will become ABA policy. This would be fantastic news for those of us in favor of the Compact and it would bring us much closer to the Compact becoming a legislative reality. The tireless work of the Compact Legislation Committee deserves our sincere gratitude for its efforts over the years to make the Compact a reality.

I hope to see you all at the Unprogram in Syracuse on April 3–4.

Ami Setright Longstreet

Editor's Message

As the Spring Edition of the *Elder Law Attorney* was being readied for print in late January 2008, the Elder Law Section under the excellent stewardship of our Chair, Ami S. Longstreet, Esq., and its officers had just completed another successful Annual Meeting at the friendly confines of the Marriott Marquis in Manhattan. I am pleased to report a most enjoyable and highly informative meeting was held. We owe a debt of gratitude to all who helped make the day a success.

This edition of the *Elder Law Attorney* consists of a diverse and informative collection of articles. We begin with an excellent submission from Ira Salzman, Esq. which in great detail reviews how Article 81 of the Mental Hygiene Legal Services can be utilized to prevent the financial abuse of the elderly. It is definitely an article that you will be able to repeatedly utilize as a reference. Valerie J. Bogart, Esq., the Director of the Evelyn Frank Legal Resources Program, Selfhelp Community Services, Inc., has written an informative piece reviewing a recent corrected fair hearing decision which sheds new light on the issue of Holocaust Reparations and Medicaid. Our immediate past Chair, Ellen G. Makofsky, in a piece entitled "Do Good and Feel Good" reminds us of the importance of volunteering our time to help others. Ellen emphasizes the importance of the Mitchell W. Rabbino Decision Making Day on May 8, 2008 and urges us to volunteer our services to help educate seniors about the importance of advance directives such as health care proxies and living wills. Please contact Kathy Plog at Kplog@nysba.org to volunteer.

We also have an excellent submission from Neil T. Rimsky, Esq., which reviews the various housing alternatives that are available to the elderly. Finally, David R. Okrent, Esq., and David Goldfarb, Esq., have collaborated to educate us as to the tax implications relevant to the purchase of a life estate in the home of another as a post-DRA planning option.

Finally, we have excellent submissions from our regular contributors Judith Raskin, Esq., Robert Kruger, Esq., and Adrienne Arkontaky, Esq.

I am confident you will find this edition of the *Elder Law Attorney* both interesting and informative.

Anthony J. Enea

Request for Articles

If you have written an article you would like considered for publication, or have an idea for one, please contact *Elder Law Attorney* Editor:

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

www.nysba.org/ElderLawAttorney

Using Article 81 of the Mental Hygiene Law to Stop Financial Abuse of the Elderly

By Ira Salzman

Article 81 of the New York Mental Hygiene Law is a powerful tool that can be used to stop financial forms of elder abuse. Typically the need to use Article 81 for this purpose occurs in one of two contexts.

The more common context is that a client comes to an attorney, alleges that financial abuse of a mentally disabled person is taking place, and asks the attorney to start a guardianship proceeding to obtain control of finances, recover assets, void transactions, and/or revoke documents. In appropriate cases courts have been willing to do all of these things in conjunction with an application to appoint an Article 81 guardian. *In re Rita R.*, 26 A.D.3d 502 (2d Dep't 2006) (Court voids powers of attorney, health care proxy, trust and will); *In re Shapiro*, N.Y.L.J. 4/19/01 (S. Ct., Nassau) (Transfer of $680,000 voided); *In re Sierra*, 15 Misc. 3d 1116A (S. Ct., Westchester 2007) (Marriage voided); *see* Mental Hygiene Law § 81.29(d).

Sometimes a court will decline to assert jurisdiction to void a transaction as part of an application to appoint a guardian. Sometimes improper transactions are not discovered until after a guardian is appointed. Sometimes an attorney will decide, for strategic reasons, that the best thing to do is to obtain an appropriate temporary restraining order in the initial guardianship proceeding and delay the actual application for the recovery of assets until after the Article 81 guardian is appointed. See *In re Loretta I*, 34 A.D.3d 480 (2d Dep't 2006). This might be a strategic choice if there are reasons to expedite the appointment of an Article 81 guardian or there is a desire to argue for the applicability of the dead man's statute, CPLR 4519. In any of these cases a proceeding to recover assets can be brought under Mental Hygiene Law § 81.43. This article will focus on issues that arise when an application is made to appoint a guardian under Article 81.

Drafting the Petition

A petition for the appointment of a guardian which also requests that transactions between the alleged incapacitated person (hereinafter "AIP") and a third party be voided must be drafted with care. *In re Loretta I*, 34 A.D.3d 480 (2d Dep't 2006) and *In re Johanna C.*, 34 A.D.3d 465 (2d Dep't 2006) are two related cases involving allegations that a neighbor of two incapacitated sisters caused the sisters to deed their home to her. Hearings were held and the trial court voided the real estate transfer.

> *"Article 81 of the New York Mental Hygiene Law is a powerful tool that can be used to stop financial forms of elder abuse."*

The Second Department reversed. It stated in *In re Loretta I*:

> The failure of the petitioners to properly name the nonparty-appellant and to properly notice the object of the proceedings as it pertains to the potential divestment of real and personal property acquired by the nonparty-appellant from the alleged incapacitated persons was fatal to that relief[;] see *Matter of Rose BB*, 243 A.D.2d 999, 663 N.Y.S.2d 415; cf. *Matter of Gershenoff*, 17 A.D.3d 243, 793 N.Y.S.2d 397; *Matter of Johnson*, 172 Misc. 2d 684, 658 N.Y.S.2d 780). However, relief ancillary to the appointment of guardians for the alleged incapacitated persons including, inter alia, temporary injunctive relief and vacatur of powers of attorney were properly noticed and did not impinge upon the nonparty-appellant's potential property rights, and the nonparty-appellant did not have to be named as a party to effectuate such relief (see CPLR 1001[b], 1004; cf. *Riverside Capital Advisors v. First Secured Capital Corp.*, 28 A.D.3d 457, 814 N.Y.S.2d 646; *Mucchi v. Haddad Corp*, 101 A.D.2d 724, 475 N.Y.S.2d 35).
>
> We note that the transactions in question were not made by persons who were adjudicated incompetent and for whom a guardian had been appointed but, rather, by persons who are unable to understand the nature and consequences of their actions, rendering the transactions voidable. (see *Ortelere v.*

> *Teachers' Retirement Bd. of City of N.Y*, 25 N.Y.2d 196, 250 N.E.2d 460, 303 N.Y.S.2d 362; *Finch v. Goldstein*, 245 N.Y. 300, 157 N.E. 146) Granting the guardians authority to commence a turnover proceeding against the nonparty-appellant rather than deeming the transactions void, and enjoining any further transfer of the subject real property pending the turnover proceeding was and is a more appropriate course of action. Therefore, we do not disturb that portion of the resettled order and judgment authorizing the guardian to commence a turnover proceeding.
> (34 A.D.3d 482–483)

In *Loretta I* the court held that a court hearing an application for the appointment of an Article 81 guardian has the right to void a power of attorney even if the attorney-in-fact was not named as a party. However, with regard to actions that impinge on a non-party's property rights, the court made two significant rulings.

The first is that the petition must properly notice the object of the proceeding as it pertains to the voiding of the transaction. In other words, it must specifically request the voiding of the transaction as one of the items of relief. This is not a problem if the petitioner is actually aware of all the transactions that have occurred. However, the petitioner may not be aware of the total assets, what assets are missing, or what documents were executed by the AIP at a time when the AIP was incapacitated. It would therefore seem that the prudent thing for petitioner to do is to be as specific as possible in the initial petition and be prepared to move to amend the petition should the petitioner become aware of additional improper transactions during the pendency of the proceeding. *See* CPLR 402; *In re Johnson*, 172 Misc. 2d 684 (S. Ct., Suffolk 1997); *In re Sierra*, 15 Misc. 3d 1116A (S. Ct., Westchester 2007).

The second holding of *Loretta I* is that, insofar as the property rights of a third party are affected, the third party has to be named as a party to the proceeding. Unfortunately, it is not at all clear what this means because the case law with regard to who is a party to an application for the appointment of an Article 81 guardian is inconsistent and at times difficult to understand. *Compare In re Allen*, 10 Misc. 3d 1072A (S. Ct., Tompkins 2005) and *In re Astor*, 13 Misc. 3d 862 (S. Ct., New York 2006). *See also In re Heckl*, 44 A.D.3d 110 (4th Dep't 2007) (AIP is the "subject" of the proceeding and not a "respondent" and therefore not a party). If nothing else, it presumably means that, among other things, the third party is entitled to receive a complete set of the pleadings, notwithstanding the requirements of Mental Hygiene Law § 81.07 which mandate that third parties are entitled to receive only a Notice of Proceeding. Also note the *Loretta I* court held that, at least based on the facts of that case, the appropriate thing for the trial court to do was to restrain further transfer of the property in question and authorize the guardian to commence a separate action to recover it. It is not at all clear whether the court meant this as a general rule, or meant that this was the proper way to proceed in this case because the third party was not named as a party to the proceeding and did not receive proper notice of the relief requested. It should be noted in this context that this court cited with approval the trial court decision in *In re Johnson*, *supra*. In that case a third party to a proceeding to appoint a guardian was properly noticed with regard to the relief requested and the court voided a marriage.

Tools That Can Be Used to Stop Further Financial Abuse While a Guardianship Proceeding Is Pending

There are a number of things that can be done to stop financial abuse simultaneously with the commencement of a guardianship proceeding. These include: 1) sending an appropriately drafted letter to financial institutions advising them of their customer's incapacity; 2) making a referral to Adult Protective Services; and 3) making a criminal referral combined with a request for an order of protection.

When a guardianship petition is filed, Mental Hygiene Law § 81.24 requires that a notice of the pendency of a guardianship proceeding be filed against all real property owned by the AIP. This will make additional transfers of title to the property subject to the outcome of the guardianship proceeding.

In the order to show cause commencing the guardianship proceeding, the petitioner can ask for preliminary relief to protect the AIP during the pendency of the proceeding. This preliminary relief can include a temporary restraining order and a request for the appointment of a temporary guardian. The order to show cause can also ask the court to issue an order of protection or, in the alternative, appoint the petitioner as temporary guardian with authority to petition for an order of protection in the family court.

Drafting the T.R.O.—Making Sure the Restraining Order Is Enforceable With the Contempt Sanction

The ultimate goal in drafting a temporary restraining order is to make sure that it is enforceable with the sanction of contempt. While it is certainly true that many people will not want to risk violating a restrain-

ing order regardless of how it is drafted, it is also true that a restraining order that is not enforceable with the sanction of contempt is ultimately worthless. The form of contempt that the drafter of the petition is particularly concerned about is civil contempt. The reason for this is that the penalty for civil contempt is the actual damages incurred as a result of the violation of the order. These damages are payable to the damaged party. *See* Judiciary Law § 753. In contrast, criminal contempt is punishable by a maximum fine of $1,000 payable to the court and a maximum of 30 days in jail. *See* Judiciary Law § 751.

In order for a court to find that civil contempt has occurred, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate was in effect."[1] *McCormick v. Axelrod*, 59 N.Y.2d 574 (1983) at 583; *see also McCain v. Dinkins*, 84 N.Y.2d 216 (1994).

Making Sure That the Language in a T.R.O. Constitutes a "Lawful" Order

Mental Hygiene Law § 81.23(b)(2) authorizes the issuance of a T.R.O upon a showing that absent the issuance of a T.R.O., the property of the AIP "would become dissipated to that person's detriment." The major restriction in the Mental Hygiene Law with regard to the issuance of a T.R.O is that the court is not permitted to issue an injunction against the AIP. The statute goes on to list a series of actions which can be enjoined.

Given that a T.R.O must be legal in order to be enforceable, one must ask whether the law requires that a T.R.O. use the exact language of the statute and no other language. Research discloses no cases where this issue has been litigated, but there are numerous reported and unreported cases where restraining orders that do not track the language of the statute have been deemed enforceable. *See, e.g., In re Matthew L.*, 6 A.D.3d 712 (2d Dep't 2004) (T.R.O. restraining execution of judgment); *In re Kaminester*, 17 Misc. 3d 1117A (S. Ct., New York 2007) (T.R.O. restraining a person from obtaining financial benefit).

Making Sure That the Language in a T.R.O. Expresses an Unequivocal Mandate

As noted above, if a T.R.O. does not express an unequivocal mandate, it will not be enforceable with the contempt sanction. An example of this is found in *In re Rose B.B.*, 243 A.D.2d 999 (3d Dep't 1997), where the court reversed a finding of contempt for failing to "preserve the assets of an elderly woman" and "impeding the court." The appellate court held that this language was not specific enough to support a contempt finding in that case. Clearly the need to make sure that the language of a T.R.O. is unequivocal is not a hypothetical problem.

In drafting a T.R.O. in a financial abuse case, there are normally two targets or groups of targets. One group of targets is those individuals and/or financial institutions that are holding the assets of the AIP. Drafting a T.R.O. for this group of targets is easy because there is a form for the appropriate language in the statute itself. Mental Hygiene Law § 81.23(b)(3) states:

> When the court is satisfied that the interest of the incapacitated person or person alleged to be incapacitated would be appropriately served, the court may provide in a temporary restraining order that such temporary restraining order shall have the effect of:
>
> (i) a restraining notice when served in a manner and upon such persons as the court in its discretion shall deem appropriate;

In addition, Mental Hygiene Law § 81.23(b)(4) states:

> Where such a temporary restraining order provides for a restraining notice the person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person or the person alleged to be incapacitated except pursuant to the order of the court.

Thus, language enjoining a bank from releasing assets of an AIP could be phrased as follows:

> ORDERED that pursuant to Mental Hygiene Law § 81.23(b)(3) and Mental Hygiene Law § 81.23(b)(4), this order shall have the effect of a restraining notice and _____ Bank is forbidden to make or suffer any sale, assignment, transfer or interference with any property of _____ including but not limited to Account No._____ except pursuant to the order of the court.

Because Mental Hygiene Law § 81.23(b) applies to a person having "custody or control of the person or property" of the AIP, this language can also be used to enjoin use of a power of attorney. Language such as the language below can be used:

> ORDERED, that pursuant to Mental Hygiene Law § 81.23(b)(3) and Mental Hygiene Law § 81.23(b)(4) this order shall have the effect of a restraining notice and _____, individually and in any fiduciary capacity including but not limited to attorney in fact, is forbidden to make or suffer any sale, assignment, transfer or interference with any property of the incapacitated person except pursuant to the order of the court.

These decretal paragraphs can and perhaps should be supplemented with additional language that is as specific and clear as possible given the facts of the case. For example, language could be added specifically restraining the use of any power of attorney for any purpose. If there are specific assets that an abuser is known to have improperly taken, specific language should be added with regard to those assets.

The second target or group of targets of a temporary restraining order is the alleged abuser or abusers. The goal of a T.R.O. with regard to this group of targets is to prevent continuing abuse during the pendency of the proceeding. The technical problem that the drafter of this kind of T.R.O. needs to solve is that the statute prohibits the court from restraining the actions of the AIP and the petitioner may not know the location of all the AIP's assets. It may therefore be impossible to restrain all of the holders of the assets of the AIP. This means that it may be possible for the abuser to continue the financial abuse during the pendency of the proceeding unless a proper order restraining the abuser can be put in place. The goal of a T.R.O. in this context is therefore to prevent the abuser from continuing to receive financial benefits during the pendency of the proceeding.

Again, the statute provides form language which can be used to restrain an abuser. Mental Hygiene Law § 81.23(b)(1) states in part:

> The court may, at any time prior to or after the appointment of a guardian or at the time of the appointment of a guardian with or without security, enjoin any person, other than the incapacitated person or the person alleged to be incapacitated from selling, assigning, or from disposing of property or confessing judgment which may become a lien on property or receiving or arranging for another person to receive property from the incapacitated person or the person alleged to be incapacitated or doing or suffering to be done any act or omission endangering the health, safety or welfare of the incapacitated person or the person alleged to be incapacitated.

Thus a temporary restraining order could state:

> ORDERED, that _____ is enjoined from selling, assigning or disposing of property of the alleged incapacitated person, or confessing judgment which may become a lien on such property, or receiving or arranging for another person to receive property from the alleged incapacitated person or doing or suffering to be done any act or omission endangering the health, safety or welfare of the alleged incapacitated person until this proceeding is dismissed or until ten days after the appointment of a guardian.

This language is certainly helpful but arguably it does not provide complete protection against the actions of an abuser. This becomes apparent if one compares this language with the language of Mental Hygiene Law § 81.29(d). This statute sets forth the powers of a guardianship court with regard to the voiding of transactions entered into by an alleged incapacitated person. It authorizes a guardianship court to modify, amend or revoke previously executed powers of attorney, health care proxies and any

> contract, conveyance or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance or disposition during lifetime or to take effect upon death was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent.

This language has been interpreted to authorize a court to void a will. *In re Rita R., supra*. It has also been interpreted to authorize a court to void a contract of marriage. *In re Sierra, supra.*

It is at least arguable that the model injunctive language in § 81.23(b)(1) is not coextensive with the actual authority of the court under § 81.29(d). Phrased another way, there are transfers that the court can void under Mental Hygiene Law § 81.29(d) that would not necessarily be enjoined if the only injunctive language that was used was based on the model language in § 81.23(b)(1). The kinds of transactions that are arguably not covered by the model language in Mental Hygiene

Law § 81.23(b)(1) include, but are not limited to, the following:

1. Entering into contracts, including but not limited to marriages;
2. Being named as the beneficiary of a future interest, such as being named the beneficiary of a life insurance policy or payable on death account at a financial institution; and
3. Being named beneficiary of a will.

In *In re Kaminester*, 17 Misc. 3d 1117A, the court held that being named the beneficiary of a life insurance policy was a violation of a T.R.O. that enjoined respondent from obtaining "financial benefit" from the AIP. Temporary restraining order language that incorporates the holding of *Kaminester* and attempts to track the language of Mental Hygiene Law § 81.29(d) appears below.

> ORDERED, that _____ is enjoined from entering into or arranging for another to enter into any contracts with the alleged incapacitated person (including but not limited to contracts of marriage), and accepting or arranging for another to accept any financial benefit from the alleged incapacitated person until this proceeding is dismissed or until ten days after the appointment of a guardian herein, and it is further
>
> ORDERED, that _____ is enjoined from receiving or arranging to receive, or arranging for someone else to receive any conveyance or disposition from the alleged incapacitated person (whether or not such disposition takes effect during the lifetime of the alleged incapacitated person or takes effect upon the death of the incapacitated person) until this proceeding is dismissed or until ten days after the appointment of a guardian herein.

Other T.R.O. Drafting Issues

Mental Hygiene Law § 81.23(b)(1) authorizes the issuance of the T.R.O. "when an application under this article seeks an injunction." In the context of an application made for a T.R.O. made in conjunction with the commencement of an Article 81 proceeding, it is not clear what this requirement means, given that the statute says a T.R.O. can extend until ten days after a guardian is appointed. This language is probably more relevant in the case where an application is made for a temporary restraining order after a guardian has already been appointed, though it may be appropriate to apply for a preliminary injunction when one is applying for a temporary restraining order in any case.

Mental Hygiene Law § 81.23(b)(1) says an injunction can extend until ten days after the appointment of a guardian. But this does not mean that there cannot be a further extension of the injunction after a hearing in the application for the appointment of a guardian.

Mental Hygiene Law § 81.23(b)(2) requires service of process of a T.R.O. as follows:

> Notice of the temporary restraining order shall be given to any person restrained, to the incapacitated person or the person alleged to be incapacitated, and any person having custody or control over the person or property of the incapacitated person or the person alleged to be incapacitated in such manner as the court may prescribe.

Mental Hygiene Law § 81.23(b)(3) states a T.R.O. that has the effect of a restraining notice shall be served on such persons and in such manner as the court shall direct.

Applicants for a T.R.O. should be aware of Court Rule 202.7(f). This rule requires that an application for a T.R.O. be accompanied by an affirmation demonstrating there will be significant prejudice if prior notice of the application is given to the adverse party. Absent such a showing, the affirmation must state that a good-faith effort has been made to notify the adverse party as to the time and place that the application for the T.R.O. will be made.

Applying for the Appointment of a Temporary Guardian

Mental Hygiene Law § 81.23(a)(1) authorizes a court to appoint a temporary guardian

> upon showing of danger in the reasonably foreseeable future to the health and well being of the alleged incapacitated person, or danger of waste, misappropriation or loss of property of the alleged incapacitated person.

The powers of the temporary guardian can be broad or limited. Obviously it is always going to be easier to obtain the appointment of a temporary guardian with limited powers than it is to obtain appointment of a temporary guardian with broad general powers. Limited temporary guardianships might include the power to:

1. Take control of a portion of the assets so that emergency expenses can be paid;

2. Apply for health insurance; and / or
3. Apply for an order of protection in family court.

Courts are understandably reluctant to authorize the appointment of a temporary guardian with broad general powers because by doing so the court is essentially deciding the whole case based on one side's papers. If an application for the appointment of a temporary guardian with broad general powers is being made, there are at least five things that should be proved to the court in a convincing way. These are:

1. The AIP is in fact incapacitated.
2. There is an emergency which requires the appointment of a temporary guardian and a T.R.O. will not provide adequate relief.
3. The powers requested constitute the least restrictive alternative given the emergency. For example, it may not be necessary to obtain temporary guardianship over all the assets; guardianship over a portion of the assets may be sufficient.
4. The proposed temporary guardian will be fair and neutral. Consider letting the court select the temporary guardian or, in larger cases, nominating a bank; and
5. The assets will be secure. The proposed guardian must be bondable. Advise the court concerning the extent to which the proposed temporary guardian is bondable. In larger cases, consider proposing a bank because no bond is required of a bank. *See* Banking Law § 100-a(5). If a bank is used, its fee arrangement needs to be placed in the order.

To prove these things in a convincing way it is important to submit, to the extent possible, documentary proof and multiple supporting affidavits (ideally from disinterested parties).

Obtaining Information During the Pendency of a Guardianship Proceeding

An Article 81 guardianship proceeding is a special proceeding within the meaning of the CPLR. This means that to the extent that Article 81 does not contain a specific rule, a guardianship proceeding is governed by Article 4 of the CPLR. Except as noted below, discovery in an Article 81 proceeding is therefore governed by CPLR 408. This statute states that except for a Notice to Admit, there is no discovery in a special proceeding without the permission of the court. The right to discovery is not freely granted in guardianship proceedings. *See generally* CPLR 408.

However, the Notice to Admit is an underutilized device that is frequently useful in financial abuse cases because it can be used to obtain admission of photocopies of relevant documents. It is important to note that the time limits for a Notice to Admit under Article 4 of the CPLR are different than they are in a plenary proceeding.

Mental Hygiene Law § 81.23(b)(3) authorizes the court to grant information subpoena power to the attorney for the petitioner. This section of the law is rarely utilized in proceedings for the appointment of a guardian, perhaps because it grants discovery rights that are not reciprocal.

The most common way that discovery is obtained in an Article 81 proceeding is by the court evaluator. Courts will often sign an order specifically authorizing the court evaluator to obtain information and documents.

Attorneys, of course, have the same authority as they would in any other proceeding to issue trial subpoenas.

Trial Issues—Burden of Proof

Whenever there is a trial with regard to the validity of transactions with a mentally disabled person, the petitioner should always be aware of the possibility of shifting the burden of proof to the person who received the assets from the mentally disabled person. In *Gordon v. Bialystoker Center*, 45 N.Y.2d 692 (1978), the court said:

> where a fiduciary relationship exists between parties, transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood and that there was no fraud, mistake or undue influence. Where those relations exist there must be clear proof of the integrity and fairness of the transaction or any instrument thus obtained will be set aside or held as invalid between the parties. (45 N.Y.2d at 698)

Recent case law holds that the evidence of a family relationship does not create a presumption of undue influence. There must be a showing that there was motive and opportunity to exercise undue influence and that influence was in fact exercised. *In re Mildred M.J.*, 43 A.D.3d 1391 (4th Dep't 2007).

Interstate and Jurisdictional Issues

Sometimes one of the complications in a financial abuse case is that the AIP has been removed from the State of New York. It is therefore important to know to

what extent a New York order will be honored outside the State of New York.

Under the United States Constitution, guardianship orders are not entitled to full faith and credit. *Hoyt v. Sprague*, 103 U.S. 613 (1880); *Stock v. Mann*, 255 N.Y. 100 (1930); *In re Serrano* 277 A.D.2d (1st Dep't 2000); *Appler v. Riverview Obstetrics & Gynecology P.C.*, 9 A.D.3d 577 (3d Dep't 2004).

However, New York takes an expansive view of its own jurisdiction. Mental Hygiene Law § 81.04(a)(2) states that a guardianship court can exercise jurisdiction over a "nonresident of the state present in the state." In *In re Mary S.*, 234 A.D.2d 300 (2d Dep't 2000), the court interpreted this to mean that the AIP has "personal connections and property" in the State. In that case the court asserted jurisdiction even though the AIP was residing in the State of Maryland at the time the proceeding was commenced. Whether Maryland would honor the New York order would presumably be determined under the law of Maryland. It would appear that if the situation were reversed and a Maryland court issued a guardianship order with regard to a person who was physically present in New York, the New York courts would make an independent determination with regard to what was in the best interest of the AIP. *See Appler v. Riverview Obstetrics & Gynecology P.C., supra*; *Application of Witten*, 5 Misc. 2d 162 (S. Ct., New York 1974).

Conclusion

New York's adult guardianship statute can be a powerful tool in the fight against financial abuse of the mentally disabled. However, because financial abusers may claim property rights in the assets they have received from mentally disabled people, they have significant procedural rights. It is important to understand the procedural rights of financial abusers so that lawsuits against them do not fail on technical grounds. If a temporary restraining order is requested, it is critical that the language submitted to the court constitute a lawful order that is clear and unequivocal. Requests for the appointment of a temporary guardian should include documents and supporting affidavits that show persuasively that the appointment of a temporary guardian is the least restrictive alternative. Petitioners for the revocation of asset transfers should be aware of the possibility of shifting the burden of proof where the financial abuser had a fiduciary relationship with the mentally disabled person.

Endnote

1. The Court must also determine that its order was disobeyed, that the party to be held in contempt had actual knowledge of the court's order (though it is not necessary to demonstrate that the order had actually been served on the party to the litigation) and that there was prejudice to the rights of a party to the litigation. To support a finding of criminal contempt there must also be a showing of willfulness. 59 N.Y.2d at 583.

New Developments in Holocaust Reparations and Medicaid

By Valerie J. Bogart

Many people know that reparations paid to victims of Nazi persecution are exempt from being counted as income or resources by Medicaid or other federally funded programs. *See* "Holocaust Compensation Payments: Effect on Eligibility for Medicaid, SSI and Other Federal Benefits," NYSBA *Elder Law Attorney*, Vol. 14, No. 3, p. 49 (Summer 2004); *see also* pamphlet and worksheet for converting European currency to U.S. Dollars posted at http://www.claimscon.org/?url=payments_benefits. This article discusses two extensions of this issue. One is a new fair hearing decision that clarifies that funds that have previously been commingled with non-exempt funds may still have exempt status. The second issue involves whether German Social Security benefits, as opposed to straight reparations benefits, are exempt.

1. Fair Hearing Decision

On September 19, 2007, the New York State Medicaid program issued a corrected fair hearing decision, replacing an earlier adverse hearing decision. FH No. 4433606Z (Rockland County) (posted on www.wnylc.net, Online Resource Center Fair Hearing database). The elderly man who won this appeal had received an average of $6,000 each year since 1952 in German reparations, and managed to save about two-thirds of those funds. Over these 55 years, during which time he worked and raised a family, he had deposited these funds in many different accounts, sometimes mixing them with his earnings or other sources of income. Finally, when he had long since retired, become frail, and was about to apply for Medicaid, he gathered the funds in a single dedicated Reparations Account. The local Medicaid program in Rockland County, New York, insisted that he spend these funds in order to qualify for Medicaid. The county claimed that since the reparations had been deposited over the years in the same accounts with other income, he could not prove that these funds were the very reparations received from Germany. The elder law firm of Littman Krooks LLP represented this man at a hearing, at which the law firm introduced evidence of the exact amount of reparations received in each of the last 55 years, along with citation to the appropriate provisions of law showing that the Reparations funds did not have to be kept physically apart from other funds in order to be separately identifiable as exempt Reparations. Nevertheless, after the hearing, the State Medicaid program agreed with Rockland County and refused to grant Medicaid until he spent all the funds in the Reparations Account on his nursing home care.

The law firm then contacted the Evelyn Frank Legal Resources Program at Selfhelp Community Services, Inc., which took a special interest in this case, having been founded in 1936 to help the waves of émigrés from Nazi Germany find employment, housing, and a meaningful new life.

Together with the assistance of Littman Krooks LLP, Selfhelp appealed to the State Medicaid program for an internal review of the initial fair hearing determination. The State Medicaid program, having heard the arguments on appeal, agreed to reverse its own hearing decision, and agreed that the funds in the Reparations Account were excluded and did not have to be spent before Medicaid would pay for this man's nursing home care. The State's decision found it was sufficient that this man could document each and every monthly payment he had received from Germany over 55 years—he did not also have to prove which account he deposited these payments in over all of these years. By this decision, the State has relieved aging Holocaust survivors of a burden of proof that would be impossible to meet, ensuring them access to Medicaid for vital long term care services.

2. German Social Security

Like the United States, Germany pays Social Security benefits to people who have worked in Germany for a requisite period of time. Like the United States, a requisite number of months or quarters of coverage is necessary for entitlement to Social Security. However, one of the ways Germany compensates victims of the Holocaust is to deem certain people eligible for Social Security benefits based on substituted work credits—credits for time that they were not permitted to earn actual work credits because of Nazi persecution.

The German National Recompensation Law (Bundesentschädigungsgesetzes or "BEG") gives special credit for insured people who are persecuted persons who suffered harm by lacking social insurance while they were persecuted. The law also provides coverage for children of persecuted persons. Generally, the amendments to the German Social Security law enacted

in 1970 authorize German Social Security for Nazi victims who, because of being forced to flee, to live in ghettos, or to live in camps, were deprived of the opportunity to work in Germany and earn credits to receive regular Social Security.[1] As a result, for the past periods of Nazi persecution, these individuals were given retroactive "substitute" credit for Social Security. In such cases, the records of the German pension agency, Landesversicherungsanstalt, indicate that the payments were based on WGSVG, which stands for "Wiedergutmachung von NS-Unrecht in der Sozialversicherung."[2] "NS" stands for Nazi Socialist. One can write to the appropriate pension office (listings are included in the materials described in the first paragraph of this article) and request the original award letter for Social Security. This letter—which may be decades old—includes a record of earnings used to compute the benefit, much as an earnings record provided by the U.S. Social Security Administration. In certain quarters during the Nazi regime, the record shows the abbreviation "NS" which indicates that substituted coverage was awarded.

Selfhelp has been successful in obtaining an exemption for these benefits in the few cases where the local Medicaid agency challenges the exemption. In one case, we obtained the actual original earnings record from Germany and explained the meaning of the "NS" annotations as set forth in this article. In a few other cases, we have simply been able to explain the law as set forth here, and explain that given the client's age and circumstances during the war, she or he could not have possibly worked enough to earn actual quarters of coverage. Only with substituted coverage could she qualify for Social Security. Hence, the benefit is exempt.

For example, we explained that a particular client individual was born in 1921 and fled Germany around 1937, when she was only 16 years old. It is not possible that she could have worked enough quarters in Germany before the Nazi regime took control to qualify for the Social Security she receives now. She could only possibly qualify for Social Security based on the "substituted" credits described above. Since these credits are based on her status as a Nazi victim, the Social Security is exempt under the Victims of Nazi Persecution Act of 1994, which provides:

> Payments made to individuals because of their status as victims of Nazi persecution shall be disregarded in determining eligibility for and the amount of benefits or services to be provided under any Federal or federally assisted program which provides benefits or services based, in whole or in part, on need. Public Law 103-286 (108 Stat. 1450).

This federal law applies to all Medicaid programs.

We also provide a copy of the pamphlet posted on the Claims Conference website. See link at the beginning of this article. While that pamphlet does not explain this particular issue, it gives credibility to the claim of an exemption.

If Section members find that a county or the state persist in denying an exemption despite this established law, please contact Selfhelp Community Services Inc. Evelyn Frank Legal Services Program at 212.971.7658 or vbogart@selfhelp.net.

Endnotes

1. Persons eligible are defined under § 1 of the BEG law above as people who were persecuted because of political opposition, or because of race, religion, or ideology, were persecuted by Nazi oppressive measures, and consequently suffered loss of life, limb, damage to health, liberty, property, possessions, or vocational or economic pursuits. German law is at http://www.bmgs.bund.de/download/gesetze_web/sonstg/beg1.htm. A translation of this section is on page 3 of the document at http://www.claimscon.org/forms/Ghetto_Pension_Handbook.pdf.

   This booklet published by the Claims Conference describes one particular type of German Social Security available to Holocaust victims—based on work done in ghettos. This is only one type, and the booklet refers to Social Security given for "substituted" coverage as is the case here.

2. The actual German WGSVG law is available online in German at http://www.bmgs.bund.de/download/gesetze_web/gesetze.htm#wgsvg/wgsvg01.htm. Thanks to Aytan Bellin, Esq., who provided some of these online references.

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Attention All Section Members

Please forward any Fair Hearing Decisions of interest to the *Elder Law Attorney*, c/o Anthony J. Enea at Aenea@aol.com.

Do Good and Feel Good

By Ellen G. Makofsky

It shouldn't be shocking news: Not everyone has an advance directive. As Elder Law attorneys, we all advise our clients that a well thought out disability plan requires the execution of a health care proxy and/or a living will. Yet despite all of our very good advice, most New Yorkers have never signed these documents because they do not understand the importance of doing so and often they never had the opportunity to execute an advance directive.

The Elder Law Section of the New York State Bar Association is trying to remedy this lapse with Mitchell W. Rabbino Decision Making Day[1] which is scheduled for May 8, 2008.[2] Decision Making Day is a concerted effort on the part of the Elder Law Section to educate New Yorkers about advance directives. The Elder Law Section asks its members to volunteer their time speaking to seniors across New York State. Participating attorneys educate audiences about health care proxies, living wills, do not resuscitate orders and provide information about participating in organ donor programs. Health Care Proxy and Living Will forms are included in the materials distributed on site so that each senior has the opportunity to execute these documents. Non-advance directive information about estate planning and guardianships is also included in the program.

This is a statewide event and requires the participation of many Section members to be successful. The Section makes your involvement easy by providing an outline and background information concerning the relevant topics. This makes preparation for the presentation a simple process. The Section coordinates the locations where presentations are given and assigns the volunteer attorneys to speak within their own neighborhoods. Contact Kathy Plog at kplog@nysba.org and put a deserving pro bono event on your calendar. Your participation will likely make an important difference to that senior who leaves Decision Making Day with an advance directive as a result of your efforts. It feels good to do good.

Postscript

In the last edition of the *Elder Law Attorney* I advised readers that SCPA 1750[3] was amended to include both the mentally retarded and developmentally disabled. Pursuant to the amendment, SCPA 1750 now provides that where a mentally retarded or developmentally disabled person lacks sufficient capacity to make health care decisions, a 17-A guardian can make health care decisions to withhold or withdraw life-sustaining treatment. Previous to the amendment a 17-A guardian's authority in regard to end of life decision-making extended to only a 17-A guardian of a mentally retarded person.

In response to my column Anthony Enea, editor of the *Elder Law Attorney*, received a letter from Paul R. Kietzman, who serves as general counsel to NYSARC, Inc. Mr. Kietzman made the following comment, which I thought readers would find useful.

> In amplification of the article, it should also be noted that the subject chapter [Chapter 105 of the laws of 2007] did not confer general health care decision-making authority on non-guardian relatives, but only the authority to initiate the 1750 process as to decisions to withhold or withdraw life sustaining treatment from a patient with MR [Mental Retardation] or DD [Developmentally Disabled]. There is authority in the OMRDD regulations for relatives to make health care decisions for major medical treatment requiring informed consent found at 14 NYCRR 633.11, which most providers accept.[4]

Endnotes

1. The Section's Decision Making Day was renamed Mitchell W. Rabbino Decision Making Day in 2003 in honor of Mitch Rabbino, an active officer of the Elder Law Section who passed that year.
2. Scheduling priorities in certain locations may cause a particular Mitchell W. Rabbino Decision Making Day to occur on another day during the week of May 8, 2008.
3. The Health Care Decisions Act for Persons with Mental Retardation.
4. December 28, 2007 letter from Paul R. Kietzman to Anthony J. Enea.

Ellen G. Makofsky is a *cum laude* graduate of Brooklyn Law School. She is a partner in the law firm of Raskin & Makofsky with offices in Garden City, NY. The firm's practice concentrates in elder law, estate planning and estate administration. Ms. Makofsky is the immediate past Chair of the Elder Law Section of the NYSBA and serves as a member of the NYSBA House of Delegates. She has been certified as an Elder Law Attorney by the National Elder Law Foundation and is a member of the National Academy of Elder Law Attorneys, Inc. She has appeared on radio and television and is a frequent guest lecturer and workshop leader for professional and community groups.

Housing Alternatives for the Elderly

By Neil T. Rimsky

I. Trends

What factors impact housing alternatives for seniors in 2007?

Demographic

The population is aging. The largest percentage increase in the United States is in the over-65 population. The shift is virtually seismic in financial dimensions. The survival of Social Security and Medicare is a significant political issue.

Financial

Retirement Funds—Retirement funds, both in qualified plans (such as IRAs, 401(k)'s,) and non-qualified plans, continue to play an increasingly large role in available cash, therefore housing options. Rule changes promulgated by the IRS for qualified plans have expanded the available planning options wherein retirement funds can be used to fund the unified credit. Most important, it is no longer true that the income tax burden need be paid within five years from date of death. Retirement funds can continue to grow tax free for generations.

Long Term Care Insurance—More persons above 50 years of age have purchased long term care insurance policies. Although still a modest percentage, more employers offer long term care insurance policies as a benefit.

The modern policies offer more flexibility than the prior generation policies. Policies are more affordable and our clients have learned how to purchase policies for lower cost that nevertheless will protect them against a financial catastrophe. In prior years, policies were out of sync with the law. For example, the underwriters would provide reimbursement for care only at a licensed facility. Since assisted living facilities were not licensed, long term care policies were deemed unavailable to pay for any form of institutional care other than nursing care. Over the years, the industry has made adjustments. In addition, changes in the law now license the more common form of assisted living facilities.

Government Assistance

Medicare provides no funding for purely custodial care, including assisted living, even where medically necessary. The Medicare supplement policies are similarly limited.

Medicaid has become the major payor of nursing home and other forms of custodial care for middle-income as well as low-income persons. As a consequence, Medicaid budgets have become bloated beyond what Congress anticipated.

The Deficit Reduction Act of 2005

With the DRA, Congress enacted the most exhaustive cutbacks and reversal of prior trends in the Medicaid funding of custodial care. The look-back period is extended to five years for all transfers of resources on or after February 8, 2006. The most dramatic change is how the penalty period is calculated. In addition, the DRA imposed restrictions on home equity and requirements on the forms of annuities and promissory notes. The DRA continues to have a dramatic impact on elder care planning for many of our clients.

Since all of these changes in the law can have a significant impact on remaining in the community, we will focus on portions of the DRA which most directly impact staying at home.

Personal Issues—While Medicaid has been essential in many cases, there is a price to be paid. Medicaid is a form of welfare. It is often a terrible embarrassment for persons who have worked hard and are so proud of their accomplishments to be relegated to a welfare program to pay for basic care needs. There are many who, understandably, are not anxious to transfer resources or who consider it difficult to execute a spousal refusal.

II. Living in the Community

There are a multitude of options to remain in the community.

Home Modification

The simplest way to stay out of a nursing home may be to remain at home. Our homes were not designed for elder care. However, modest changes can make the home far more appealing to seniors who need some level of assistance.

For example, the owner can replace door knobs with larger knobs or handles which are easier to manipulate by hands that have limited flexibility. The same can be said with respect to kitchen utensils. Many companies now manufacture utensils that are much easier to use.

Scatter rugs are easy to trip over, so it may make sense to remove the rugs and replace them with wall-to-wall carpeting. If there are wood floors, the occupant can wear rubber-soled shoes or socks with a rubberized bottom.

Illumination is another problem that can easily be addressed. It is possible to increase luminescence without increasing wattage. For those who are somewhat visually impaired, many appliances have large dials. A phone can have oversized buttons. For the hearing impaired, phones can be purchased with amplifiers.

The bathroom always presents some unique dangers. However, these too can be reduced. Installing a shower without a high lip which is easy to step into, plastic chairs and grab bars all reduce the possibility of injury in a shower.

Using the Home as a Financial Resource—Reverse Mortgages

Often, the home is the primary financial resource, which means that equity is not available. That does not help when care needs far outstrip Social Security, pension and other monthly income.

The reverse mortgage is designed to convert the illiquid home into a source of monthly income. In a typical reverse mortgage, the lender offers a monthly payment to supplement income. The owner does not owe the money back until the home is sold. There are many variations, including loans where, in addition to the monthly payment, the lender provides money up front to pay old bills or possibly to make household repairs.

The reverse mortgage has another advantage for those who are considering Medicaid home care. Since the **monthly payments** are in the form of a loan, the payments **are not deemed income and not budgeted**. However, if money remains at the end of the month, such excess will be deemed a resource and possibly cause ineligibility by reason of excess resources.

However, reverse mortgages present significant **financial issues**. These loans compound income on the principal balance, which means that the balance owing may far exceed the cash actually received. The equity in the home may quickly be reduced or, in some cases, exhausted.

It is for this reason that New York law insists on protections. Persons may not apply for a reverse mortgage unless they have received counseling from a not-for-profit organization which advises them of the long term financial risks.

For additional information on reverse mortgages, look at http://www.aarp.org/revmort/ and http://www.reverse.org.

Using Medicaid to Stay at Home

There are several factors which encourage the use of Medicaid to provide care so as to enable many of the elderly with some need for custodial care to remain home.

No Transfer of Assets for Community Care or Long Term Home Health Care—The transfer of asset provisions have never applied to Community Medicaid. And, as of September 2007, the transfer of asset provisions no longer apply to Long Term Home Health Care Program, also known as the Lombardi Program. More and more clients are considering transfers, either outright or in trust, to access these home-based Medicaid programs. There is no question but that these same transfers will cause a substantial period of ineligibility should the individual require institutional care. However, the draconian changes in calculating the period of ineligibility have encouraged more persons to risk problems with institutional Medicaid in order to remain at home with medical assistance.

Income Protection with the Pooled Community Trust—Income limits severely restrict an individual's ability to remain at home and often pushed persons into a nursing home who did not belong there. Under current regulations, income in the community is limited to $720 a month plus the cost of health insurance. Current rules permit the assignment of excess income to a community pooled trust operated by a not-for-profit organization. The pooled trusts, which were originally created in response to OBRA 1993, now enable individuals to remain at home.

Excess income is assigned to the pooled trust. Since the transfer of asset rules do not apply to Community Medicaid (and now the long term home health care program), there are no periods of ineligibility. Assets in the trust, although designed for the benefit of a particular individual, are not deemed to be an available resource and are not subject to a monthly spend-down. The assignment of income similarly converts income into unavailable income. The not-for-profit entity, for a modest fee, manages the money and acts upon instructions to pay ordinary household bills and expenses. This preservation of income permits needy individuals to stay at home with a sense of dignity.

There is an issue as to whether the monthly transfers to the pooled trust would be aggregated into a substantial period of ineligibility should the individual require institutional care. Although there is some confusion, the more accepted rule is that aggregation will not apply.

Consumer Directed Personal Assistance Program (CDPAP)—Many persons are not well served by traditional Community Medicaid. Clients may be unhappy with the aides available through an agency. Aides may not have been available at all due to lack of public transportation in many parts of the state. In addition, aides were limited in services they could perform. (For example, aides would not suction a feeding tube, nor could they give medicines or injections to the patient.)

The CDPAP program offers a way to provide care for these families while using Medicaid funds. The individual is responsible for hiring and training the aides. The individual is also responsible for the care, including the provision of substitute aides in the event that the primary aides are not available. The aides do

not have to be certified; they can be family members or friends. The aides must be lawful residents.

Once financially approved, the case is directed to one of several CDPAP programs around the state. These entities serve as the financial middleman, taking the Medicaid dollars and paying for the care, as well as providing the necessary government reporting requirements.

Recent Changes in the Law Which Impacts Medicaid for Community Care

Home Equity Cap—Applicants for home care must be cognizant of the cap on home equity.

The traditional "homestead" exemption is found at 18 N.Y.C.R.R. § 360-4.7(a). Prior to the DRA, the homestead was an exempt resource for persons 65 or older, certified blind or disabled. The homestead loses its exempt status if the owner moves out without the intent to return home AND no spouse, child under 21, certified blind or certified disabled child or other dependent relative is living in the home.

18 N.Y.C.R.R. § 360-1.4(f) defines homestead as the primary residence occupied by medical assistance (MA) Applicant/Recipient (A/R) and/or members of his/her family. Family members may include the A/R's spouse, minor children, certified blind or certified disabled children and other dependent relatives. Homestead includes the home, land and integral parts such as garages and outbuildings. Homestead may be a condominium, co-op, or mobile home, but may not be a vacation home, summer home or cabin.

Deficit Reduction Act—Section 6014 of the DRA—"Disqualification for Long Term Care Assistance for Individuals with Substantial Home Equity"

> in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000. . .

Each state has the option to increase the cap above $500,000, but not in excess of $750,000. New York State has exercised the option and set the home equity cap at $750,000. The home equity cap is set to increase, beginning in 2011, based on the consumer price index, but only in increments of $1,000.

The home equity cap does not apply if applicant's spouse or child under 21, blind child or disabled child is residing in the home.

According to the Center for Medicare and Medicaid Services (CMS), the home equity cap applies to nursing home care, home- and community-based waiver services, certified home health care (CHHA), personal care services (home attendant) and alternate level of care in a hospital. New York, according to the 06 ADM 05, has a broader application of the cap. New York also includes medical model adult day care, private duty nursing, the consumer directed personal assistance program (CDPAP), hospice (in-patient or home hospice), personal emergency response systems and the managed long term care program.

Home Equity is fair market value less mortgage indebtedness. If the home is held in a form of shared ownership, e.g., joint tenancy, tenancy-in-common, or other similar arrangement, only the fractional interest of the A/R should be considered.

The Centers for Medicare and Medicaid Services are required to establish a process to request a waiver for demonstrated hardship. CMS has not issued criteria; however, 06 ADM 05 provides that hardship exists where denial would:

deprive the A/R of medical care such that the individual's health or life would be endangered; OR

deprive the A/R of food, clothing, shelter, or other necessities of life

AND

there is a legal impediment that prevents the A/R from being able to access the A/R's equity interest in the property.

A legal impediment exists when an applicant is legally prohibited from or lacks the authority to liquidate the resource; e.g., a legal impediment exists when an A/R needs the consent of a co-owner of a jointly owned resource in order to sell the resource and the co-owner refuses to give consent.

III. Housing Alternatives

Naturally Occurring Retirement Communities

Naturally occurring retirement communities, or NORCs, are "communities" where residents age in place. These facilities were not designed as retirement communities; they may be apartment buildings, attached housing communities, condominium complexes, or other designed communities. While these communities were not intended as retirement communities, the nature of the community lends itself to planning for seniors.

These communities have recreation areas and other common areas which can be adapted as residents age. The fact that so many seniors live in reasonably close quarters allows residents to share resources, including personal assistance. For example, two residents with light needs can share one aide. Or possibly, a resident

with limited needs can share an aide with one or more residents with limited needs. Since most agencies insist on a four-hour minimum before sending an aide, the sharing offers the ability to reduce costs while providing safety.

NORCs offer a variety of social and recreational activities, including transportation for shopping and medical appointments, as well as theater and recreational outings.

NORCs may also be favored to provide Medicaid services to a larger number of persons at a lower cost without compromising safety.

Home Sharing

Maintaining a house and performing all the necessary chores can be exhausting. Many seniors who desire to remain at home have opted for home sharing. They barter some use of their home in exchange for companionship and assistance with home maintenance. Sometimes a local college student will take a room. The student may, for example, be responsible for caring for the yard, cooking, shopping, household cleaning, or similar light chores. Home sharing is often promoted by faith-based groups who help students and seniors find each other.

Accessory Apartments

An accessory apartment is a practical way to remain safely in the community and close to family. The senior resides in an independent unit, usually in the home of an adult child. The family enjoys the senior's company, yet both remain independent and separate.

Day Care Programs for Seniors

Day care programs provide a source of enrichment and stimulation for the senior and respite for the caregiver, both of which supplement a senior's life in the home. The programs are broken down into two models, the **social model** day care and the **medical model** day care. The social model, for which funding may be available under the Community Medicaid program, provides entertainment, socialization and activities. The medical model, for which funding is available under the government-sponsored long term home health care program, provides a higher level of care.

IV. Assisted Living Facilities

"Assisted living" refers to a housing option for older adults which includes a residential unit, meals, on-site activities, links to health care providers and assistance with activities of daily living.

The popularity of assisted living facilities is fueled by the following factors:

a. People often fear nursing homes; an assisted living facility is viewed as a more humane alternative.

b. Assisted living facilities promise a more active and satisfying lifestyle for those able to enjoy them.

c. The *cost* of assisted living facilities is *significantly lower* than nursing care. Nursing homes in the New York metropolitan region charge approximately $400 a day, or $12,000 a month. Assisted living facilities in the same region charge a basic monthly rate between $4,000 and $5,500. Add-ons, however, including necessary individualized assistance, can drive the cost of assisted living much closer to the cost of nursing home care.

New York Law

Prior to 2004, New York legislation, as in most other jurisdictions, was grossly inadequate to protect the consumer. (Assisted Living Program legislation was found at § 461-L of the New York Social Services Law.) Historically, facilities which were "licensed" assisted living facilities were a few "adult homes" or "enriched housing programs."

The larger, well-known facilities that we commonly associate with assisted living facilities were **not** subject to license requirements. The absence of regulation created problems for the industry, including poor oversight. In addition, the facilities typically operated as two separate entities, a rental unit and home care unit, resulting in confusion and lack of communication.

On August 12, 2004, the New York Legislature passed assisted living legislation, which added a new Article 46-A to the Public Health Law.

The 2004 legislation recognizes the importance of "congregate, residential housing with supportive services in a home-like setting" (§ 4650). The statute recognizes the basic philosophy of assisted living which "emphasizes *aging 'in-place'* (emphasis added), personal dignity, autonomy, independence, privacy and freedom of choice" (*id*).

The statute **defined assisted living facility** as "an entity which provides or arranges for housing, on-site monitoring and personal care services, and/or home care services (either directly or indirectly), in a home-like setting of five or more adult residents unrelated to the assisted living provider" (§ 4651(1)).

This legislation imports many concepts from federal legislation. For example, the facility must provide an ISP, or **Individualized Service Plan**, for every resident and must update the ISP on a regular basis. The ISP is developed with the resident, the resident's

representative and the operator, in consultation with the resident's physician.

The legislation specifies that the **needs of the resident must be met** and that, if necessary, the resident's home health agency and physician must certify that such needs can be met. It is in this circumstance that the gray areas appear. The statute says that a resident who requires 24-hour nursing care must be discharged. However, such discharge need not take place and the resident may remain if: a) the resident hires appropriate nursing, medical, or hospice care; b) the resident's physician and home care services agency both determine and document that with the provision of such additional care, the resident can be cared for safely; c) the facility operator agrees to retain the resident and to coordinate the care; and d) the resident is otherwise eligible to remain at the residence.

The statute also provides that an operator can apply for an **enhanced assisted living certificate**. (§ 4654). The operator who qualifies as "enhanced" is permitted to keep a resident beyond ordinary discharge. The operator has to make a showing of how the operator will meet these needs, including a written description of services, staffing levels, staff education and training, work experience and environmental modifications that will be made to protect the safety, health and welfare of the resident.

Many facilities hold themselves out as being able to deal with the special needs of persons with dementia or cognitive impairment. Facilities that hold themselves out as providing *special services* or *serving individuals with special needs* must submit a plan setting forth how such needs will be met.

Every resident is entitled to a **clear admissions agreement** that must contain certain minimum provisions. In addition, all residents must be presented with a statement of residents' rights when presented with advertising brochures or an admissions agreement.

You can find more information on assisted living options at http://www.assisted-living411.org/ and http://www.ltccc.org/news/documents/alguidepotresfinal.pdf.

V. Continuing Care Retirement Communities (CCRCs)

Essential Components of CCRCs

Continuing Care Retirement Communities offer shelter, care and services for a person's lifetime. There are three basic stages of care: independent living, assisted living and nursing home care. In the traditional life care arrangement, a resident may be admitted at the independent living level. As the resident becomes unable to perform certain activities of daily living, he/she moves to the assisted living facility. Should a resident's physical and/or psychological needs further increase, the facility, in consultation with the resident and the resident's health care provider, may move the resident to the nursing center. As new types of arrangements and financing (other than life care) are available, residents may enter at the assisted living level or, in some cases, the nursing home level.

Payment Arrangements

The *traditional life care* or *extensive long-term contract* offers unlimited long term care at little or no substantial increase in monthly cost. The *modified contract* often provides independent living and assisted living at a substantially similar monthly rate. However, the modified contract offers only a limited amount of nursing care at the modest monthly rate, after which the resident is responsible for substantially higher payments. The *fee-for-service* contract provides for the payment of a daily rate for all personal services according to the resident's level of care. Fee-for-service arrangements in New York State were first authorized at CCRCs in 2005.

The choice of contract affects who may apply. The extensive contract offers long term care at a level monthly cost. These CCRCs seek healthy and mentally competent applicants, since well residents, in effect, subsidize the more frail residents, thereby reducing the facility's average cost per resident over the long term. This approach to admitting residents enables CCRCs to take a risk that the cost of care for a certain percentage of their residents will exceed the income generated by the average resident. A fee-for-service arrangement, on the other hand, will manage its costs differently. These facilities are far less restrictive, admitting applicants with a significant level of physical or mental disability since each resident, in effect, pays for him/herself.

The extensive and modified contracts sometimes require a substantial up-front fee. However, in the case of the extensive contract, the facilities offer a continuum of care for a constant rate. That is, the resident pays the same fee whether in the assisted living unit or the nursing home.

Continuing Care Retirement Communities may require the residents to have long term care insurance; otherwise the CCRC itself applies a portion of the resident's payment to procure insurance on behalf of the resident.

A New York State Historical Overview

Most New Yorkers know so little about continuing care retirement communities. In fact, the number of CCRCs in New York State is far below those of our neighboring states. Why?

Early models elsewhere in the country showed potential, but also generated problems and possible abuses. People paid large sums of money for the promise

of lifetime care; however, in many cases, the facilities could not follow through on their promises for lifetime care, because their limited financial reserves could not keep up with the health care demand of the resident mix. Likewise, in many such cases, the value of the resident's investment was severely compromised, and on occasion, totally lost. New York lawmakers took note of these failures and drafted legislation with significant consumer safeguards that have resulted in a barrier to entry to potential operators.

New York law sets the bar high in terms of a facility's financial requirements. For example, the CCRC's liquid assets must be maintained in reserve to cover principal and interest payments for a year, operating costs for six months, repairs and replacements for a year and cash flow conditions as determined by regulation. There are additional restraints on CCRCs funded with Industrial Development Agency (or IDA) bonds.

Add to this the high cost of land in New York, particularly in the New York metropolitan area, and the result is a limited number of communities.

Resources for Further Information

Over the last decade, we have seen an explosive growth of these communities in the United States. Two entities, both of which have extensive Web sites, have organized in response to the spread of these communities. The first is the American Association of Homes and Services for the Aging, or AAHSA, which offers advice on these communities, including definitions, a discussion of services provided and contract issues, as well as reference to other resources (*see* aaha.org). The second organization is the Continuing Care Accreditation Commission, or CCAC, which was acquired by the Commission on Accreditation of Rehabilitation Facilities (CARF) in 2003 to form CARF-CCAC. CARF-CCAC provides accreditation and reviews the credentials of continuing care retirement communities, aging services networks and other types of providers. Their Web site (ccaconline.org) discusses standards and lists currently accredited facilities.

The DRA—Treatment of Entrance Fees in CCRCs

The DRA provides that a Medicaid applicant is not eligible by reason of available resources (1) if the individual is a resident of a CCRC or life care community; (2) the contract provides that the facility may use the entrance fee to pay for the care where the resident has insufficient funds; (3) the individual or the individual's estate is eligible for a refund of a portion of the remaining entrance fee when the contract terminates; and (4) the entrance fee does not confer an ownership interest in the life care community.

As a practical matter, contractual provisions consistent with the new law are common. That is, all of the extensive or modified agreements which this author has reviewed have similar provisions permitting the facility to invade the refundable portion of the entrance fee.

In the case of a life care or extensive long term contract, this result is neither surprising nor significant. The life-care arrangement usually requires a substantial up-front payment and the monthly costs are modest. Therefore, the issue addressed is not likely to arise in the extensive or life-care arrangement.

The resident with a *modified contract* is more likely to be impacted by the subject provision of the DRA. Residents with a modified contract, where the monthly costs are likely to be much higher for nursing care than in a life-care agreement, could possibly have used Medicaid to pay for their care. However, *the DRA eliminates such possibility*, as the resident would be deemed to have an available resource, namely, the residency deposit.

The DRA also provides that contracts for admission to a state licensed, continuing care retirement community or life care community may require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance. This provision, which is a direct violation of the Nursing Home Reform Act of 1987, gives additional light to the political climate which motivated the DRA.

Advantages of CCRCs

One-stop shopping
Peace of mind
Lifestyle
Socialization

Disadvantages of CCRCs

High cost
Potential financial risk
Potential risk of inadequate services
Limited choice

VI. Advising the Client—Factors to Consider When Looking at Assisted Living Facilities and CCRCs

Style of Living

Private bedroom, private bath

Independent kitchen available, if desired

Condition and Repair

Comfort and amenities—television, computers, music, outdoor facilities such as gardens or walkways

Air Conditioning

Pets—allowed?

Meals—dietary issues and restrictions; variety; flexibility in schedule

Neighborhood—Safe, close to shopping, religious facilities or social contacts or family

Can residents have their own cars?

Is there alternative transportation available?

Storage area

Quality of Care

How do residents appear? Clean? Content?

Do residents interact well with staff? Do staff listen? Are there clear lines of communication? Ratio of staff/residents?

Quality assurance program? Are residents' rights clearly posted?

Is there an on-site Ombudsman?

Services and Activities

Are Lounge Areas comfortable and well arranged to encourage socialization?

Opportunities to participate in activities with the surrounding community?

Shopping?

Religious activities and practices—are these available on site or locally?

Is there an exercise room or facility?

Policies

Restrictions on drinking/smoking/offensive behavior

Formal visiting hours

Procedures for short-term removal, such as long weekends with family or a month in Florida

Are discharge criteria clearly set forth?

Safety regulations

- Sprinkler/Fire Extinguisher/Exit lights
- Door bars
- Physician/nurse available
- Handling of medications
- Arrangements with off-site physicians/hospital
- Intercom or other emergency device

Business Practices

Licensure

Complaints/Violations

Financial disclosure

References

Contract Issues

The possibility of negotiating a contract is limited particularly in the case of CCRCs insofar as these facilities are developed and approved with filed plans. In New York, the plans are filed with the Attorney General/Department of Law. The contract is part of the filing so that negotiation of significant terms is limited. The real issue is the ability to evaluate and choose between competing facilities.

A knowledge of local law is important, but not critical. What is significant is an understanding of the issues. The analysis should focus on four major issues:

Financial risk

Fee/payment obligations

Care/services provided

Residents' rights

Financial Risk

Our clients may be selling their largest asset, their home, and investing in the CCRC for their retirement, care, etc. These facilities offer no guarantees and there is no governmental backstop, as is the case with insured bank accounts. The analysis/review should investigate:

The developer

The provider of services, if different

Financial projections

Actual statements for functioning facilities including available reserves

Accreditation/licensure

Fees and Charges

There are a variety of contractual obligations. Those facilities with a small entrance fee may have high operational costs. A high entrance fee will probably signal moderate and stable costs.

A typical CCRC agreement where there is a substantial payment for the right to reside at the facility divides the purchase price into two components, a residential component and a life care component. The residential component can be viewed as the cost of housing. The life care component can be viewed as the cost of health related care.

The residential component is often the lion's share of the up front cost, possibly 80 to 90% of the price. The residential component will often amortize at a modest rate. However, in many cases, the amortization is

limited so that the residential component never drops below 80% or 90% of the original price.

The health care component usually amortizes at a higher rate. This portion of the cost may disappear in a relatively modest period of time.

The consequence of the amortization is that when the resident dies or moves out of the facility, the sum returned may be less than the original price paid. This author knows of no situation where the price return increases in value over time.

The cost of increased care is often managed by means of long term care insurance. In some instances, the facility may require the applicant to have a certain minimal level of insurance. In other instances, the up front and monthly installments may be used to purchase long term care insurance.

The financial factors to consider are:

Purchase price / Entrance fee

Residential component

Life care component

Escrow

Rescission / cancellation

Refunds

Monthly fees—what is covered and what is not?

Caps on fees / increases in fees

Change in status (married-single)

Services Provided

Our clients are relying on these facilities for life care. What basic needs are provided in terms of housing, food, utilities, transportation, socialization, physician services, nursing assistance, drugs?

Charge for the services provided

Cost at different levels of service

Pre-existing conditions

Quality of care

Residents' Rights

Continuum of care implies transfer from one level of care to another. In the assisted living context, there is often a disposition against change, which should be absent. However, there may be situations where the medical staff suggests a change, and the resident opposes it.

Appeal of medical decisions—who is the final arbiter?

Participation in governance

Grounds for termination of contract

We suggest, for general information on housing options, a review of http://seniorhousing.state.ny.us/home/governor.htm.

VII. Deducting Costs of Community Based Care

a. Section 213 of the Internal Revenue Code provides that medical expenses can be deducted to the extent that expenses exceed 7.5% of adjusted gross income.

b. Medical / non-medical care—care is deductible only if it is medically necessary, and not a lifestyle choice.

c. Qualified long term care services—assisted living **that is medically necessary** should qualify as "maintenance and personal care services," which qualify for the § 213 deduction.

VIII. Looking Ahead—Trends We Would Like to See

Tax Incentives

Home modification may be the least costly way to remain in the community. However, the costs nevertheless may be challenging for persons living on a fixed income. Tax incentives that encourage home modifications with deductions against income would demonstrate the government's support for such programs.

Cooperative Corporation and Condominium Associations

NORCs offer many distinct opportunities. New York legislation should encourage cooperative corporations and condominiums to provide these benefits, which include a senior center, part-time social worker and transportation assistance.

The Compact

Given the pressure from significant budget cuts, the Elder Law Bar working with the Long Term Care Insurance industry has considered alternatives in the form of a "Compact." The Compact would offer Medicaid eligibility to persons who voluntarily spend a portion of their assets on long-term care. Long term care insurance would be available to meet the private obligation.

Costs of remodeling the home, assisted living and continuing care retirement communities should be counted toward meeting the private Compact obligation.

DRA and Tax Collide: Purchase of a Life Estate in Another Individual's Home

By David R. Okrent and David Goldfarb

David R. Okrent

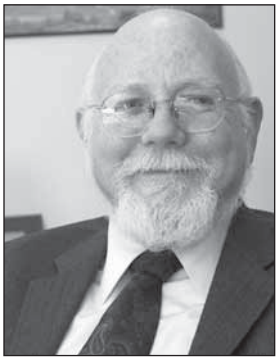
After the enactment of the Deficit Reduction Act of 2005 the purchase of a life estate in another individual's home has taken on strong interest. For purposes of Medicaid, the funds used for the purchase will not be considered the disposal of an asset for less than fair market value if the purchaser resides in the home for a period of at least one year after the date of the purchase. 42 U.S.C. 1396p(c)(1)(J); N.Y. Soc. Serv. Law § 366 subd.5(e)(3)(ii). The purchase will usually be in the home of a child or family member. This article aims to discuss the tax ramifications of such a transactions.

The purchase or sale of a life estate interest in a personal residence generates several tax issues. Does the sale of the life estate interest in the seller's principal residence qualify for the I.R.C. § 121 capital gain exclusion? How do you calculate gain or loss? What is the basis of the respective interests before and after the sale? If after the sale the life tenant and the remainderman choose to sell the property, what are the tax ramifications? Does the I.R.C. § 121 exclusion apply to each interest and if so, how? Does I.R.C. § 2702 apply creating gift tax issues? Is there a tax event upon death of the life tenant or remainderman? This article will address these issues. Many of these issues are far from settled and the practitioner should proceed with caution.

I. Income Tax Issues

a. Initial Sale of Life Estate

The sale of a life estate in a personal residence may result in the realization of capital gain to the seller, but generally not a loss since it is a personal asset. In determining the amount of gain or loss, the seller's basis for the property must be apportioned between the retained remainder interest and the sold life estate interest. *See* Hunter, Eileen (1965); 44 T.C. 109; and Rev. Rul. 77-413, 1977-2 C.B. 298. The Internal Revenue Code prescribes, under I.R.C. § 7520, that the apportionment of an interest for life or a term of years, or any remainder must be determined—(1) under tables prescribed by IRS and (2) by using an interest rate (rounded to the nearest 2/10 of 1%) equal to 120% of the federal midterm rate in effect under I.R.C. § 1274(d)(1) for the month in which the valuation date falls.



David Goldfarb

Except with respect to the sale of a remainder interest, a taxpayer may apply the I.R.C. § 121 exclusion to gain from the sale or exchange of an interest in the taxpayer's principal residence that is less than the taxpayer's entire interest, even between related parties, if the interest sold or exchanged includes an interest in the dwelling unit. I.R.C. § 121(d)(8)(A); Treas. Reg. § 1.121-4(e); and Rev. Rul. 84-43, 1984-1 C.B. 27. This is not inconsistent with the result in P.L.R. 200018021, where the IRS denied I.R.C. § 121 treatment to the holder of a life estate in a trust that owned a residence. In P.L.R. 200018021, the trust (and not the taxpayer) owned the interest, and the IRS had long held former I.R.C. § 1034 and former I.R.C. §121 inapplicable to trusts (other than grantor trusts). There is some difference of opinion as to the applicability of the § 121 exclusion to a sale of a life estate, and therefore the practitioner should proceed with caution.

b. Subsequent Sale by Life Tenant and Remainderman

Upon a subsequent sale by the life tenant and the remainderman, where the life tenant and remainderman have vested interests in the property, and there is no requirement that the life tenant hold and conserve the proceeds for future distribution, and the parties have the power to separately sell their interests, the sale proceeds are taxable to the life tenant and remainderman, as individuals, in accordance with their interest in the property. Rev. Rul. 71-122, 1971-1 C.B. 224. With respect to their basis in their interests for determining gain, the remainderman's basis should be his or her remaining adjusted basis, meaning that portion of the basis that was not previously allocated to the sale of the life estate plus or minus any appropriate other basis adjustments. The life tenant's basis should be equal to the cost price of his or her interest in the property, plus again any appropriate basis adjustments. *See* I.R.C. § 1012 and Reg. § 1.1012-1(a).

However, what if I.R.C. § 2702 applies in a manner making the original sale of the life estate a part gift/part sale by causing the retained remainder interest to be valued at zero? *See* discussion of I.R.C. § 2702 below. This may not be as uncommon as it seems. For example, A needs to dispose of $100,000 in order to eventually qualify for institutional Medicaid; he purchases a

life estate in his son's home; however the life interest would be valued as $200,000. It is therefore a part gift / part sale.

A special basis rule applies where part or all of a term interest (i.e., a life estate) is received in a manner whereby the basis would be determined in accordance with I.R.C. §§ 1014 (inherited basis), 1015 (gift basis), or 1041 (incident to divorce). In those instances, the basis attributable to such part received, in said manner, is treated as zero, unless the term interest together with all other interests in said property are conveyed at the same time. If all interests in the property are conveyed at the same time then this rule does not apply and basis is determined normally. *See* Reg. § 1.1014-5(a)(3); *cf.* § 1001(e).

First, the special basis rule applies only to the transfer of the term interest alone without the reminder. Second, I.R.C. § 2702 states it applies only for gift tax purposes. If I.R.C. § 2702 does apply making the initial sale of a life estate a part gift / part sale, and all interests in the entire property are sold, then the basis to the life tenant may be required to be determined under the part sale / part gift rules, and that basis would be determined in part under I.R.C. § 1015 and the provisions under Treas. Reg. § 1-1015-4 would apply. Treas. Reg. § 1-1015-4 provides where a transfer of property is in part a sale and in part a gift, the unadjusted basis of the property in the hands of the transferee is the greater of: (i) the amount paid by the transferee for the property or (ii) the transferor's adjusted basis for the property at the time of the transfer, and the amount of increase, if any, in basis authorized by § 1015(d) for gift tax paid (see § 1.1015-5). It also provides that for purposes of determining loss, the unadjusted basis of the property in the hands of the transferee shall not be greater than the fair market value of the property at the time of such transfer.

The next inquiry: Does the I.R.C. § 121 exclusion apply to each interest and if so how?

Treas. Reg. § 1.121-4(e) provides, for purposes of § 121(b)(1) and (2) (relating to the maximum limitation amount of the § 121 exclusion), that sales or exchanges of partial interests in the same principal residence are treated as one sale or exchange. Therefore, only one maximum limitation amount of $250,000 ($500,000 for certain joint returns) applies to the combined sales or exchanges of the partial interests; these partial interests are assumedly held and sold by the same individual. In applying the maximum limitation amount to sales or exchanges that occur in different taxable years, a taxpayer may exclude gain from the first sale or exchange of a partial interest up to the taxpayer's full maximum limitation amount and may exclude gain from the sale or exchange of any other partial interest in the same principal residence to the extent of any remaining maximum limitation amount, and each spouse is treated as excluding one-half of the gain from a sale or exchange to which § 121(b)(2)(A) and § 1.121-2(a)(3)(i)(relating to the limitation for certain joint returns) apply.

For purposes of applying section 121(b)(3) (restricting the application of section 121 to only one sale or exchange every two years), each sale or exchange of a partial interest is disregarded with respect to other sales or exchanges of partial interests in the same principal residence, but is taken into account as of the date of the sale or exchange in applying § 121(b)(3) to that sale or exchange and the sale or exchange of any other principal residence.

Treas. Reg. § 1.121-4(e)(3) Example: In 1991 Taxpayer A buys a house that A uses as his principal residence. In 2004 A's friend B moves into A's house and A sells B a 50% interest in the house, realizing a gain of $136,000. A may exclude the $136,000 of gain. In 2005 A sells his remaining 50% interest in the home to B, realizing a gain of $138,000. A may exclude $114,000 ($250,000 - $136,000 gain previously excluded) of the $138,000 gain from the sale of the remaining interest.

It would appear that the maximum limitation discussed above would be with respect to each owner separately. Therefore, the purchaser of the life estate should be treated separately from the original seller of the life estate for purposes of the maximum limitation amount of $250,000 ($500,000 for certain joint returns).

Where the remainder interest that is being sold, I.R.C. § 121(d)(8) election must be considered. I.R.C. § 121(d)(8) applies to the sale of a remainder interest. It permits the exclusion to be applied as long as the sale of a remainder interest is not to a family member. It also prevents the exclusion from being applied to any other interest retained by the seller at a later time. It does not eliminate any of the other requirements of the I.R.C. § 121, e.g., the use as a principal residence requirement. Thus, the two situations where the I.R.C. § 121(d)(8) election seems most useful would be either where (a) the life tenant and the remainderman both simultaneously use the residence as their principal residence or (b) an existing owner who already satisfies the use requirement sells a remainder interest to a third party.

Whether the IRS will permit a remainderman who simultaneously occupies the residence along with the life tenant to thereby satisfy the "use" requirement is unclear. In P.L.R. 8246123, the IRS denied former I.R.C. § 1034 treatment to such a remainderman, concluding that the statutory requirement of "use" presumes a legal right to occupy, as opposed to a permissive occupation. I.R.C. § 121, of course, has its own "use" requirement but it appears to parallel that of former I.R.C. § 1034.

Comment: If ownership of the life estate and remainder interests is unified in a single individual prior to sale, it is unclear how the use test would be applied. An example would be where the owner of the life estate gives that estate to the remainderman. An argument exists that if the holding period of the life estate tacks to that of the remainderman, then the period of use by the life tenant should tack to that of the remainderman. The problem with this argument is that nothing within I.R.C. § 121 links the use requirement of I.R.C. § 121 with the concept of a holding period for capital gains purpose. The more likely result would be that, in this example, the remainderman would have to begin his or her "use" period on the day that he or she first began occupying the residence as a principal residence after the gift of the life estate. A closer case is presented if it is the remainderman who gifts the remainder to the life tenant. In such circumstances the life tenant would likely already have satisfied the use requirement (albeit in the capacity as life tenant). It is simply unclear whether the portion of gain attributable to the former remainder interest can be excluded under I.R.C. § 121, since the life tenant did not own (and hence could not "use") this interest in the residence.

II. I.R.C. § 2702 Gift Tax Issues

Where a transfer of an interest in property to a family member is involved and the transferor has retained an interest, I.R.C. § 2702 needs to be considered. As discussed above, for Medicaid planning purposes, it may not be uncommon for there to be a partial gift and partial sale. This should be approached with extreme caution, because as set forth below, this may trigger an unexpectedly large gift for gift tax purposes.

Section 2702 provides special rules to determine the amount of a gift when an individual makes a "transfer in trust" to (or for the benefit of) a "member of the individual's family" and the individual transferor or an "applicable family member" of the transferor retains an interest in the trust. Treas. Reg. § 25.2702-1(a). In general, if § 2702 applies, the interest retained by the transferor or an applicable family member is valued at zero so that the gift tax value of the transferred interest is equal to the full fair market value of the property in which the donee receives an interest.

The statute and the regulations broadly construe the phrase "transfer in trust." Section 2702(c)(1) provides that "[t]he transfer of an interest in property with respect to which there is one or more term interests shall be treated as a transfer of an interest in a trust." *See* Treas. Reg. § 25.2702-4(a). The phrase "term interest" is defined as "a life interest in property" or "an interest in property for a term of years." Treas. Reg. § 25.2702-4(a) further defines "term interest" as follows: A term interest is one of a series of successive (as contrasted with concurrent) interests. Thus, a life interest in property or an interest in property for a term of years is a term interest. A term interest, however, does not include a leasehold interest in property to the extent the lease is for full and adequate consideration (without regard to the principals of § 2702). A "transfer in trust" includes the sale by an individual of a remainder interest in property to the individual's child when the individual retains the right to receive the income from the property for a period of years as well as a joint purchase. *See* Treas. Reg. § 25.2702-4(d).

Based upon this it would appear that I.R.C. § 2702 would likely apply to a sale of a life estate in which the transferor retains the remainder interest. There is an exception under I.R.C. § 2702 for a qualified retained remainder interest, but the other interest has to be a qualified annuity interest or qualified unitrust interests as further defined in I.R.C. § 2702.

If a transfer falls within the scope of § 2702(a)(1), special valuation and deemed gift rules apply to determine if a gift has been made and, if so, the value of the gift. In general, under the special valuation and deemed gift rules when § 2702(a)(1) applies, the entire value of the property transferred in trust is subject immediately to gift tax (unless one of the exceptions or special rules discussed below applies). Under § 2702(a)(2), the interest retained by the grantor or an applicable family member is valued at zero. Therefore, the value of the transferred interest is deemed to be equal to the entire value of the property. Treas. Reg. § 25.2702-1(b). The amount of the gift, if any, is then determined by subtracting the value of any consideration received.

It is apparent that I.R.C. § 2702 was not intended to apply to the sale of a life estate since the mitigation provisions under Treas. Reg. § 25.2702-6 seem to ultimately treat the transaction as if I.R.C. § 2702 did not apply. That regulation requires that if an individual makes a gift that is valued under § 2702(a)(2)(A), and that individual subsequently transfers by gift an interest in the trust so valued, or if the interest in the trust is includible in the individual's gross estate, the individual or the individual's estate is entitled to a reduction in the individual's aggregate taxable gifts (or adjusted taxable gifts). Treas. Reg. § 25.2702-6. This adjustment is required to mitigate the potential for double taxation. Clearly this should apply to the sale of life estate and retained remainder. Upon death of the remainderman, either the remainder interest together with the proceeds of sale will be includable in the remainderman's estate. Furthermore, if the remainderman gifts his or her interest, there will be no effect since the mitigation rules recognize the remainderman has already been treated as gifting the interest under I.R.C. § 2702. These mitigation rules evidence that the value of the remainder interest will not escape gift or estate tax due to this type of transaction, the purpose for which was the aim of I.R.C. § 2702.

III. Estate Tax Issues

a. Death of the Life Tenant

It would appear that no part of the property would be included in the estate of the life tenant. The modern estate tax law first came into being with the Revenue Act of 1916. 39 Stat. 777-780, 1002 (1916). Then, as now, the principal provision for inclusion in the gross estate was the predecessor of I.R.C. § 2033, which included property owned by the decedent at death (roughly speaking, the probate estate). Since the 1916 Revenue Act did not contain a gift tax, the obvious way of avoiding estate tax inclusion was to effect an *inter vivos* transfer to another during one's lifetime. Considering only the predecessor of I.R.C. § 2033, one could avoid estate inclusion by transferring property and retaining a life estate or income interest for life: The retained interest was excludible because it was not transferred from the decedent to the remainderman at the time of death (rather, the retained interest expired and the remainder, which existed from the date of transfer, merely came into possession). Again, considering only the predecessor of I.R.C. § 2033, a retained reversion incident to an *inter vivos* transfer would be includible in the transferor's gross estate only if the reversion was not contingent on the transferor's survival of the preceding interests, and even where a reversion was includible, the amount includible was limited to its actuarial value at the transferor's death. Finally, the predecessor of I.R.C. § 2033 was unable to reach transfers with retained powers, because it was (and still is) thought that no combination of powers could rise to the level of an "interest" under I.R.C. § 2033. The absence of a gift tax and the minimal ability of the predecessor of § 2033 to reach *inter vivos* transfers necessitated the inclusion in the 1916 Revenue Act of provisions that would reach the most "abusive" (i.e., testamentary) forms of transfers. These provisions included: the predecessor of the current § 2035, which included transfers in contemplation of death; the predecessor of current §§ 2036–2039, which included transfers "intended to take effect in possession or enjoyment at or after [the transferor's] death"; the predecessor of § 2040, which included joint tenancy property in the gross estate of the joint tenant who created the joint tenancy; and the predecessor of § 2042 (enacted in 1918), which included the proceeds of insurance on the life of the decedent.

None of these provisions would appear to require inclusion of any amount in the life tenant's estate. For example, under I.R.C. § 2033 no interest is owned by the life tenant upon death of the life tenant; under I.R.C. § 2036 the life tenant did not transfer something in which he retained a life estate; under I.R.C. § 2037 the life tenant did not transfer an interest which takes effect at the death of the transferor and under I.R.C. § 2038 the life tenant did not transfer something in which he retained the right to revoke a transfer. Therefore, upon the death of the life tenant, there presumably would be no interest which is includable in his estate. It follows from this that the remainderman also would not receive an adjustment in basis in the property by reason of the life tenant's death under I.R.C. § 1014.

Note there could be an income tax event upon the death of the life tenant. The IRS may argue that, upon the life tenant's death, the receipt of the property (unencumbered by a life estate) by the remainder beneficiary constitutes the realization of income to the remainder beneficiary (which should be recognized for income tax purposes). What has economically occurred in such a situation is that, upon the termination of the life interest, the remainder interest might be treated as being exchanged for the property itself. If the property interest fully obtained upon termination of the life interest is other than cash or a cash equivalent, the argument might be made that no income realization event occurred. If, however, the remainder interest is transformed into the equivalent of cash at the death of the life tenant, the IRS's position might be that a realization event requiring income recognition occurred at that time. *See Guthrie v. Comr.*, 42 B.T.A. 696 (1940); *Jones v. Comr.*, 40 T.C. 249 (1963), *vac'd* and *rem'd*, 330 F.2d 302 (3d Cir. 1964), on remand, T.C. Memo 1966-136. However, the better argument would seem to be that this is merely equivalent to perfecting title in property, and not being a realization event for income tax purposes. These cases focused upon the sale of the remainder interest after the termination of the life estate and concluded that part of the proceeds would be considered ordinary income and part capital gain based upon an allocation between that part which was attributable to a discount in purchase price when the remainder interest was purchased subject to the life estate.

b. Death of the Remainderman

Upon the death of the remainderman, before or after the death of the life tenant, clearly the remainderman's interest is includable in his estate. If the life tenant has predeceased the remainderman, the value of the entire property will be includable in the estate under I.R.C. § 2033. The more difficult question: What is the value of the interest required to be included in the gross estate if the remainderman dies before the life tenant? Is it the value of the reminder interest itself subtracting the value of the life estate, or is it the full value of the property? Conceptually if we include both the proceeds from the sale of the life estate and the full value of the property it would appear that the estate is overstated. In reviewing the strings–attached sections, I.R.C. § 2035–2042, none of them applies. The only provision under the I.R.C. that directly addresses a retained remainder or reversion in the decedent is

I.R.C. § 2037; it deals, however, with transfers taking effect at death.

I.R.C. § 2037 includes transfers in the transferor's gross estate if: (1) "possession or enjoyment of the property can, through ownership of such [transferred] interest, be obtained only by surviving the decedent" (the "survivorship requirement"), and (2) "the decedent has retained a reversionary interest in the property . . . , and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property" (the "reversionary interest requirement").

Here are two (2) examples under Treas. Reg. § 20.2037-1:

1. The decedent transferred property in trust with the income payable to his wife for life and, at her death, remainder to the decedent's then surviving children, or if none, to the decedent or his estate. Since each beneficiary can possess or enjoy the property without surviving the decedent, no part of the property is includible in the decedent's gross estate under section 2037, regardless of the value of the decedent's reversionary interest. (However, see section 2033 for inclusion of the value of the reversionary interest in the decedent's gross estate.) Treas. Reg. 20.2037-1(e) Example (1).
2. The decedent transferred property in trust with the income payable to his wife for life and with the remainder payable to the decedent or, if he is not living at his wife's death, to his daughter or her estate. The daughter cannot obtain possession or enjoyment of the property without surviving the decedent. Therefore, if the decedent's reversionary interest immediately before his death exceeded 5 percent of the value of the property, the value of the property, less the value of the wife's outstanding life estate, is includible in the decedent's gross estate. Treas. Reg. § 20.2037-1(e) Example (3).

It appears that by example (1) I.R.C. § 2037 would not apply, but I.R.C. § 2033 would. Under I.R.C. § 2033 the value of the remainder interest at the time of the remainderman's death is includable in his estate. *See* G.C.M. 38169, 11/16/1979 and Rev. Rul. 82-24, 1982-1 CB 134.

IV. Conclusions

Many of these issues are far from resolved. These conclusions are the opinions of the authors based on their research as reflected in this article.

Does the sale of the life estate interest in the seller's principal residence qualify for the I.R.C. § 121 capital gain exclusion?

Yes, a taxpayer may apply the I.R.C. § 121 exclusion to gain from the sale or exchange of a life estate.

How do you calculate gain or loss?

In calculating the gain (and the exclusion) the basis for the property must be apportioned between the retained remainder interest and the sold life estate using IRS tables and 120% of the federal midterm rate in effect.

What is the basis of the respective interests before and after the sale?

The remainderman's basis is that portion of the basis that was not previously allocated to the sale of the life estate plus or minus any appropriate other basis adjustments. The life tenant's basis is the cost price of his interest in the property plus any appropriate basis adjustments. A special basis rule applies to the life tenant where part of the life estate is received as a gift: (1) if all interests in the property are sold at one time, basis of the property in the hands of the life tenant is the greater of: (i) the amount paid by the life tenant or (ii) the transferor's adjusted basis for the property at the time of the transfer, and the amount of increase, if any, in basis authorized for gift tax paid; and (2) if the only interest being sold is the life estate and the life tenant's basis is zero.

If after the sale the life tenant and the remainderman choose to sell the property what are the tax ramifications?

The sale proceeds are taxable to the life tenant and remainderman, in accordance with their interest in the property.

Does the I.R.C. § 121 exclusion apply to each interest and if so how?

Only one maximum limitation amount of $250,000 ($500,000 for certain joint returns) applies to the combined sales of the partial interests by the original seller. The purchaser of the life estate is treated separately from the original seller for purposes of the maximum limitation amount of $250,000 ($500,000 for certain joint returns). The exclusion is applied as long as the sale of a remainder interest is not to a family member. The requirement for use as a principal residence applies and it is unclear whether the IRS will permit a remainderman who simultaneously occupies the residence along with the life tenant to satisfy the "use" requirement.

Does I.R.C. § 2702 apply creating gift tax issues?

Where the transaction is between family members and a gift (or partial gift) of the life estate is involved, the interest retained by the transferor or an applicable family member is valued at zero so that the gift tax value of the transferred interest is equal to the full fair market value of the property less the value of any consideration received. However, I.R.C. § 2702 was not

intended to apply to the pure sale of a life estate where no gift is involved.

Is there a tax event upon death of the life tenant or remainderman?

No part of the property would be included in the estate of the life tenant and therefore there is also no step up in basis to the remainderman. Upon the death of the remainderman, before or after the death of the life tenant, the remainderman's interest is includable in his estate. If the life tenant has predeceased the remainderman, the value of the entire property will be includable in the remainderman's estate. If the remainderman dies before the life tenant, the value of the remainder interest at the time of the remainderman's death is includable in his estate.

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Recent New York Cases

By Judith B. Raskin

Res Judicata Re: Administrative Decisions

Petitioner appealed from a decision affirming denial of disability status based upon originally approved documentation several years prior. Reversed. *Jason B. v. Novello, etc., et al.*, 843 N.Y.S.2d 654, 2007 N.Y. App. Div. LEXIS 10561, 2007 Slip Op. 7697 (App. Div., 2d Dep't October 9, 2007).

The Hudson Valley Developmental Disabilities Services Office, a regional office of the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD), approved petitioner's application for Home and Community-Based Waiver Services under 14 N.Y.C.R.R. § 645-10.1 *et seq.* in May and September 2003. In 2006, OMRDD reevaluated petitioner's eligibility for the program and determined, based only upon the original evidence submitted in 2003, that petitioner was never developmentally disabled. This determination was upheld at a fair hearing and in an Article 78. Petitioner appealed.

The Appellate Division annulled the 2006 decision that reversed the original 2003 determination that petitioner was developmentally disabled. *Res judicata* is applicable to administrative law where reasonably possible. In order to support reversal of the 2003 determination the plaintiff would need to submit new information showing error in the original decision. In this case the 2006 decision reinterpreted the same information submitted, reviewed and relied upon in 2003.

Thank you to Ira Salzman for submitting this decision.

Medicaid Recovery From *Inter Vivos* Trust

Court of Appeals remanded case to determine whether the Surrogate's Court had personal jurisdiction over decedent's *inter vivos* trust therefore barring DSS recovery. Upheld determination of no personal jurisdiction. *In re Tomeck*, 2007 Slip Op. 9484, 2007 N.Y. App. Div. LEXIS 12223 (App. Div., 3d Dep't November 29, 2007).

Decedent's estate contained probate and non-probate assets. In the probate proceeding, the irrevocable trust that provided decedent/settlor an income interest was listed on the estate accounting and was part of the calculation of the surviving spouse's elective share. In addition the trustees were parties to the probate proceeding as beneficiaries. Based on these factors, DSS claimed that Surrogate's Court had jurisdiction over the trustees and sought recovery from the *inter vivos* trust.

The Surrogate's Court dismissed the DSS claim. On appeal the Appellate Division, Third Department upheld the lower court decision that decedent did not have an implied contract to pay for her husband's care. On further appeal, the Court of Appeals remitted the matter to the Appellate Division to determine whether the Surrogate's Court had personal jurisdiction over the trustees of the irrevocable trust.

On remand the Appellate Division held that the Surrogate's Court did not have personal jurisdiction over the trust. DSS never filed a claim against the trust and never sought to serve or cite the trustees.

Article 81

Medicaid Planning with Promissory Note

Article 81 guardian proposed Medicaid planning using a Promissory Note. Granted *nunc pro tunc*. *In re Anna R.*, Index No. 8354/05 (Sup. Ct., Rockland County November 26, 2007).

Anna R., a nursing home resident with a life expectancy of over 13 years, had $29,000 in available resources. Her Article 81 guardian petitioned to protect a portion of those funds by gifting approximately one-half to a NYSARC trust and using the remainder to fund a loan under a DRA-compliant Promissory Note.

The court approved this gift/promissory note planning *nunc pro tunc* with approximately $17,000 of the funds. The Order was signed November 26, 2007. The transfers and date of the Note were ordered *nunc pro tunc* to be effective in October 2007. The court directed $12,000 be retained in escrow free from Medicaid availability for administrative costs of the guardianship until all guardianship costs were paid. The guardian was authorized to establish a NYSARC pooled trust with $9,074 *nunc pro tunc*. He was also authorized to execute a promissory note to a third-party attorney in the amount of $8,000 plus interest with an execution date *nunc pro tunc* of Oct. 24, 2007.

Thank you to Lee Hoffman for submitting this case. Lee as the guardian accomplished this planning for Anna R.

Default Judgment Against Incapacitated Person

An Article 81 guardian moved to vacate a default judgment against the incapacitated person. A hearing was set to determine whether plaintiff knew or should have known of defendant's incapacity. *Countrywide Home Funding Co. v. Henry J.K., Nancy*

***L.K., et al.*, Index no. 00840/00 (Sup. Ct., Nassau County June 28, 2007).**

Defendant husband and wife defaulted on their mortgage. Plaintiff mortgagee obtained a default judgment against the defendants in 2001. In 2005 one of the defendants, Nancy L.K., was deemed an incapacitated person in an Article 81 proceeding. A co-guardian brought this motion to vacate and set aside the default judgment.

Nancy L.K. was served in June 2000 on a street several blocks from her home. While the court discussed the obligation of the process server to determine capacity of the person being served, it stated that the ultimate obligation to determine mental status rests with the plaintiff. A default judgment entered against an incapacitated person will be set aside if the plaintiff knew or should have known of the defendant's incapacity but nevertheless proceeded without notifying the court. If a court is notified of incapacity, the court may appoint a guardian *ad litem* to represent the defendant.

The court ordered a hearing to determine whether plaintiff knew or should have known that Nancy L.K. was incapacitated when it commenced this action against her.

Thank you to Jaime Lathrop for submitting this decision.

Court Ordered SNT

Article 81 co-guardians proposed creation of an SNT for the benefit of their son. DSS objected to several trust provisions. Trust approved. *In re Koprowski*, Index no. 28589-I-07 (Sup. Ct., Nassau County Nov. 19, 2007).

Petitioners, Article 81 guardians of their son Christopher, wished to protect their son's medical malpractice settlement. The settlement proceeds totaled $950,000, $585,000 of which was put into a Structured Settlement Trust to make payments to a pour-over trust for Christopher.

In 2006, Christopher's local school district stopped paying for his education. Because the private cost of $300 per day would exhaust the available funds, petitioners applied to have the pour-over trust converted to a payback SNT. Christopher could then apply for Medicaid, which would pay his educational costs. When petitioners submitted the proposed trust, DSS objected to the use of trust funds for the basic needs of health care, shelter, private health insurance and attorney fees without court approval. DSS argued that payment for basic needs would be deemed income, which would make the trust an available asset. DSS relied upon the language of EPTL 7-1.2(a)(5)(ii), Social Services Law § 366, and N.Y.C.R.R §§ 360-4.5 and 360-4.3(e). The petitioners disputed those arguments in a memorandum of law. Following a conference with the parties and representative of the New York Department of Health, petitioners created and executed the trust, leaving in the majority of the disputed provisions. DSS continued to raise its objections to the SNT but did not take any action to accept or deny the trust.

The court approved the payback SNT. Although DSS failed to take action on the completed trust, the court assumed denial based on the continued objections raised by DSS. Although the court noted some inconsistencies in the Social Services Law, the court held that the important legislative intent is to provide a source of support to disabled persons.

Thank you to Terry Scheiner. Terry submitted this decision and represented the petitioners.

Attorney Fees in Article 81

Facility appealed from an order in an Article 81 proceeding that it pay attorney fees. Reversed. *In re T*, 2007 Slip Op. 06046 (App. Div., 2d Dep't July 10, 2007).

This is an appeal of a case previously summarized in this column. In that Article 81 proceeding, petitioner argued that Holliswood Care Center would not release Mr. T to his daughter's care on the basis that he was not competent. The petitioner produced evidence of Mr. T's competency. The court appointed a temporary guardian who arranged for Mr. T's discharge. At a subsequent hearing it was determined that Mr. T was competent and that a guardian was not needed. The court ordered Holliswood to pay the attorney fees. Holliswood appealed. This is the decision on Holliswood's motion to reargue.

The Appellate Division reversed. Holliswood did not have notice that the award of attorney fees and disbursements would be argued and therefore did not have an opportunity to present its reasons for not discharging Mr. T. Attorney fees can be assessed against a party only where the party engaged in malicious acts. In addition, Mental Hygiene Law provides only for payment of attorney fees from the petitioner or the incapacitated person.

Thank you to Tammy Lawlor for submitting this case. The firm of Miller & Milone, P.C. represented Holliswood Care Center.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky. She is a Certified Elder Law Attorney (CELA) and maintains memberships in the National Academy of Elder Law Attorneys, Inc., the Estate Planning Council of Nassau County, Inc., and NYS and Nassau County Bar Associations. She is the current chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter.

Guardianship News

By Robert Kruger

End of Life Decision Making

This article is about a decision that attorneys, probably without exception, are totally unprepared and untrained to make. I refer to the decision to hasten the death of another person.

Several readers have, I suspect, acted as healthcare proxies and have been involved in end of life decision making. I have, but I have previously done so in conjunction with family or the closest of friends. I was not, therefore, the sole decision maker. Each of my previous exposures contained components that eased the decision making process . . . a favorite client dying of AIDS who had clearly and repeatedly expressed his desire to avoid heroic efforts to delay the inevitable . . . he had seen too many close friends die in prolonged fashion; or an IP who had a clear and explicit healthcare proxy plus an out-of-state nephew who served with me as Co-Guardian and who was both a Board Certified Radiologist and his aunt's favorite; or the client who had terminal cancer and who did not need a healthcare proxy to make tough decisions; he was in a hospice receiving palliative care and the disease, not a healthcare proxy, took his life.

In the guardianship I describe here, none of these comforting factors are present. The IP, a 79-year-old woman, has four adult children in conflict: the son (with his wife) are the primary caregivers and they oppose premature termination of his mother's life, arguing that she is still responsive. The three daughters are united against him; the most insistent of them argues that her mother's Living Will contains explicit instructions against, for example, hooking her up to a ventilator.

The IP, who suffers from C.O.P.D. (emphysema), is indeed on a ventilator and she is suctioned; without the vent and the suctioning, the doctors give her three days at most.

I was appointed her Personal Needs and Property Management Guardian in September 2007. I serve alone; the appointing Judge wanted an independent, unaligned Guardian. At the time of my appointment, the IP was in the hospital, for a stay that eventually lasted four months.

What follows in this article is personal . . . how I dealt with the issues and how my conclusions evolved and changed regarding the removal / retention of the vent and the level of care the IP should receive (palliative care v. acute care v. some middle ground). It is a tale of tentative conclusions and a constant effort to respect the IP's wishes, in the context of changing facts.

When I was first appointed, I was advised that she was semi-comatose. When I visited her in the hospital she certainly appeared so. The care manager initially on the case treated her as having one foot in the grave.

After my appointment, my instinct was to follow the instructions of the Living Will closely, and I anticipated removing the vent in the near future. The son and his counsel argued that I should not act precipitously, because she had some quality of life. I thought it likely that the son was in denial and that I could not trust his reporting. However, because the son and his wife had been the primary caregivers for the IP, they had (in my eyes) some moral authority. And I stayed my hand and kept the vent, hoping in a way that nature would take its course.

The next chapter was generated by the ethicist of the hospital. The meeting was called because the hospital wanted to discharge her home. We all know that the hospital is required to make a safe discharge. It is rare indeed to discharge a vent-dependant patient home. To do so safely, the geriatric care manager had to coordinate the discharge. This in turn required a vent company to supply the vent and the mandated backup vent, in the event the first vent malfunctioned. The residence had to be properly wired to accommodate the vent. The case also required proper staffing, with round-the-clock LPNs or RNs. This was going to be very expensive indeed. An agency to provide the nurses had to staff the case, and the staffing had to be reliable. Reliability cannot be taken for granted; the nurses cannot miss a shift and some backup was required. A small agency cannot do this . . . there must be a pool of nurses to pinch hit if one becomes unavailable.

We met at the hospital. Attending the meeting were: the care manager, a second care manager to manage the discharge home, the vent and staffing representatives from the vent supplier, the nursing agency supervisors, the son and his wife, the companion who had attended the IP, the ethicist, myself, and a representative from Visiting Nurses (in the event it were possible to create a hospice at home . . . which I later learned was impossible because hospice or palliative care is incompatible (by regulations) with a vent-dependent patient).

The atmosphere at this meeting, which the ethicist both ran and framed, was that the IP was close to imminent death.

The ethicist urged the retention of a new treating physician to provide palliative care, which also proved to be impossible. There may be such an animal, but not in this part of the world.

This effort, however, was instructive because one focus was the treatment the IP should receive. What if she spiked a fever or suffered an infection? The ethicist advised that in the event of a fever or infection the IP *not* be treated, the thought being that the IP, who was believed to be unresponsive, would go quietly and would not suffer. The IP's treating physician or other physicians involved in her care were not present . . . an important omission, because (as I later learned) they would have forcefully opposed non-treatment. The operative assumption, that the IP was at death's door, would certainly have been challenged.

Discussion of the differences in treatment between palliative and acute care provided a subtext to the treatment issue. The ethicist placed particular emphasis on the aggressive treatment one receives in acute care and the number of calories the IP should receive. (The normal amount of nutrients a patient receives does not change if the patient is, as the IP is here, immobile. Thus, a patient of the IP's weight will be given the prescribed amount even if, as happened here, the normal caloric count results in diarrhea.) The ethicist strongly advised a lower caloric count and opined that treating the IP in a hospital setting would probably result in an unchanged caloric count, unnecessary blood tests, other tests and constant poking and prodding.

At the conclusion of this meeting I authorized that the vent company be retained, that necessary electrical work to the apartment be done to accommodate the vents, that the nursing agency be retained, that the IP be returned home when all was ready, that a palliative physician be retained if possible, that the IP not be treated if she spiked a fever or suffered an infection and that the caloric count be reduced.

Within 11 hours of the IP's returning home, she was back in the hospital. The vent machine may or may not have malfunctioned, a nurse may or may not have been inattentive, but whatever happened, the IP began to choke or gag, 911 was called, and back to the hospital she went. I will skip the recriminations, of which there was no shortage. My initial thought was, still, that the IP was so fragile that a quasi-hospice situation was called for. The son was now going ballistic about the fact that his mother was responsive, which fact was still being ignored, and that her life should not be prematurely terminated. I began to realize that the geriatric care manager was giving me none of this. She wanted to be told what to do but she did not pass on information about the IP's condition.

So I reached out to the treating physician, who in a calm, patient and persuasive way, convinced me that the IP still had a quality of life. I might have done so sooner had I not believed that he was, in a sense, programmed to aggressively treat, come hell or high water. He persuaded me otherwise. Therefore, my earlier decision, not to treat a fever or infection, changed. The physician agreed that he will not use heroic measures, nor will he resuscitate if the IP suffers a heart attack or stroke, but he will treat what is readily treatable. He was, interestingly, somewhat contemptuous of the ethicist, saying, in essence, that she had no contact with the patient, had barely seen her, did not know her, and lived in an ivory tower.

Finally, with confidence that I can rely on him for treatment advice, I decided to change geriatric care managers. I felt that the first manager and her colleagues, whom I had "inherited," did not see the patient for what she was. Instead, they appeared to be desirous of one thing . . . to get her home and turn her over to the nurses, as if they were not being compensated for their services. They appeared, in retrospect, to be on automatic pilot, doing a thoroughly pedestrian, minimalist job, by rote, with no insight or thought. With an IP at risk, as this one was, the performance, in hindsight, was woefully inadequate.

We are still trying to bring the IP home. An infection (treatable) has kept her in the hospital. Therefore, this story is not over. The decision to withdraw treatment is still in the future and, I hope, will not prove necessary. Or if necessary, I hope it will prove to be obvious, because I do not intend to make this decision if there remains some quality of life.

Once again, I invite letters and comments from the Bar and the judiciary. I can be reached at 225 Broadway, Suite 4200, New York, New York 10007, phone number (212) 732-5556, fax number (212) 608-3785, and e-mail address Robertkruger@aol.com.

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Special Needs Forum

By Adrienne Arkontaky

In a perfect world, parents of a child with special needs would have access to all services that would help their child develop to the child's fullest potential, services that would allow the child to lead as fulfilling a life as possible given the nature of the child's disabilities. Unfortunately, the world is not perfect, and parents of children with special needs find themselves overwhelmed by the many needs of children with disabilities and the inaccessibility of appropriate services to meet the child's needs. In many cases, parents are unaware of services available and the laws enacted to protect the rights of children with disabilities.

With the increase in the diagnosis of autism and the fact that medical technology allows us to increase the survival rate of premature babies and treat previously untreatable conditions in infancy, we are faced with the challenge of educating children with disabilities in greater numbers. This column is dedicated to providing practitioners with an overview of the laws that protect a child's right to receive a Free Appropriate Public Education ("FAPE"). This area has become an increasingly important part of any practice devoted to assisting families of children with special needs.

My first experience with special education law was several years ago when a client asked for assistance in obtaining additional special education services from a school district which previously had refused to acknowledge that the client's child had severe learning disabilities. The child was entering sixth grade, but was reading on a first grade reading level. For years, the parents had requested additional services to address the child's reading comprehension and ancillary issues that prevented the child from progressing academically. The school district refused, stating that "the child would never progress much beyond where she was and the parents should accept that fact and deal with it."

Initially the family was forced to pay privately for a special program to address the child's educational needs outside of the school district. The private program proved that the child could progress using a specific methodology of learning. During one summer, the child's reading comprehension increased from a first grade to a third grade level with the use of the method provided at the private program.

Given the results of this program and a review of the educational records that proved (at least in our minds) that this school district had truly abandoned the needs of this child, our firm was able to facilitate payment for this private program by the school district and a school-based reading program for the child going forward. The family continues to have a representative from our firm attend every Committee on Special Education ("CSE") meeting and the child is thriving today.

I assure you, practitioners handling special needs planning will one day find themselves faced with a child with special needs who is not receiving educational services that the child is entitled to under the law. There are many such statutes that address such issues, but probably the most relevant is the Individuals with Disabilities Education Act of 2004 ("IDEA"). I believe it is in the best interest of your clients that you at least be familiar with some of the key concepts and protections afforded under this statute. Many families have no idea of how to advocate for an appropriate education for their children, using the above laws to obtain educational and related services. In many instances, the families are unfamiliar with the statute and cannot navigate the system without the help of a strong advocate. The laws governing special education may be very confusing and change rapidly. Therefore, it can be daunting for parents to become well-versed in this area.

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There is solid research that lends to the theory that many of the youthful and adult offenders in our prisons today were children with learning and other disabilities, whose educational needs were not met early on. Emotional disabilities can also cause anxiety and depression because children feel unable to succeed in an educational setting. The IDEA was enacted to not only allow children access to a "free appropriate education," but also to provide a basis for post-graduate success. In fact, the statute mandates that the behavioral, academic, social and emotional needs of a child must be considered when developing a plan to educate a child with disabilities.

Historically, as far back as the 19th century, special programs did exist for children with disabilities. However, they were usually residential facilities for only the

most severely disabled children. We all may remember the movie *The Miracle Worker*, depicting the incredible life of Helen Keller, the first deaf-blind person to graduate from college. Many people thought that she was not able to be educated. Some even thought that she was mentally retarded. It was only after her family enlisted the help of Anne Sullivan, an educator well-versed in teaching the deaf and blind, that Helen's true potential was realized. Sullivan taught Helen to speak using the Tadoma method of touching the lips and throat of others as they speak, combined with fingerspelling letters on the palm of Helen's hand. Later Keller learned Braille, and used it to read not only English but also French, German, Greek and Latin. Helen Keller went on to become a lecturer, a writer and a zealous advocate for those with disabilities. She taught the world that each child regardless of his or her disability can be and should be educated "in a manner that meets a child's unique needs." This quote is one of the noted purposes of the IDEA of 2004. The statute was also enacted to prepare children for further education, employment, and independent living. (20 U.S.C. 1400(d)(1)).

There have been many other cases and statutes that have attempted to address the issue of an appropriate education. *Brown v. Board of Education* decided by the Supreme Court in 1954 was a landmark decision that stood for the proposition that segregated public schools deprived African-American children of the right to equal educational opportunities. The Elementary and Secondary Education Act of 1965 (ESEA) was enacted to ensure that underprivileged children had access to a quality education. However, it was the Education of the Handicapped Act of 1970 (Public Law 91-230) that offered incentives to help states make available educational programs for individuals with disabilities. There were also cases in the 1970s such as *The Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC)* (334 F. Supp. 1257 (E.D. Pa. 1971)) and *Mills v. Board of Education of District of Columbia* (348 F. Supp. 866 (D.D.C. 1972)) that facilitated change in how we educate children with disabilities. Until that time, children with severe disabilities were very rarely allowed to attend classes with their "non-disabled" peers. The school district in *Mills* even went so far as to use a cost-benefit analysis as a defense, stating that the high cost of educating children with disabilities was a basis for denying children an education.

In 1975 Congress enacted The Education for All Handicapped Children Act of 1975 (Public Law 94-142). This statute established the procedural safeguards used today to protect children's rights to an education. These procedural safeguards provide for IDEA's second noted purpose which is "to protect the rights of both children with disabilities and their parents." (20 U.S.C. 1400(d)(1)).

As you can see, special education law has taken a long time to develop. It is important to have a basic knowledge of the referral process when a parent, professional or even a school district suspects a child has a disability and of the procedural safeguards available to children with disabilities.

In New York, the Regulations of the Commissioner of Education–Part 200 govern the development of an Individualized Education Plan ("IEP") for children with disabilities. This Plan is the seminal tool in providing a child with a free appropriate public education. The IEP must include the child's present levels of performance, including the levels of academic achievement and function performance. The IEP must indicate the needs of the student. These needs are based upon how the student's disability affects the child's involvement and performance in the general education curriculum (200.4(d)(2)(i)). The classification of a disability must be included (200.4(d)(2)(ii)) and measurable goals must be addressed (200.4(d)(2)(iii)). The recommended special education programs and services with their anticipated frequency, location, duration and projected date for the beginning of the services must be stated. Any modifications and additional supports must also be identified (200.4(d)(2)(v)).

This IEP generally is developed by a Committee on Special Education ("CSE"). The members of this committee generally include: the parents; at least one regular education teacher of the child if the child is or may be participating in the "the regular education environment"; at least one of the child's special education teachers; a teacher or administrator of special education who is knowledgeable about the general curriculum and the availability of district resources; a school psychologist; an additional parent of a child with a disability (parent member); and such other people as either the parent or district designates having knowledge or special expertise regarding the student (200.3(a)(i)). It is very important that parents realize they are a part of the Committee and that they have a right to voice their opinion about how to enhance their child's education. They also may present evaluations for consideration and bring advocates and/or professionals to the meeting to support their position.

Once the IEP is developed, the school district must implement the plan within sixty (60) school days (200.4(e)) of the receipt of the referral. If there is a disagreement as to any aspect of the education of a child with disability, both the school district and parents have the right to request an impartial hearing to try to resolve the issues.

An impartial hearing is a formal proceeding in which disagreements between parents and school districts are decided by an Impartial Hearing Officer (IHO) appointed by the school district (200.5).

Impartial hearings are held for several reasons. For school-age children, the school district may request mediation or an impartial hearing when a parent refuses to give consent for an initial evaluation if a district suspects a disability. Parents may request a hearing when they disagree with the placement recommended by the school district or if they feel that the services recommended are inappropriate or insufficient. The impartial hearing is at no cost to parents (except for the associated attorneys' fees). It should be noted that even though a parent may be required to provide a retainer fee to an attorney for representation at a due process hearing, if the parents prevail at the hearing, they may be entitled to reimbursement for their attorney fees. A parent should never be prevented from advocating for appropriate educational services due to a lack of financial resources. When a parent requests an impartial hearing, the school district must inform the parent of any free or low-cost legal and other relevant services in the area.

The issue about which a parent is filing a complaint must have occurred not later than two years from the date the parent knew or should have known about the problem, unless the parent was prevented from submitting the complaint because the school district misrepresented that it had resolved the problem forming the basis of the complaint or the school district did not give the parent information that the parent was required to have (200.5(j(i)).

There are very specific requirements for submitting a request for due process (200.5(i)). Although a form is available for parents to use when submitting a request for due process, we caution parents that a due process hearing is a very complicated and involved process. We recommend that parents consult with an attorney specializing in education law prior to filing a request for due process. The school district can challenge the sufficiency of the complaint (200.5(i)(6)). A parent may not be able to sufficiently protect the interests of their child without legal representation.

Before an impartial hearing can be held, the parents are required to meet with the school district at a resolution session meeting (200.5(j)(2)). At this meeting, the parents will discuss their concerns and allow the school district an opportunity to resolve the issues. The school district must arrange for the resolution session within fifteen (15) days of the request for an impartial hearing.

The resolution session must include the parent or guardian of the child and the relevant member or members of the CSE or CPSE who have specific knowledge of the facts identified in the complaint. Someone from the school district who can make decisions for the school district must also attend. The school district cannot bring its attorney to the resolution session, unless the parent brings an attorney. The parents and the school district can agree to waive the resolution session. Since the waivers must be agreed to by both parties, even if the parents want to expedite the hearing process, most districts will not agree to a waiver (200.5(j)(2)(iii)).

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We have found most resolution sessions to be unproductive, as many school districts are unprepared to resolve the issues presented in the complaint at the session. However, if both parties agree in writing to resolve the problem, the agreement is a legally binding agreement that is enforceable in court (200.5(j)(2)(iv)). The parties also have three (3) business days to withdraw from the agreement, if they so choose. If the resolution session is not fruitful within thirty (30) days of receipt of the complaint by the school district, the impartial hearing must begin.

At a due process hearing, the parents have a right to be represented by an attorney or an individual with special knowledge or training about the education of students with disabilities. We always recommend that a parent have an attorney present at the hearing. The parents and the school district have the opportunity to present evidence and testimony and question, cross-examine and require the attendance of witnesses (200.5(j)(3)(xii)). The hearings are generally conducted in the same manner as a court proceeding and the rules of evidence generally apply.

As one might imagine, it can be a very emotional and stressful event for parents. I have attended many hearings, and it can be very adversarial and unpleasant for parents. Unlike other types of litigation where once the proceeding is over, the parties may not have continued contact with each other, parents may be faced with dealing with the opposing party (the school district) for many years after the proceeding is over, since the school district is still responsible for the education of the child. In many cases, it is difficult to repair a relationship between the district and the parents after a due process hearing.

At the close of the hearing, the IHO has to make his or her decision no later than 45 calendar days for a school-age child, or 30 calendar days for a preschool child, after the impartial hearing begins. However, the IHO may extend the time for a specific period at the request of a parent or the school district, but only after considering the impact a delay would have on the child's educational interest and other important factors (200.5(j)(4)).

Our firm represents parents in hearings all over New York State, including New York City, where it is often extremely difficult for families to obtain appropriate educational services for children with special needs. We find it advantageous in many hearings to submit a written brief in lieu of a closing statement. It is my opinion that submitting a closing brief assists the hearing officer to read a summary of the issues presented and "refresh" the IHO's memory on many of the key issues. Submitting a closing brief may, however, extend the period for an IHO to issue a decision, so it is important to consider the impact of a delay in the IHO's issue of a decision on the child involved in the proceeding.

"[T]he decision of the SRO is final, unless either the parent or the school district seeks review of the SRO's decision in either State Supreme Court or Federal District Court within four months from the date of the SRO's decision."

In New York State, we operate under a "two tier system." This means that the decision made by the IHO is final, unless a parent or the school district asks for a review of the decision of the IHO by the State Review Officer (SRO) (200.5(j)(k)). There are specific timelines that must be followed in order to appeal a decision by an IHO. All applicable timelines may be found on the New York State Department of Education's website at www.nysed.gov.

Once again, the decision of the SRO is final, unless either the parent or the school district seeks review of the SRO's decision in either State Supreme Court or Federal District Court within four months from the date of the SRO's decision.

As you can see, it can be incredibly difficult, costly and time consuming to address special education issues. Parents must either be knowledgeable or seek guidance from an attorney experienced in education law. There are several resources available to both special needs planning attorneys and parents that may assist in researching how to best resolve special education issues. The New York State Department of Education website provides guidance on the various laws and procedural safeguards available to parents. Wrightslaw.com is also a very informative website that provides parents, advocates and attorneys a wealth of information on special education issues. I also recommend that attorneys and advocates read *The Special Education Battlefield: A Guide to the Due Process Hearing* by Andrew Cuddy, Esq., for an overview of due process proceedings and how professionals and parents can prepare for these proceedings.

It is extremely frustrating to see parents have to struggle to obtain appropriate educational services for their children. However, as a professional and parent of two children serviced under the CSE, I also find it extremely rewarding to see the positive results of representation of children with disabilities and the positive impact it makes in the life of a child. It is important for parents to have advocates to turn to who will be able to at least advise them that they have rights and options when they do not agree with how a school district is educating their child with special needs. If you have any questions or comments on this column, please do not hesitate to contact me via e-mail at aarkontaky@littmankrooks.com

Adrienne Arkontaky is an attorney with Littman Krooks LLP with offices in New York City, Westchester and Dutchess counties. Adrienne's areas of practice include Special Needs Planning, Special Education Law and Guardianship. She represents parents of children with special needs throughout New York State in Special Education advocacy matters. She is a member of the New York State Bar Association, Westchester Bar Association and Westchester Women's Bar Association. She is also a member of the Council of Parent Attorneys and Advocates (COPAA).

Adrienne lectures to parents and organizations throughout New York State on issues affecting families of loved ones with special needs.

She earned her J.D. from Pace University. Prior to joining Littman Krooks, she served as Pro Bono Coordinator for the Financial Products Practice Group at Duane Morris and as a Service Coordinator for families of children with disabilities for Family Connection, a service coordination agency in Westchester. She is the mother of three children, one with severe disabilities.

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Elder Law Section Co-Founder Dies at 95

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

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

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

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

Goodstein is survived by his wife, Marjorie.

ELDER LAW ATTORNEY

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