

Elder Law Attorney

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

Message from the Chair

On January 22, 2002, the Elder Law Section will convene at the New York Marriott Marquis as part of the New York State Bar Association's Annual Meeting. If you have not attended the Annual Meeting in New York City in the past, I strongly encourage you to do so. It is the single event where members of all Sections of the Bar converge, with outstanding programs and extra services provided to all members of the Bar. It is a truly special event, and one worthy of the time and expense required to attend.



The Elder Law Section's program will begin with an Executive Committee Meeting at 11:00 a.m., followed by individual Committee Meetings at 1:00 p.m., and our annual program from 2:00 p.m. to 5:15 p.m. This year's program will be chaired by Dan Fish, and will include a special awards program recognizing two members of the Elder Law Section, Ellice Fatoullah and René Reixach, and Dean Joseph Bellacosa, formerly a Court of Appeals Judge, who has contributed scholarly decisions on elder law topics that our Section deems worthy of recognition.

The program this year will focus on hot topics for the elder law practitioner, with several members of the Section's Executive Committee presenting "short subjects" on vital practice areas. Howard Krooks will then provide us with an elder law update, which will include a discussion of the Birnbaum Commission's Report on Fiduciary Appointments, recent Medicaid rulings, and a host of other timely topics. Finally, René Reixach will share the dais with attorneys from the New York City HRA to discuss and debate challenges to Medicaid eligibility. To douse the flames fanned by the lively debate of the hot topics included

in our program, we will conclude the day with a cocktail reception for all Section members.

As most of you know, the Birnbaum Commission appointed by Judge Kay and the Inspector General have issued reports on fiduciary appointments in the New York State court system. Both reports are highly critical of the Bench and Bar, and call for substantial reforms in fiduciary appointments. In response to the reports, the House of Delegates of the New York State Bar Association formed a special committee to examine the fiduciary appointment system. It is my honor to serve on that Committee, along with Section member Kate Madigan, and we will have our first formal meeting on January 23rd in New York City. One area covered by the reports that is primarily within the province of our Elder Law Section is guardianship under Article 81 of the Mental Hygiene Law. A number of Section members have communicated with me

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their strong response to the reports, and in order to formulate a response on behalf of the Elder Law Section, the Guardianship Committee under the direction of Bob Kruger will dedicate its Committee Meeting at 1:00 p.m. on January 22nd to discussion of the Birnbaum and Inspector General's reports, and our Section's response. It is our intent to provide information to the State Bar Special Committee on Fiduciary Appointments, to be integrated with the formal Bar Association response.

Prior to the publication of the two reports, our Section filed its own report on guardianship with the House of Delegates, calling for specific reform of the guardianship system, including increased education and training for those handling guardianships, in addition to changes in the court system to facilitate more efficient administration and improved awareness of the nuances of Article 81. The proposed resolution was supported by an excellent report on Article 81 prepared by a committee of Elder Law Section members, and authored principally by Howard Krooks, which together were presented by myself and Joan Robert at the November 3rd House of Delegates' meeting. The resolution was modified slightly, but as modified, it was passed unanimously by the House of Delegates, and has become the formal position of the New York State Bar Association. The Section's report and resolution will be a foundation upon which the State Bar Association will build its response to the Commission reports as they pertain to guardianship under Article 81.

In addition, our Section's Task Force on Long-Term Care Reform has continued its work, and is currently drafting a final report based upon the conference held on October 10th and 11th, the preliminary reports prepared by the Section, and the presentations and materials provided by our speakers. The Task Force is currently operating under the direction of Cora Alsante, with assistance from Tim Casserly and the Committee on Legislation. It is anticipated that a preliminary draft of the final report will be ready for

review at the time of the Annual Meeting, with a target date of April for publication of the final report. To be included with the report will be proposed legislation, which will form the Elder Law Section's legislative agenda for 2002. Anyone wishing to participate at this time on the final writing and editing of the Task Force report, should contact Cora Alsante or Tim Casserly.

In order to facilitate continued growth of our Elder Law Section, and to find ways to better serve our constituents and provide Elder Law Section members with opportunities to participate in and grow with the Elder Law Section, a Long-Range Planning Committee under the direction of Kate Madigan, which includes all of the Section's past Chairs, has scheduled a retreat for April 12, 2002. Section Officers, along with selected Committee Chairs and Section members, will meet with the Committee at the New York State Bar Center in Albany to review our Section's long-range planning, with a focus on such issues as continuing legal education, meeting schedules, our Section's Committee structure, membership services, and other features of our Section's activities. If anyone has topics which they would like to see addressed by the select Long-Range Planning Committee, please forward them to me at lpierro@pierrolaw.com.

Finally, I would like to recognize all those who have been affected by the tragic events of September 11, 2001, especially the victims and their families, and those whose actions proved again and again that our state and country are full of heroes. Our continuing contribution as elder law attorneys may be to simply keep working hard for our clients and for the public good, as the growing needs of our seniors and persons with disabilities continue to demand our attention.

I hope to see you all on January 22nd in New York City.

Louis W. Pierro

Editor's Message

I am pleased to present to you the 2002 Winter Edition of the *Elder Law Attorney*!

As I begin each issue I try to think of new and interesting themes that might add value to our elder law knowledge base. In thinking about the theme for this edition, I looked back on the issues I have worked on during the past two years to see if any of them would inspire a theme for this edition. This led me to review an edition I worked on one year ago and to which I got a lot of positive feedback, that being, *THE LAW OF THE RETIREMENT STATES*. What I did last year was to present a common questionnaire to prominent elder law attorneys (the best of the best) in five of the most popular retirement states (Florida, North and South Carolina, California and Arizona). The answers they gave us are now an important resource tool in our practices.

I then began to think about other states that we New Yorkers might find interesting. This exercise was difficult for a New Yorker like myself, since all New Yorkers know that the world sort of ends at the New York border. Doesn't it? Well, apparently not! You see, I actually looked at a map and New York, it turns out, is bordered by five states: New Jersey, Connecticut, Pennsylvania, Massachusetts and Vermont. Yes, Vermont too!

Since this is the case, it occurred to me that we must at times be confronted with multistate issues that affect our clients and their families. Especially those of us with practices near a state border. This



edition of the *Elder Law Attorney* is dedicated to helping New York elder law attorneys handle these multistate issues caused by THE BORDER STATES.

To facilitate this theme, I presented a single questionnaire (the same questionnaire that we used last year for the retirement states) to a prominent (best of the best) attorney in each of the five border states. What follows is their answers to my questions. I hope you will find the information helpful.

Regarding our NEWS section, we have added a new regular column. If you recall, two editions ago we used as our theme, *THE YOUNGER DISABLED CLIENT*. Since working with younger disabled clients is a common denominator that many of our practices share, we thought it a good idea to add a regular column on the subject. As such, we are privileged that two of the writers who contributed to the theme edition have agreed to write a regular NEWS column. Thank you Beth Polner, Esq., and Candace Appleton, Esq. We look forward to your contributions in the years ahead.

There are also many other articles to read in the NEWS section on a whole host of topics. Each NEWS writer works very hard to come up with interesting and fresh topics for each edition. If you should see any of these writers in person, please say thank you. They are a very dedicated group of people who really care about our Section and seniors in general. They make a difference in our lives and the lives of our clients.

I hope you enjoy reading this edition of our journal. It was fun to work on. All my best! Keep smiling!

Lawrence Eric Davidow, CELA

Connecticut

Questions on the Minds of New York Elder Law Attorneys

By Jay Kearns

1. Medical Advance Directives

A. Will a New York Health Care Proxy be honored in your state?
Yes.

B. If a New York Health Care Proxy is technically honored, will it be honored in practice?
Yes.

C. Does your state honor living wills?
Yes, Connecticut honors living wills. Are there any formal requirements? The signature must be witnessed by two people.

D. What medical advance directives do you commonly prepare for your clients?
Connecticut's statutory form combines the following into one document: living will, appointment of conservator, appointment of health care agent and anatomical gifts.

E. Is there anything else we should know about medical advance directives that are peculiar to your state?
Nothing else about medical directives that are peculiar to Connecticut.

2. Durable General Powers of Attorney

A. Will a New York Durable General Power of Attorney be honored in your state?
Yes.

B. If a New York Durable General Power of Attorney is technically honored, will it be honored in practice?
Yes.

C. What financial advance directives (i.e., powers of attorney) do you commonly prepare for your clients?
Connecticut's statutory short form includes power to manage financial affairs in the general form.



D. Is there anything else we should know about financial advance directives that are peculiar to your state?

You should be aware that most banks in Connecticut will honor powers of attorney for only a certain period of time after they are executed. This period could range from one year to several years. Your clients should check with their banks to find out when they will need to renew their powers of attorney. Other options include making the accounts joint or using "POA accounts."

E. Does your state allow springing powers of attorney?
Yes.

"[M]ost banks in Connecticut will honor powers of attorney for only a certain period of time after they are executed."

3. Probate and Trusts

A. What is the average range of probate costs for an estate that consists of a \$250,000 house and \$250,000 of various stocks, bonds and cash?
Approximately \$7,500.

B. Are probate fees usually by the hour or a percentage of the estate?
Probate fees in Connecticut could go either way regarding hourly fees vs. percentage fees.

C. Is probate considered an expensive or lengthy procedure in your state?
Probate is neither expensive nor lengthy in Connecticut.

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- D. Is there a minimum amount of assets which make probate necessary?**
The decedent must have \$20,000 in solely owned assets before a formal probate proceeding is required.

- E. New York attorneys are still debating whether avoiding probate should be a central part of an estate plan. What is the consensus in your state?**
There is no consensus in Connecticut.

- F. Are there any formalities to form a trust in your state?**
- i. Signatures notarized?**
 - ii. Signatures witnessed?**
There is no statute in Connecticut which contains specific execution requirements for trusts. To be safe, the signature should be notarized and it should be witnessed by two people.

- G. Is there anything else we should know about trusts that are peculiar to your state?**
There is no recording requirement for trusts in Connecticut, although a trustee's deed must be recorded on the land records. You should also be aware of Connecticut's trust-busting statute regarding Medicaid eligibility (see answer to 5H).

- H. If we want to place real property or other property from your state in a New York trust, what pitfalls should we know about?**
There are no known pitfalls regarding the placement of Connecticut property into a New York trust.

- I. Does placing assets in a trust impact any of the following:**
- i. Creditor's rights?**
 - ii. Community property laws?**
 - iii. Other spousal rights?**
 - iv. Real property laws?**
 - v. Local taxes?**
 - vi. Homesteads or other constitutional rights?**
Placing assets in a Connecticut trust does not have any impact on these items, with the exception of the local taxes. Most towns provide real estate

tax benefits for veterans and/or the elderly. These benefits may be lost if you place the house into a trust. You need to check with your specific town.

4. Taxes

- A. Does your state have an income tax?**
Yes.
- B. Does your state have an estate tax?**
Yes.
- C. Any other tax we should know about?**
Connecticut is one of the few states with a state gift tax, although the state is in the process of phasing it out. Starting in 2006, only gifts of \$1,000,000 or greater will be taxed. The gift tax is due on April 15th of the following year.
- D. In what way do your state taxes impact on your drafting documents for your clients?**
No.

"Connecticut is one of the few states with a state gift tax, although the state is in the process of phasing it out."

5. Nursing Homes and Long-Term Care Financing Issues

- A. What is Medicaid called in your state?**
Medicaid, administered through the Department of Social Services.
- B. Is your state an income cap state?**
No income cap for coverage in long-term care facility or for home services provided under the Connecticut Home Care for Elders Program (state funded). There is however, an income cap of \$1,590 for coverage under the Medicaid Waiver (federally-funded Home Care for Elders Program). Recent legislation has waived this requirement and provided coverage on a sliding scale basis.

- C. 2000 Numbers:**
- i. What are the regional rates for Medicaid transfer penalty purposes in your state?**
 - ii. What is the MMMNA and CSRA in your state?**
- For 2001:**
- i. \$6,779.**
 - ii. CSPA (Community Spouse Protected Amount) maximum \$87,000. Minimum \$17,000.**
 - iii. MMNA \$1,451.25 (150% FPL for two) Maximum MMNA \$2,175.**
- D. What is the true average cost of nursing homes throughout your state?**
Depends greatly in what part of the state. Slightly higher in lower Fairfield County; however, statewide average is about \$7,000.
- E. Does your state allow the rule of halves?**
Yes.
- F. Does your state allow spousal refusal? If no, what techniques do you use in your state to protect the surviving spouse? Annuities? Trusts? How are the community spouse's IRAs or qualified plans treated?**
Spousal refusal is not allowed in Connecticut. The Community Spouse Protected Amount is the best protection for the community spouse. Connecticut has historically been a resource first state, so additional assets are protected through a fair hearing, although by virtue of recent legislation, this technique has become increasingly more difficult. In almost every instance, trusts and annuities are deemed available assets. The community spouse's IRA or qualified plans are deemed available, but can be retained as part of the CSPA. In only limited, narrow circumstances can some qualified plans be protected in excess of the CSPA.
- G. Does your state allow income only trusts?**
Connecticut follows the OBRA '93 trust rules with regard to the availability of trust assets.
- H. What type of Medicaid planning trusts are popular in your state and why?**
Virtually no type of Medicaid planning trusts are allowed in the state of Connecticut,

the only exception being section 1396p(d)(4)(a) & (c). In addition to strictly following OBRA '93, Connecticut has gone so far as to adopt a so called "trust busting statute." Connecticut General Statutes § 45a-486:

Upon application of the Department of Social Services, the Superior Court shall terminate an inter vivos trust established by a person or the person's spouse when the person or the person's spouse becomes an applicant for or recipient of public assistance or Medicaid. The Superior Court shall order that the principal and any undistributed income shall be distributed to the settlor of the trust.

Although we know of no known situations where this statute has been invoked, this has not been necessary. The chilling effect alone is sufficient to frustrate any Medicaid planning involving trusts.

- I. Does Medicaid cover assisted living facilities in your state?**
To date, there is no Medicaid coverage for assisted living facilities.
- J. Does the creation of a life estate with one's home protect their home in your state?**
The home's value, minus the value of the life estate, is protected, providing the applicable penalty period on the transfer of the house has expired. Upon application for benefits, the value of the life estate is considered an available asset, which is usually deemed inaccessible by virtue of the owner's refusal to buy out.
- K. What significant assets are exempt from Medicaid in your state?**
Primary residence, automobile, personal possessions (excluding collections).
- L. Does Medicaid pay for any home care services in your state?**
Yes. There are two programs in Connecticut that pay for home care benefits, the state-funded Home Care for Elders Program and the Medicaid Waiver Home Care for Elders Program. The asset limit

varies slightly under both programs. The maximum is 30 hours per week.

M. What are the biggest issues your state is currently facing regarding long-term care?

One of the biggest issues facing long-term care is a shortage of nursing home beds and staffing shortage.

"[S]top, look and listen before using New York techniques in Connecticut."

N. Is there anything else we should know about Medicaid and long-term care that are peculiar to your state?

Qualifying for Medicaid in Connecticut might be more difficult than in other states. The state has become increasingly aggressive in deeming assets available. The state takes a strict position on the availability of annuities, retirement plans and trusts, as can be evidenced by the enactment of the trust busting statute. In addition, in June of this year, new regulations were passed, which dramatically impacted the availability of the fair hearing technique to enlarge the CSPA. The latest regulations significantly impact those clients who wish to pursue a fair hearing and who have engaged in other Medicaid planning techniques, such as gifting or disinheriting a recipient spouse from the will. You should also be aware that there is a lengthy period of time between the application date and granting benefits with some district offices. This may result in litigation initiated by nursing homes.

6. Is There Any Other Elder Law Advice You Would Give to a New York Attorney Whose Client Will Retire to Your State, Either Full or Part Time?

The most important elder law advice I can offer is to stop, look and listen before using New York techniques in Connecticut. Despite the geographic proximity, what works in New York probably will not work in Connecticut. Be careful!

7. Please Tell Us About Yourself, Your Background and Your Practice.

Jay Kearns practices in West Hartford, Connecticut, with three other attorneys and eight staff members. They focus on Medicaid planning, estate planning and probate. Mr. Kearns was the first Connecticut attorney board certified as an elder law specialist by the National Elder Law Foundation (NELF), which is an organization that examines and certifies elder law specialists. He is a former Director of the National Academy of Elder Law Attorneys (NAELA), having served from 1995-2001, and was selected as a Fellow of NAELA.

Mr. Kearns serves on the Advisory Board of the General Electric Center for Financial Learning, which is one of the Internet's best financial Web sites, found at financiallearning.com.

He is a member of the Executive Committee of the Connecticut Bar Association's Elder Law Section. He is a Past President of the Northern Connecticut Chapter of the Alzheimer's Association.

Mr. Kearns graduated from Fordham University and Syracuse University College of Law and is a member of Phi Beta Kappa.

Massachusetts

Questions on the Minds of New York Elder Law Attorneys

By Harry S. Margolis

1. Medical Advance Directives

- A. Will a New York Health Care Proxy be honored in your state?

Yes. All that is required is that it be signed by two witnesses.

- B. If a New York Health Care Proxy is technically honored, will it be honored in practice?

Yes.

- C. Does your state honor living wills? Are there any formal requirements?

Not officially. But any health care agent should follow any verifiable statement as to the patient's wishes. If the matter must go to court, the court will apply a substituted judgment standard and give due weight to any prior statements.

- D. What medical advance directives do you commonly prepare for your clients?

Health care proxies including a medical directive within the document.

- E. Is there anything else we should know about medical advance directives that are peculiar to your state?

We're not peculiar.

2. Durable General Powers of Attorney

- A. Will a New York Durable General Power of Attorney be honored in your state?

Yes.

- B. If a New York Durable General Power of Attorney is technically honored, will it be honored in practice?

Yes, as much as any power of attorney. Some institutions are reluctant to honor instruments that are old or that are not on the institutions' forms. Such actions are contrary to law, but hard to fight.



- C. What financial advance directives (i.e., powers of attorney) do you commonly prepare for your clients?

Durable powers of attorney.

- D. Is there anything else we should know about financial advance directives that are peculiar to your state?

No.

- E. Does your state allow springing powers of attorney?

Yes.

3. Probate and Trusts

- A. What is the average range of probate costs for an estate that consists of a \$250,000 house and \$250,000 of various stocks, bonds and cash?

\$5,000–\$10,000.

- B. Are probate fees usually by the hour or a percentage of the estate?

Hourly.

- C. Is probate considered an expensive or lengthy procedure in your state?

Yes, but not to be avoided like the plague.

- D. Is there a minimum amount of assets which make probate necessary?

Voluntary administration—a very simple process—is available for probate estates of \$15,000 and less.

- E. New York attorneys are still debating whether avoiding probate should be a central part of an estate plan. What is the consensus in your state?

It's moving in that direction, at least in our practice. Until a few years ago, Massachusetts had its own estate tax and an automatic lien on real estate that could only be released by filing an estate tax return. All estates holding real estate, whether or not in the probate estate, had to file an estate tax return. Probate didn't seem to add much to this burden. Now, Massachusetts has adopted the sponge tax and all that's

required to release the Commonwealth's lien is an affidavit of no tax due. It seems more worth the effort and expense to avoid probate.

F. Are there any formalities to form a trust in your state?

It must be signed by the grantor and each trustee. If it is to hold real estate, all trustee's signatures must be notarized.

i. Signatures notarized?

Only if it is to hold real estate.

ii. Signatures witnessed?

No.

G. Is there anything else we should know about trusts that are peculiar to your state?

Massachusetts practitioners often use so-called "nominee realty trusts" to hold real property. These are hybrids between trusts and agency agreements. The trustees hold title to property on behalf of beneficiaries named on schedules that are not recorded at the registry of deeds. The trustees may only act at the direction of the beneficiaries. These are used for a variety of reasons, including (1) concealing the identity of the true owners of property, (2) avoiding the necessity of filing a trust or limited partnership agreement at the registry, or (3) facilitating the annual giving of portions of the property valued at \$10,000 or less. The problem with these entities is that they are often misused and misunderstood. Lawyers have taken the basic nominee realty trust form and added features that don't fit. The schedules of beneficiaries are often lost. And the Division of Medical Assistance has misconstrued nominee realty trusts to give trustees true trust powers as opposed to their acting as agents for the beneficiaries.

H. If we want to place real property or other property from your state in a New York trust, what pitfalls should we know about?

Despite the problems described above, it's best to use a nominee realty trust and name the trustees of the New York trust as beneficiary—just do it right and don't lose the schedule of beneficiaries. Otherwise,

you would have to record the New York trust at the registry and any subsequent title search would have to include an analysis of the trust provisions.

I. Does placing assets in a trust impact any of the following:

i. Creditor's rights?

No.

ii. Community property laws?

Not applicable.

iii. Other spousal rights?

No.

iv. Real property laws?

No.

v. Local taxes?

Possibly. Unless the grantor is a trustee and the trust is revocable, he or she will lose any senior or veteran tax exemptions that may be available.

vi. Homesteads or other constitutional rights?

Yes, a homeowner may not qualify for a homestead exemption if the property is held in trust.

4. Taxes

A. Does your state have an income tax?

Yes.

B. Does your state have an estate tax?

Yes, a sponge tax.

C. Any other tax we should know about?

Nothing unusual.

D. In what way do your state taxes impact on your drafting documents for your clients?

Again, nothing unusual. You will see some older Massachusetts trusts taking into account both the old Massachusetts estate tax and its phaseout, which made for some complex documents. These are no longer necessary, but in most instances cause no harm.

5. Nursing Homes and Long-Term Care Financing Issues

A. What is Medicaid called in your state?

MassHealth.

- B. Is your state an income cap state?**
No.
- C. 2000 Numbers:**
- i. What are the regional rates for Medicaid transfer penalty purposes in your state?**
\$5,010 for the entire state.
 - ii. What is the MMMNA and CSRA in your state?**
MMMNA \$1,452.
CSRA \$87,000. This is the minimum as well as the maximum.
- D. What is the true average cost of nursing homes throughout your state?**
\$7,000–\$8,000.
- E. Does your state allow the rule of halves?**
Yes.
- F. Does your state allow spousal refusal? If no, what techniques do you use in your state to protect the surviving spouse? Annuities? Trusts? How are the community spouses IRAs or qualified plans treated?**
There's nothing on paper that bars the use of spousal refusal, but it is not used in practice. We have used it on occasion in the case of second marriages. The tools of choice are the increased CSRA and annuities. With respect to an enhanced CSRA, the income-first rule adopted by the Division of Medical Assistance was repealed by act of the Legislature. Income only trusts work. IRAs of the community spouse are countable. With respect to 401(k) and other qualified plans related to employment, the key factor is whether the community spouse is still working. If so, the funds are not countable; if not, they are countable.
- G. Does your state allow income only trusts?**
Yes.
- H. What type of Medicaid planning trusts are popular in your state and why?**
Income only trusts. Testamentary trusts for the surviving spouse. Massachusetts regulations exempt pourover trusts funded at death from the usual trust rules in the same way as testamentary trusts left by a deceased spouse. But many practitioners are concerned about relying on this exemption since it appears to go beyond federal law, and such a pourover arrangement would provide no protection if the surviving spouse were to leave Massachusetts.
- I. Does Medicaid cover assisted living facilities in your state?**
In limited circumstances. There is a MassHealth foster care program and an SSI-G program that provide some assistance in some situations. In addition, some facilities that received tax-exempt bond funding must set aside a certain percentage of lower-priced units for lower-income residents.
- J. Does the creation of a life estate with one's home protect their home in your state?**
Yes.
- K. What significant assets are exempt from Medicaid in your state?**
The principal residence. Retirement plans of employed individuals. Business property essential for self-support. Generally, real property owned with someone other than the MassHealth applicant and his or her spouse is considered inaccessible.
- L. Does Medicaid pay for any home care services in your state?**
Yes. It covers some assistance through the state network of home care agencies, but this is limited. It also covers adult day health care. For disabled individuals, it can provide extensive personal care attendant coverage. There has been talk of extending this service to seniors—many of whom need care because they are disabled—but I haven't seen any examples of this happening yet.
- M. What are the biggest issues your state is currently facing regarding long-term care?**
Sufficient payment to nursing home and home care aides so that patients will get adequate care.

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- N. **Is there anything else we should know about Medicaid and long-term care that are peculiar to your state?**

The Division of Medical Assistance in Massachusetts can be arbitrary and act contrary to the plain reading of its own regulations, federal law, and established law in other fields, such as real estate and trusts.

6. **Is There Any Other Elder Law Advice You Would Give to a New York Attorney Whose Client Will Retire to Your State, Either Full or Part Time?**

It would make sense to have a Massachusetts durable power of attorney and health care proxy, not so much because they're legally necessary but because people here are more used to seeing them. If the client has real property in more than one state, I would urge him or her to take steps to avoid probate—one is bad enough, but two probates is a double helping of the burden.

7. **Please Tell Us About Yourself, Your Background and Your Practice.**

Harry S. Margolis founded Margolis & Associates, a four-lawyer Boston law firm, in 1987. He is a graduate of Swarthmore College and New York University School of Law. His practice concentrates on elder law, planning for individuals with disabilities, estate administration and guardianship. Mr. Margolis edits *The ElderLaw Report*, a monthly newsletter for elder law attorneys published by Aspen Law & Business. He also wrote the *ElderLaw Forms Manual* and served as founding editor of *The ElderLaw Portfolio Series*, both also published by Aspen. Mr. Margolis is a Fellow of the National Academy of Elder Law Attorneys and has served on the adjunct faculty of Boston College Law School. He is the founder and President of ElderLawAnswers.com.

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New Jersey

Questions on the Minds of New York Elder Law Attorneys

By Thomas D. Begley, Jr.

1. Medical Advance Directives

A. Will a New York Health Care Proxy be honored in your state?

Yes. New Jersey law, N.J.S.A. 26:2H-76, specifically states that a health care proxy valid in the state where it is executed is valid in New Jersey.

B. If a New York Health Care Proxy is technically honored, will it be honored in practice?

It is very likely that a health care proxy prepared in New York will be honored in New Jersey. If the issue were a living will or advanced directive rather than a health care proxy, the standard would be whether or not the document is clear and complete.

C. Does your state honor living wills? Are there any formal requirements?

Yes, New Jersey honors living wills. The requirement is that it be executed in front of two witnesses or a notary public. The health care representative cannot be a witness.

D. What medical advance directives do you commonly prepare for your clients?

Commonly an advanced directive and health care proxy are combined in one form. The advanced directive is usually a directive to terminate life under certain circumstances outlined in the statute, N.J.S.A. 26:2H-55 *et seq.* But good practice dictates a detailed listing of treatment alternatives that the client declines. An alternative is an advanced directive directing that the client continue to be treated aggressively no matter how hopeless the situation. The third alternative is a simple health care proxy leaving the treatment decision to the health care representative.



E. Is there anything else we should know about medical advance directives that are peculiar to your state?

New Jersey has a religious exception provision permitting religiously affiliated facilities to opt out of taking any action to terminate life but requiring the facility to transfer the patient to another facility selected by the patient.

2. Durable General Powers of Attorney

A. Will a New York Durable Power of Attorney be honored in your state?

There is no statutory provision that a durable general power of attorney valid in the state where it is executed be honored in New Jersey. Therefore, the New Jersey Rule regarding formality of execution would have to be honored. Under N.J.A.C. 46:2B-8, a power of attorney must obtain an acknowledgment by a notary public or other person authorized to take oaths. No witnesses are required.

B. If a New York Durable General Power of Attorney is technically honored, will it be honored in practice?

A New York Durable General Power of Attorney would be held to the same standard as any other power of attorney. If the instrument is clear it is much more likely to be honored than if it is not.

C. What financial advance directives (i.e., powers of attorney) do you commonly prepare for your clients?

This office commonly prepares a general durable power of attorney covering financial matters and separate powers of attorney for banking, sale of real estate, and for dealing with securities.

D. Is there anything else we should know about financial advance directives that are peculiar to your state?

New Jersey has a Special Banking of Attorney Act, N.J.S.A. 46:2B-10 *et seq.* If the power of attorney refers to the statute, all banks

must accept it. A power of attorney authorizing banking that does not contain such a reference may or may not be accepted by a banking institution. Good practice dictates this reference always be included.

- E. Does your state allow springing powers of attorney?**
Yes. This state does permit springing powers of attorney.

3. Probate and Trusts

- A. What is the average range of probate costs for an estate that consists of a \$250,000 house and \$250,000 of various stocks, bonds and cash?**

The cost for probating the will and obtaining the necessary executor's short certificates for an estate consisting of a \$250,000 house and \$250,000 in securities would likely range between \$75 and \$100. Executor's commissions would be \$20,500. Executor's commissions are fixed by the Administrative Regulation at 5 percent of the first \$200,000 of an estate and 3 1/2 percent of the next \$800,000 and 2 1/2 percent of the excess.

- B. Are probate fees usually by the hour or a percentage of the estate?**

Probate fees are usually by the hour or flat fee. They are seldom a percentage of the estate.

- C. Is probate considered an expensive or lengthy procedure in your state?**

Probate in New Jersey is probably as simple as any state in the union. There is virtually no court supervision unless there is a challenge of some kind.

- D. Is there a minimum amount of assets which make probate necessary?**

The minimum amount of assets to make probate necessary is \$10,000.

- E. New York attorneys are still debating whether avoiding probate should be a central part of an estate plan. What is the consensus in your state?**

Because of the simplicity of probate in New Jersey, very few practitioners use living trusts unless there is a special reason such as avoidance of multistate probate where there is real estate located in another state.

- F. Are there any formalities to form a trust in your state?**

i. Signatures notarized?

ii. Signatures witnessed?

There are no formalities to form a trust other than a signature by the grantor. Good practice dictates that there be two witnesses and a notary. If the trust is ever going to be recorded, it needs an acknowledgment by a notary and must comply with the State Recording Act.

- G. Is there anything else we should know about trusts that are peculiar to your state?**

New Jersey trust rules are pretty much plain vanilla.

- H. If we want to place real property or other property from your state in a New York trust, what pitfalls should we know about?**

There are really no pitfalls in placing real estate in New Jersey in a New York trust. There is a special exemption from the New Jersey Real Estate Transfer Tax for such transfers.

- I. Does placing assets in a trust impact any of the following:**

I assume the trust contemplated as a revocable living trust.

i. Creditor's rights?

No.

ii. Community property laws?

New Jersey is not a community property state.

iii. Other spousal rights?

New Jersey has an elective share statute using an augmented estate.

iv. Real property laws?

There is no effect except that a title company may want to examine the trust if the trust subsequently conveys real estate. If the trust is to be recorded, it must comply with the requirements of the Recording Act.

v. Local taxes?

New Jersey has a number of special rebate and deduction programs. These include a homestead tax rebate, senior citizen deductions, veterans' deductions, disabled persons' deductions and

saver's rebates. There are also exemptions for disabled veterans. Placing a property in a trust would terminate the grantor's rights to the benefits under these programs. The solution is to transfer the property to a trust, but reserve a life estate for the grantor.

vi. Homesteads or other constitutional rights?

New Jersey does not have a homestead provision.

4. Taxes

A. Does your state have an income tax?

Yes. New Jersey has an income tax.

B. Does your state have an estate tax?

New Jersey only has a "sponge" tax as an estate tax. New Jersey does have an inheritance tax. The inheritance tax does not apply to spouses or to lineal ascendants or descendants.

C. Any other tax we should know about?

Technically, New Jersey does not have a gift tax. However, if transfers (i.e., gifts) are made within three (3) years prior to death to someone other than a spouse or lineal ascendant or descendant, those assets are included in the New Jersey inheritance tax. Effectively, this amount is a gift tax.

D. In what way do your state taxes impact on your drafting documents for your clients?

There is very little that document drafting can do to avoid state taxes. There are exemptions which can be included in drafting but clients seldom want to limit themselves in this manner.

5. Nursing Homes and Long-Term Care Financing Issues?

A. What is Medicaid called in your state?

Medicaid is called Medicaid or Medical Assistance.

B. Is your state an income cap state?

New Jersey is an income cap state. For calendar year 2001 the income cap is \$1,590. However New Jersey also has a medically needy program for persons whose income exceeds the income cap. The medically needy program does not apply to assisted living or community-based waiver programs.

C. 2001 numbers:

i. What are the regional rates for Medicaid transfer penalty purposes in your state?

New Jersey has a state-wide divisor of \$5,540.

ii. What is the MMMNA and CSRA in your state?

MMMNA in New Jersey for the period July 1, 2001, to June 30, 2002, is \$1,452. The excess shelter allowance is \$436.

The CSRA for calendar year 2001 is one-half of the countable assets with a ceiling of \$87,000 and a floor of \$17,400.

D. What is the true average cost of nursing homes throughout your state?

True average cost of nursing homes throughout the state is approximately \$7,000-\$7,500 per month.

E. Does your state allow the rule of halves?

Yes. New Jersey allows the rule of halves.

F. Does your state allow spousal refusal? If no, what techniques do you use in your state to protect the surviving spouse? Annuities? Trusts? How are the community spouse's IRAs or qualified plans treated?

New Jersey does not allow spousal refusal although the issue has not been litigated. Under new Medicaid regulations effective June 18, 2001, an annuity for a community spouse is considered a transfer to the extent that the amount of the annuity combined with any other assets of the community spouse exceed the CSRA. Spousal Annuity Trusts are considered available resources to the extent the assets in the trust exceed the CSRA. Community spouse IRAs are considered countable assets. Qualified plans are treated as countable assets to the extent that they can be accessed.

G. Does your state allow income only trusts?

New Jersey does allow income only trusts.

H. What type of Medicaid planning trusts are popular in your state and why?

Medicaid planning trusts that are popular in this state are the following:

1. **Income Only Trusts**—Transfer of the assets to the trust starts the clock on the

transfer penalty. Under New Jersey law, assets in a living trust may be subject to estate recovery. At the time of the Medicaid application, assets in the trust should be distributed to children or other beneficiaries.

2. **Disability Annuity Trusts**—Disability annuity trusts are popular in New Jersey, however the state takes the position that there must be a payback provision. These trusts are popular because they qualify the parent for Medicaid immediately and preserve assets for the disabled child. In cases where the disabled child is receiving SSI and/or Medicaid, the disability annuity trust can be combined with a special needs trust so that it is effectively a disability annuity special needs trust.
 3. **Pooled Trusts**—There is one pooled trust in the state run by Plan NJ.
 4. **(d)4A Trusts**—(d)4A Trusts are commonly used for tort victims or disabled persons who have inheritances or alimony or equitable distribution.
- I. **Does Medicaid cover assisted living facilities in your state?**
Medicaid does cover assisted living facilities in the state. There is an income cap. Only about 50 percent of the facilities in the state accept Medicaid and most have fairly long private pay requirements, i.e., two years.
 - J. **Does the creation of a life estate with one's home protect their home in your state?**
The creation of a life estate with one's home will protect the home to a certain extent. The transfer is a disqualifying transfer. There is no estate recovery against the life estate. There is a discount on the Medicaid transfer penalty for the value of the life estate unless there is no reasonable prospect that the transferor will live in the home for a reasonable period of time.
 - K. **What significant assets are exempt from Medicaid in your state?**
The only assets exempt from Medicaid are those set forth in federal law, which are the home under certain circumstances, an automobile, personal effects, etc.
 - L. **Does Medicaid pay for any home care services in your state?**

Medicaid has a number of home care waiver programs. They are all subject to the income cap.

- M. **What are the biggest issues your state is currently facing regarding long-term care?**
The State Medicaid Agency has adopted a slash and burn mentality and is very hostile toward Medicaid planning of any kind. It grasps for any opportunity to rule against the Medicaid application.

The Medicaid reimbursement rates are such that each nursing home loses \$27 per day for each Medicaid recipient. Facilities are unable to provide the level of care that the maintenance of human dignity requires.
 - N. **Is there anything else we should know about Medicaid and long-term care that are peculiar to your state?**
New Jersey has a very strict estate recovery law containing a broad definition of estate. Enforcement is aggressive.
6. **Is There Any Other Elder Law Advice You Would Give to a New York Attorney Whose Client Will Retire to Your State, Either Full or Part Time.**

The New York client retiring in New Jersey will have little problem with estate planning documents such as a will, trust, living will, power of attorney, etc. New Jersey Inheritance Tax must be considered.

With respect to Medicaid planning, the rules change quickly and they are not always in writing. The best advice is to co-counsel with an experienced New Jersey practitioner.
 7. **Please Tell Us About Yourself, Your Background and Your Practice**

Thomas D. Begley, Jr., has committed to practice law in New Jersey since 1962. He is a Fellow of the National Academy of Elder Law Attorneys and is a Certified Elder Law Attorney. He is past Chair of the Elder Law Section and the Real Property Probate and Trust Law Section of the New Jersey State Bar Association. He is co-author of *Representing the Elderly Client* (Aspen Publishing Co.), co-author of *Representing the Elderly or Disabled Client* (Warren Gorham Lamont), author of *How to Develop and Manage an Elder Law/Trust and Estates Practice* (New Jersey ICLE) and co-author of *Profitable Law Firm Management* (New Jersey ICLE).

Pennsylvania

Questions on the Minds of New York Elder Law Attorneys

By Hal Fliegelman

1. Medical Advance Directives

A. Will a New York Health Care Proxy be honored in your state?

Yes.

B. If a New York Health Care Proxy is technically honored, will it be honored in practice?

A New York Health Care Proxy *will* be honored in Pennsylvania. If a state has a living will statute, it *must* honor another state's living will. The problem occurs when a state does not recognize living wills at all. The famous *Cruzan* case contested the right of a state that did not recognize living wills to deny the terms of the patient's living will (specifically in *Cruzan*, to "pull the plug" on a comatose patient). Nonetheless, the opinion is that *if* a review board of the hospital or the nursing facility rules to override the directive for some reason (e.g., where there is a serious dispute as to whether the patient will ever have a sapient life), the deciding body is well within its authority to do so.

C. Does your state honor living wills? Are there any formal requirements?

Pennsylvania *does* honor living wills. To "CYA" have *two* witnesses and notarize.

D. What medical advance directives do you commonly prepare for your clients?

Fliegelman Elder Law uses a health care power of attorney.

E. Is there anything else we should know about medical advance directives that are peculiar to your state?

Yes. If a care facility wants to contest the implementation of a specific living will, the final legal determination will be made by the courts.

2. Durable General Powers of Attorney

A. Will a New York Durable General Power of Attorney be honored in your state?

B. If a New York Durable General Power of Attorney is technically honored, will it be honored in practice?

Yes. A properly executed New York DPA *will* be honored anywhere, both legally and practically.

C. What financial advance directives (i.e., powers of attorney) do you commonly prepare for your clients?

Fliegelman Elder Law uses a durable power of attorney.

D. Is there anything else we should know about financial advance directives that are peculiar to your state?

No. Nothing unusual about Pennsylvania. The DPA is "standard."

E. Does your state allow springing powers of attorney?

Yes. Pennsylvania does allow/honor springing powers of attorney.

3. Probate and Trusts

A. What is the average range of probate costs for an estate that consists of a \$250,000 house and \$250,000 of various stocks, bonds and cash?

The cost to probate a \$500,000 estate in Pennsylvania is about \$690. The nature of the property is not relevant; the cumulative value of the probated assets is what determines the cost to probate. The cost of probate is subject to a "sliding scale." The costs may differ county by county. To find the cost in a given county, go to the *Legal Directory*, which lists attorneys, and will show probate costs county by county.

B. Are probate fees usually by the hour or a percentage of the estate?

In terms of probate fees charged by the county, the "formula" essentially is a percentage (but not a "simple" percentage of the estate value—see "sliding scale" for a given Pennsylvania county). It is not determined hourly.

With respect to counsel fees, individual attorneys follow different approaches, some charge according to a percentage of the assets, some bill according to an hourly rate and some use a flat fee.

C. Is probate considered an expensive or lengthy procedure in your state?

In Pennsylvania, probate is *not expensive* and is *not time consuming*.

D. Is there a minimum amount of assets which make probate necessary?

A simplified probate petition process is available for small estates with less than \$25,000 in assets, where the decedent is not survived by a spouse, child, parent or sibling. Additionally, state statute permits direct distribution to immediate family members of certain types of assets, including up to \$5,000 in wages owed to the decedent, \$3,500 in reimbursement of funeral expenses and life insurance of up to \$11,000.

E. New York attorneys are still debating whether avoiding probate should be a central part of an estate plan. What is the consensus in your state?

Avoiding probate in Pennsylvania is a controversial issue. It should *not* be the central goal of an estate plan because the costs to probate are low and the time required is *not* lengthy. However, attorneys who do estate planning have the propensity to urge clients to “avoid probate” when the client doesn’t realize that probate is *not* the menace. Assets that are probated or not probated are *both* subject to estate tax, so the client who spends money “avoiding probate” is not saving his/her estate the taxes that will be levied, and the money spent to avoid probate will more than likely outweigh the modest costs to probate.

F. Are there any formalities to form a trust in your state?

i. Signatures notarized?

ii. Signatures witnessed?

The only formalities to form a trust in Pennsylvania are (1) notarized signatures, and (2) two witnesses.

G. Is there anything else we should know about trusts that are peculiar to your state?

The real issue around the formation of trusts designed to get property out of the client’s

dominion and control is, “Is the trust irrevocable?” Forming a trust may avoid probate, but to properly weigh the advantages of a trust, a CPA should do a comparison between leaving the assets in the grantor’s control and irrevocably moving them to a trust.

H. If we want to place real property or other property from your state in a New York trust, what pitfalls should we know about?

If a parcel of real or other property is located in Pennsylvania, that does not foreclose putting such property in a New York trust. The advisability of this action should be weighed, however, by a CPA because there are still tax consequences. Pennsylvania *will* tax real property located here that is ordinarily taxable, whether or not it is in a Pennsylvania trust or a New York trust.

I. Does placing assets in a trust impact any of the following:

i. Creditor’s rights?

Regarding creditors’ rights, the question is *when* was the trust formed and did the debt precede the trust formation? In other words, did the grantor have the intent to hide assets to avoid the creditor (or did the grantor know in advance that a debt would be incurred and form the trust in anticipation)? In other words, if there is a contest as to whether the trust was meant to hide assets, the burden will be on the grantor to prove that he/she did not form the trust *intending* to shelter assets from the creditor.

ii. Community property laws?

Pennsylvania doesn’t have community property, but rather “equitable distribution” of marital property. If one spouse attempts, unilaterally, to put bona fide marital property into a trust to avoid having that property included in equitable distribution, he/she will fail, as such property will nonetheless count as part of the marital assets. Same is true if both spouses put bona fide marital property in a trust—it will still be calculated in the equitable distribution.

iii. Other spousal rights?

No other spousal rights.

- iv. **Real property laws?**
Again, the issue concerning real property put into a trust is, "Is the trust irrevocable?" In other words, does the grantor still have dominion and control over the property in the trust? Nonetheless, whether real property is in an individual's control or in trust, it is still subject to tax—the state will merely bill the trust rather than the grantor.
- v. **Local taxes?**
Property, whether in or out of a trust, is still subject to the same Pennsylvania and local taxes such property would be under local law. The party responsible to pay such taxes is all that changes.
- vi. **Homesteads or other constitutional rights?**
Whether or not real property is in a trust does not affect such constitutional rights as, for example, when a property is "condemned" and a "taking" is involved. Similarly, the same constitutional rights apply to a trust's property as to an individual's where such issues as, e.g., due process, are involved.

For each of the issues above, the operative question is always, "Is the trust irrevocable?" Also, the wisdom of forming a New York rather than a Pennsylvania trust (and vice versa) should be left to a CPA, who needs to do a comparison between Pennsylvania *tax rates* and New York *tax rates* in any specific instance. *That* is really the determining factor in deciding whether to form a Pennsylvania trust or a New York trust.

4. Taxes

- A. **Does your state have an income tax?**
Pennsylvania has a state income tax.
- B. **Does your state have an estate tax?**
Pennsylvania does not have an estate tax *per se*. However, there is an all-encompassing inheritance tax. Rates are 4.5 percent for direct lineal descendants, 12 percent for siblings and 15 percent for all others, based on 100 percent of the estate after administrative costs and several small deductions.

- C. **Any other tax we should know about?**
No.
- D. **In what way do your state taxes impact on your drafting documents for your clients?**
The inheritance tax has a one-year look-back. Consequently, we transfer assets as early as possible.

5. Nursing Homes and Long-Term Care Financing Issues

- A. **What is Medicaid called in your state?**
Medical Assistance or Medicaid.
- B. **Is your state an income cap state?**
No.
- C. **2000 Numbers:**
 - i. **What are the regional rates for Medicaid transfer penalty purposes in your state?**
 - ii. **What is the MMMNA and CSRA in your state?**
- 2001 Numbers:**
 - i. \$5,250.83.
 - ii. MMMNA is \$1,407 plus adjustments. Minimum CSRA is \$17,400, maximum is \$87,000, otherwise half of assets.
- D. **What is the true average cost of nursing homes throughout your state?**
Don't know.
- E. **Does your state allow the rule of halves?**
Yes.
- F. **Does your state allow spousal refusal? If no, what techniques do you use in your state to protect the surviving spouse? Annuities? Trusts? How are the community spouse's IRAs or qualified plans treated?**
No spousal refusal. Spousal IRA (or similar) is exempt. Revocable trusts are treated as available assets. Irrevocable trusts are treated as gifts.
- G. **Does your state allow income only trusts?**
Yes, subject to a five-year look-back.
- H. **What type of Medicaid planning trusts are popular in your state and why?**
None.

ELDER LAW IN THE BORDER STATES

I. Does Medicaid cover assisted living facilities in your state?

No.

J. Does the creation of a life estate with one's home protect their home in your state?

The home is protected, subject to estate recovery. Creation of a life estate creates no additional protection.

K. What significant assets are exempt from Medicaid in your state?

Automobile, spousal IRA (or similar), term life insurance.

L. Does Medicaid pay for any home care services in your state?

There is a "waiver" program for home care benefits, but it is unfunded as of today.

M. What are the biggest issues your state is currently facing regarding long-term care?

Use of annuities as an asset-sheltering device. State courts have ruled in favor of Medicaid, which continues to deny such annuities as transfers or as violations of MCCA. However, a federal district court recently approved such use of annuities and severely criticized the state court. For now, Medicaid intends to continue to deny.

N. Is there anything else we should know about Medicaid and long-term care that are peculiar to your state?

No.

6. Is There Any Other Elder Law Advice You Would Give to a New York Attorney Whose Client Will Retire to Your State, Either Full or Part Time?

No.

7. Please Tell Us About Yourself, Your Background and Your Practice.

Fliegelman Elderlaw has five attorneys plus a staff of eight, with offices in Norristown, Pennsylvania, Cherry Hill, New Jersey and Toms River, New Jersey. Offices in Harrisburg and Wilkes Barre, Pennsylvania will be opened before year end.

What is Fliegelman Elderlaw?

Most folks don't know this: the law lets people keep a lot of their money so they don't have to

spend it all on long term health care. At Fliegelman Elderlaw, we know how to help our clients keep every penny the law allows.

Headed by Hal Fliegelman, Esq., Fliegelman Elderlaw is a law firm that deals *exclusively* with legal problems of older and disabled people. The firm's special focus is on preserving clients' assets from the devastating financial demands of health care costs and nursing homes.

Mr. Fliegelman has a unique appreciation for the needs and concerns of older and disabled people because he is, himself, 66 years old and has had four close family members reside in nursing homes. He also has a 93-year-old father-in-law in the middle stages of dementia and a mentally retarded adult sister-in-law. He recently celebrated his 40th wedding anniversary with his elementary school teacher wife, has three adult children and two magnificent grandchildren.

He has been recognized for his outstanding academic achievements. He graduated from Brown University with high honors, attended Harvard Law School and was a *magna cum laude* graduate of Widener University Law School, where he was an Editor of the Law Review.

Mr. Fliegelman is the founder and operator of the Pennsylvania Elderlaw Network, an Internet information exchange among Pennsylvania elder law attorneys. He also is author of *Medicaid Planning for Guardians*, published by the Law Review of the Wake Forest University School of Law. He also writes and publishes a monthly newsletter entitled *Elderlaw*.

He is an active member of the National Academy of Elder Law Attorneys. In addition, Mr. Fliegelman chaired the elder law Committee of the Montgomery County Bar Association and serves on numerous other elder law committees.

Mr. Fliegelman is active in charitable and civic matters. He serves as volunteer counsel to the Senior Citizens' Center of Ardmore and as a volunteer lawyer to the Legal Aid Society. He is a frequent speaker to professional and public groups and organizations and has served his local synagogue as President and in other capacities.

Vermont

Questions on the Minds of New York Elder Law Attorneys

By Mark L. Tapper

1. Medical Advance Directives

A. Will a New York Health Care Proxy be honored in your state?

Yes. A New York Health Care Proxy will be honored in Vermont.



B. If a New York Health Care Proxy is technically honored, will it be honored in practice?

Other states' advance directives are routinely honored in Vermont. For anyone who will be settling in Vermont, however, the better practice is to create Vermont advance directives, so that health care professionals will be dealing with documents with which they are routinely familiar.

C. Does your state honor living wills? Are there any formal requirements?

Vermont statute has provision for living wills.¹ These documents are limited, however, to conveying the intent of the signer to not receive "extraordinary measures" if the signer is terminally ill. The document must be signed before two witnesses "none of whom shall be the person's spouse, heir, reciprocal beneficiary, attending physician or person acting under the direction or control of the attending physician or any other person who has at the time of the witnessing thereof any claims against the estate of the person."²

D. What medical advance directives do you commonly prepare for your clients?

I commonly prepare only a durable power of attorney for health care. This document grants broad authority to the agent, provides for an alternate agent, and provides direction for care in the event the principal is terminally ill or in a permanent vegetative state.

E. Is there anything else we should know about medical advance directives that are peculiar to your state?

Under Vermont law, the agent may not order or decline care over the objections of the grantor of the power, even if the grantor is not competent. Vermont requires the heightened process of guardianship to provide or decline treatment over a patient's objections.

"The willingness of anyone to honor a power of attorney, whether from New York or anywhere else, is entirely idiosyncratic. Out-of-state powers don't fare any better or worse than those drafted and executed in Vermont."

2. Durable General Powers of Attorney

A. Will a New York Durable General Power of Attorney be honored in your state?

Yes. A New York Durable General Power of Attorney will be honored in Vermont.

B. If a New York Durable General Power of Attorney is technically honored, will it be honored in practice?

The willingness of anyone to honor a power of attorney, whether from New York or anywhere else, is entirely idiosyncratic. Out-of-state powers don't fare any better or worse than those drafted and executed in Vermont.

C. What financial advance directives (i.e., powers of attorney) do you commonly prepare for your clients?

I commonly prepare two general unlimited durable powers of attorney for each client. One is the primary and the other an alternate. At the time of executing the powers, my clients also sign an escrow

agreement, directing me not to release the first power without their direction or the written opinion of their doctor that they cannot manage their affairs. The second power is released under the same conditions, but only if the primary attorney in fact cannot or will not act.

D. Is there anything else we should know about financial advance directives that are peculiar to your state?

Even broad grants of power will be held valid for specific acts.³

E. Does your state allow springing powers of attorney?

Vermont law is silent as to springing powers of attorney. While there are attorneys who draft them in Vermont, the usual problems with financial institutions honoring powers of attorney can be greatly magnified with a springing power.

“Probate is not considered expensive. Because some of our probate courts are only part-time, probating an estate can take time.”

3. Probate and Trusts

A. What is the average range of probate costs for an estate that consists of a \$250,000 house and \$250,000 of various stocks, bonds and cash?

Average probate costs range from \$1,500 to \$5,000; although regardless of the amount of money involved, many folks successfully navigate the probate process without counsel.

B. Are probate fees usually by the hour or a percentage of the estate?

Probate fees are always by the hour and, if they are to be charged against the estate, approved by the court.

C. Is probate considered an expensive or lengthy procedure in your state?

Probate is not considered expensive. Because some of our probate courts are only part-time, probating an estate can take time.

D. Is there a minimum amount of assets which make probate necessary?

There is no minimum value required for probate. However, Vermont has a special procedure for “small estates” where there is a surviving spouse or child, no realty and personalty of \$10,000 or less.⁴

E. New York attorneys are still debating whether avoiding probate should be a central part of an estate plan. What is the consensus in your state?

I don’t believe there is consensus in Vermont on probate avoidance. If an estate planning client is contemplating Long-Term Care Medicaid, probate avoidance is critical to avoid a Medicaid claim. Otherwise, because of the simplicity of the process, probate avoidance is often just a matter of convenience.

F. Are there any formalities to form a trust in your state?

i. Signatures notarized?

ii. Signatures witnessed?

There are no statutory formalities for establishing an *inter vivos* trust in Vermont, although Vermont does observe the equal dignities rule. Any trust that will hold realty should have witness and be notarized.

G. Is there anything else we should know about trusts that are peculiar to your state?

No.

H. If we want to place real property or other property from your state in a New York trust, what pitfalls should we know about?

Other than all of the usual pitfalls, creating an unintended grantor trust, merging the interests in trust property, etc., placing a home in a revocable trust destroys the exclusion of the home as a resource in determining Long-Term Care Medicaid eligibility.

I. Does placing assets in a trust impact any of the following:

i. Creditor’s rights?

It can, although this is not a settled question in Vermont.

ELDER LAW IN THE BORDER STATES

- ii. **Community property laws?**
There are no community property laws in Vermont.
- iii. **Other spousal rights?**
- iv. **Real property laws?**
Generally, placing property into a trust will not affect realty. The effect of placing property in trust on spousal rights is too complex to answer in this format.
- v. **Local taxes?**
Placing a property in trust can result in the loss of Act 60 tax rebates.
- vi. **Homesteads or other constitutional rights?**
Again, this is not a settled question in Vermont.

“Vermont rules are significantly better than the rule of halves.”

4. Taxes

- A. **Does your state have an income tax?**
Yes.
- B. **Does your state have an estate tax?**
Only a “pick up” tax.
- C. **Any other tax we should know about?**
Vermont charges a transfer tax of 1.5 percent (.5 percent if the property is the primary residence of the purchaser) on any nonexempt conveyance of real estate. Also, Vermont can assess a “land gains tax” on a seller who has owned property for less than six years.
- D. **In what way do your state taxes impact on your drafting documents for your clients?**
Because Vermont’s income tax is merely a percentage of federal tax liability, Vermont tax law does not significantly affect the documents we draft.

5. Nursing Homes and Long-Term Care Financing issues

- A. **What is Medicaid called in your state?**
Medicaid.

- B. **Is your state an income cap state?**
No.
- C. **2000 Numbers:**
 - i. **What are the regional rates for medical transfer penalty purposes in your state?**
Vermont uses one nursing home rate for the state, which is calculated from actual nursing home rates. That figure, as of October 1, 2001, is \$4,726.
 - ii. **What is the MMMNA and CSRA in your state?**
The MMMNA is currently \$1,407 and the Community Spouse Resource Allocation is \$87,000.
- D. **What is the true average cost of nursing homes throughout your state?**
See above.
- E. **Does your state allow the rule of halves?**
Vermont rules are significantly better than the rule of halves. When calculating a disqualification period, Medicaid drops any remainder. This means that a Vermonter can transfer 1.9 times the average cost of nursing home care—about \$9,000—and only lose Medicaid for the month of transfer. (This assumes that the transferor is not already under a transfer penalty from a previous transfer.) Using this planning opportunity, the average prospective Medicaid applicant can usually protect two-thirds of their assets by making monthly transfers and paying for care.
- F. **Does your state allow spousal refusal? If no, what techniques do you use in your state to protect the surviving spouse? Annuities? Trusts? How are the community spouse’s IRAs or qualified plans treated?**
Vermont does have spousal refusal rules, but I have never heard of anyone employing them in Vermont. The purchase of excluded resources is the best way to plan for Long-Term Care Medicaid. When one member of a couple enters care, we typically recommend that all excess resources be transferred to the community spouse, and that the community spouse purchase a three-year term certain annuity. The pur-

chase of the annuity makes the institutional spouse immediately eligible for Medicaid, while preserving all of the assets for the community spouse. A single person can purchase a variety of real estate interests which can be excluded. The most important of these is jointly held property. If an applicant for Medicaid owns real property jointly with others, and if any of the others refuse to sell their share of the property, the applicant's interest does not count toward the allowable resource limit. An applicant for Medicaid could purchase partial interests in his children's homes, for example. Because the purchase is "for-value" it does not create a disqualification period. Once the joint owner refuses to sell the remaining share, the applicant's share becomes an excluded resource. Trusts are not necessary or useful planning tools for Long-Term Care Medicaid in Vermont, especially given the effectiveness of other techniques. The IRA or other retirement plans of the community spouse are not countable resources under Vermont rules.

G. Does your state allow income only trusts?

Income only trusts are fraught with peril in Vermont, and, again, are not necessary given the other available planning techniques. Transfers to the trust are penalized under the 60-month look-back period. Income is countable toward the applicant's patient share, and any trigger in the trust which stops the flow of income results in a penalty equal to the monthly income of the trust projected over the applicant's actuarial life.

H. What type of Medicaid planning trusts are popular in your state and why?

In my view, the only trusts in use in Vermont by competent Medicaid planners are irrevocable burial trusts for the costs of funeral and burial and special needs trusts for the benefit of disabled children.

I. Does Medicaid cover assisted living facilities in your state?

No. Some assisted living facilities have a very limited number of beds designated "enhanced residential care" (ERC) beds. Because these are considered Level II beds, they are covered by Medicaid.

J. Does the creation of a life estate with one's home protect their home in your state?

Creating a life estate will protect a recipient's home from a claim by Medicaid, but it will also create a disqualification period equal to the value of the remainder interest divided by the average cost of nursing home care. More commonly, Medicaid recipients convey their homes, but they reserve a life estate and the power to sell the property in fee simple absolute or any lesser fee during their lives. Such a conveyance does not create a transfer penalty, maintains the exclusion for the home, and allows the home to pass outside of probate and, therefore, safe from a claim by Medicaid.

"Income only trusts are fraught with peril in Vermont, and . . . are not necessary given the other available planning techniques."

K. What significant assets are exempt from Medicaid in your state?

Significant excluded resources in Vermont include: the primary residence (regardless of the likelihood of the recipient ever returning home); income-producing property; jointly held property, where a joint owner refuses to sell; personalty such as automobiles (regardless of number, value, or road-worthiness), household goods, personal effects, appliances, furniture, and clothing. Any nonliquid asset that is jointly owned can be excluded if a joint owner refuses to sell and shares of the asset cannot be converted to cash to pay for care. The IRA, Keogh or other retirement plan of the community spouse is excluded. Assets received by the community spouse after the institutional spouse is found eligible for Medicaid are completely excluded in determining the institutional spouse's eligibility. Annuities are excluded if they provide payments only to the applicant or spouse and if all of the principal of the annuity will be returned during the actuarial life of the annuitant. Finally,

prepaid burial plans and funds placed in irrevocable trust for burial are excluded.

L. Does Medicaid pay for any home care services in your state?

Medicaid provides at-home care under the Home and Community-Based Waiver Program.

M. What are the biggest issues your state is currently facing regarding long-term care?

Medicaid payment for nursing homes is an ongoing issue in Vermont. Payment for Level III community care homes is also an issue.

“Generally speaking, anyone can protect significant assets with good planning in Vermont, even if they delay the planning process until they are already in care.”

N. Is there anything else we should know about Medicaid and long-term care that are peculiar to your state?

Vermont is a terrific environment for long-term care planning.

6. Is There Any Other Elder Law Advice You Would Give to a New York Attorney Whose Client Will Retire to Your State, Either Full or Part Time?

Generally speaking, anyone can protect significant assets with good planning in Vermont, even if they delay the planning process until they are already in care.

7. Please Tell Us About Yourself, Your Background and Your Practice.

Mark L. Tapper is the owner of Tapper Law Offices, where his practice is concentrated on elder law and special needs estate planning. Mr. Tapper graduated *magna cum laude* from the University of Connecticut in 1982. He completed a four-year Law Office Study Program while a paralegal at Vermont Legal Aid and was admitted to practice in Vermont in 1989. He is also admitted to practice in the U.S. District Court for the District of Vermont and the U.S. Court of Veterans Appeals. He is a member of the Vermont Bar Association and past Chairman of its Elder Law Committee, a member of the National Academy of Elder Law Attorneys and author of numerous articles on elder law, Social Security Disability practice, and estate planning for children with disabilities. He is a frequent panelist in seminars devoted to public benefits and special needs planning. Mr. Tapper is a returned Peace Corps volunteer, having served in the Islamic Republic of Mauritania from 1982-1984. He has served on numerous non-profit boards and as a Trustee of the village of Saxtons River, Vermont.

Endnotes

1. Vt. Stat. Ann. tit. 18, §§ 5251 *et seq.*
2. Vt. Stat. Ann. tit. 18, § 5254.
3. *Schall v. Gilbert*, 169 Vt. 627, 741 A.2d 286 (S. Ct. 1999).
4. Vt. Stat. Ann. tit. 14, §§ 1901, *et seq.*

ELDER LAW NEWS

REGULAR COLUMNS



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NEW YORK CASE NEWS

By Judith B. Raskin

We actively solicit receipt of New York cases that you would like to see included in the New York Case News article. Please send your New York cases to Judith B. Raskin, Esq., Raskin & Makofsky, 600 Old Country Road, Suite 444, Garden City, NY 11530.

Medicaid

Plaintiff nursing home operator appealed from an order dismissing its complaint against Medicaid for its denial of coverage to a resident based upon failure to supply documentation.

Denied. *Green Manor Associates v. Beaudoin*, _____

A.D.2d _____, _____

N.Y.S.2d _____ (3d Dep't 2001).



Decedent Dorothy Van Ort resided at plaintiff's nursing home for a year. Decedent's only child was decedent's attorney in fact and the executor of her estate. The plaintiff, with authorization from Mrs. Van Ort, submitted a Medicaid application on her behalf. The plaintiff did not submit documentation with the application but did state: "The facility has limited information on [decedent's] resources. [Decedent] has informed me her son was handling her affairs. Her son called February 4, 1999 to the facility. He is aware of the application being filed. He was mailed a list of what information will be needed for her application."

DSS attempted unsuccessfully to get necessary information from the son and the plaintiff to establish eligibility. DSS issued a denial based upon the failure to submit documentation. The nursing home brought an action against DSS and the son arguing *inter alia* that DSS had an obligation to investigate and should not have denied the application for lack of documentation. The court granted the Commissioner's motion for summary judgment. The plaintiff appealed.

The Appellate Division, Third Department, denied the appeal. The court held that the Medicaid denial was proper. 18 N.Y.C.R.R. § 360-2.3 requires the social services district to investigate in order to verify information submitted with the application where the applicant is unable to document certain information. In this case, the information was available to the applicant but was not submitted. Medicaid is not required to complete the application.

Article 81

An Article 81 guardian petitioned for an accounting by the attorney in fact acting prior to the guardian's appointment. Granted. *In re Guardianship of Kent*, _____ Misc. 2d _____, _____ N.Y.S.2d _____ (Sup. Ct., Dutchess Co. 2001)

In June 1998, a psychiatrist found Alice Kent incapable of making financial decisions. Her niece by marriage, Jane Smith, then began receiving Ms. Kent's Social Security checks as Representative Payee. Three months later, Alice Kent mortgaged her home for \$20,000. It was alleged that Ms. Smith retained \$3,000 of the mortgage proceeds. In November 1998, Alice Kent signed a power of attorney appointing Jane Smith as her attorney in fact. (The issue of Mrs. Kent's capacity at this time was not raised.) In December 2000, the Dutchess County Commissioner of Social Services successfully sought appointment of an Article 81 guardian for Alice Kent. The power of attorney was rescinded in the proceeding.

The guardian petitioned for an order requiring Jane Smith to produce an accounting. Smith argued the court lacked jurisdiction to order the accounting and requested sanctions including legal fees.

The court ordered Jane Smith to produce the accounting. The court has jurisdiction to order an accounting where four factors exist: (1) a fiduciary relationship; (2) entrustment of money or property; (3) no other remedy; and (4) a demand and refusal of an accounting. The court found all four to exist in this case. This case was unusual in that it is generally the principal that demands the accounting. Here a guardian was acting in her place. Although Article 81 does not specifically refer to "accountings," the guardian is required to discover withheld property, and the accounting is the way to do this. The court is authorized to customize each guardianship proceeding to advance the interests of the incapacitated person and in this case, Alice Kent had a right to an accounting.

A court-appointed attorney in an Article 81 proceeding sought legal fees equal to Article 18-B rates if the IP's funds were insufficient to pay reasonable attorneys fees. Granted. *In re Turner*, _____ Misc. 2d _____, _____ N.Y.S.2d _____ (Sup. Ct., N.Y. Co. 2001).

An Article 81 guardian brought a special proceeding to request authority to place the IP in a nursing home. The court appointed an attorney to represent the IP. The appointed attorney, realizing the IP's funds might be insufficient to pay him reasonable attorney fees for his services, suggested the court pay

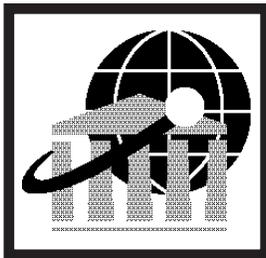
him at the Article 18-B rates of \$80 per hour of court time and \$50 per hour for out of court time.

The court ordered payment to the court-ordered attorney of reasonable fees of \$200 per hour. However, if the IP's funds were insufficient to make such payment, the attorney would be paid at the 18-B rates as he suggested. The decision included a lengthy discussion on the need for increased 18-B rates in order to assure sufficient attorney representation for indigent clients.

Judith B. Raskin is a member of the law firm of Raskin & Makofsky, a firm devoted to providing competent and caring legal services in the areas of elder law, trusts and estates, and estate administration.

Judy Raskin maintains membership in the National Academy of Elder Law Attorneys, Inc.; the New York State Bar Association, where she is a member of the Elder Law and Trusts and Estates Law Sections; and the Nassau County Bar Association, where she is a member of the Elder Law, Social Services and Health Advocacy Committee, the Surrogate's Trusts and Estates Committee and the Tax Committee.

Ms. Raskin shares her knowledge with community groups and professional organizations. She has appeared on radio and television and served as a workshop leader and lecturer for the Elder Law Section of the New York State Bar Association as well as for numerous other professional and community groups. Ms. Raskin writes a regular column for the *Elder Law Attorney*, the newsletter of the Elder Law Section of the New York State Bar Association, and is a member of the Legal Committee of the Alzheimer's Association, Long Island Chapter. She is past president of Gerontology Professionals of Long Island, Nassau Chapter.



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FAIR HEARING NEWS

By René Reixach and Ellice Fatoullah

We actively solicit receipt of your Fair Hearing decisions. Please share your experiences with the rest of the Elder Law Section and send your Fair Hearing decisions to either Ellice Fatoullah, Esq., at Fatoullah Associates, 2 Park Ave., New York, NY 10016 or René Reixach, Esq., at Woods, Oviatt, Gilman, Sturman & Clarke LLP, 700 Crossroads Building, 2 State St., Rochester, NY 14614. We will publish synopses of as many relevant Fair Hearing decisions as we receive and as is practicable.

In re Appeal of D.F.

Holding

Where the appellant defaulted in appearing at a fair hearing, the Department of Health will consider the fair hearing request abandoned where neither the appellant nor his or her authorized representative has contacted the Department within 45 days of the scheduled date of the hearing and established that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date.



Ellice Fatoullah

Facts

The appellant is an 87-year-old widow who applied for medical assistance for home care on March 31, 1999, by her designated legal representative. The representative indicated on the application that while her residence was located at her home address, any letters should be mailed to the designated representative at his law office. The appellant's representative also presented a "Medicaid Agent Authorization" form signed by the appellant's adult son, advising the agency that any notices should be sent to the law office of the representative; in that authorization the address of the law office was the same as on the application except that the name of the town was different (the ZIP code was the same).

By notice dated August 24, 1999, the agency determined to deny the application on the grounds that the appellant was in receipt of excess monthly income and resources. The August 24, 1999, notice was sent to the appellant, "D.F.," at the address listed on the application but without the designation on the application that the address include the title "Law Offices of ____."

The appellant's designated representative requested a fair hearing on September 23, 1999, to review the August 24, 1999, determination. The fair hearing request was made by fax consisting of a one-

page document in which the tear-off portion of the August 24, 1999, notice was affixed to the middle portion of stationery for the Law Offices of _____. The tear-off portion of the August 24, 1999, notice showed the name of the appellant, D.F., and listed her address as shown on the application (that of her legal representative), but again without reference to the Law Offices of _____.



René H. Reixach

A fair hearing was scheduled for December 7, 1999, and a notice of this hearing was sent on November 15, 1999, to D.F. at the address of her legal representative, but again without reference to the Law Offices of _____. There was no appearance by the appellant or her representative at the December 7, 1999, fair hearing, and the Office of Administrative Hearings considered it to be abandoned. On February 16, 2000, the appellant requested the present fair hearing, seeking again to review the agency's determination of August 24, 1999.

The fair hearing was adjourned for various reasons, and during the course of those adjournments the agency requested to have this fair hearing bifurcated and to have a formal decision issued regarding the statute of limitations issue before arguments were presented regarding the merits. The agency's request was granted and this fair hearing was held on March 27, 2001. A decision after fair hearing was issued on April 10, 2001, holding that the statute of limitations did not bar the Commissioner from reviewing the merits of the agency's August 24, 1999, determination denying the appellant's March 1999 application for medical assistance.

On May 8, 2001, the agency requested that the Office of Temporary and Disability Assistance review and reconsider the April 10, 2001, decision after fair hearing. The agency contended that the decision contradicted the court's intent in *Zellweger v. New York State Department of Social Services*.¹ According to the

agency, *Zellweger* did not apply since there the applicant, who was incompetent, had received the notice but the agency had failed to notify the representative (wife), while here the evidence showed that the legal representative had timely received the August 24, 1999, denial notice, although the appellant had not.

The appellant's representative responded on May 24, 2001, on the letterhead of the Law Offices of ____, showing the address as set forth on the Medicaid Agent Authorization, with a different town but the same ZIP code as on all the notices from the Office of Temporary and Disability Assistance. The appellant's representative stated that testimony had been offered at the hearing, that he had never received notice of the December 7, 1999, fair hearing, and relied on *Zellweger* for the proposition that the failure to send notice to the representative tolled the statute of limitations. Additionally the appellant's representative argued that the agency had the burden of proving that notice was properly addressed, posted and mailed, and that absent such proof it might not rely on the rebuttable presumption of receipt of the notice.

By letter and decision after fair hearing dated June 20, 2001, the Office of Temporary and Disability Assistance issued an Amended Decision after Fair Hearing.

Applicable Law

Section 22 of the Social Services Law provides that applicants for and recipients of medical assistance must request a fair hearing within 60 days after the date of the action or failure to act complained of.

Section 358-5.5 of 18 N.Y.C.R.R. (the "Regulations") provides that the Department will consider a fair hearing request abandoned if neither the appellant nor the appellant's authorized representative appears at the fair hearing, unless either of them has (1) contacted the Department within 15 days of the scheduled date of the fair hearing to request that it be rescheduled and provided the Department with a good cause reason for failing to appear at the fair hearing on the scheduled date; or (2) contacted the Department within 45 days of the scheduled date of the hearing and established that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date. If the appellant or appellant's authorized representative has met either of the above conditions, the Department will restore the case to the calendar.

Fair Hearing Decision

The Commissioner is barred by the statute of limitations from reviewing the agency's August 24, 1999,

determination to deny the appellant's March 1999 application for medical assistance.

Discussion

The agency asserted that the August 24, 1999, denial notice was sent to the address of the appellant's representative as reflected in the March 1999 medical assistance application. It was contended that the Law Offices of ____ had actually received the August 1999 notice in a timely fashion, as demonstrated by the faxed document sent to the Office of Administrative Hearings on September 23, 1999, which had the "tear off" portion of the August 1999 notice affixed to it.

"The arguments presented by the agency are persuasive and meritorious."

The agency stated that the appellant's request to reopen the December 7, 1999, fair hearing was made on February 10, 2000, which was in excess of 45 days of that hearing date. It was contended that this tribunal does not have any discretion to toll the statute of limitations, even if the appellant established that there was no actual receipt of the scheduling notice, and that it must consider the December 7, 1999, fair hearing abandoned pursuant to the pertinent regulations.

The appellant's representative contended that the agency's August 24, 1999, notice was defective pursuant to *Zellweger v. New York State Department of Social Services* and other related cases. It was stated that the agency was required to send its August 24, 1999, notice of denial to both the appellant and representative, and he asserted that there is no proof that the August 24, 1999, notice was sent to the appellant, D.F., and that the agency sent the August 24, 1999, notice to an inaccurate address for the designated representative based on the misstatement of the town.

The appellant's representative asserted that since the agency's August 24, 1999, notice was defective, the statute of limitations did not commence at all. The appellant's representative also objected to the evidence presented by this tribunal from the files of the Office of Administrative Hearings regarding the December 7, 1999, fair hearing, since there was no proof presented concerning the mailing procedures for the November 15, 1999, scheduling notice for that hearing.

The arguments presented by the agency are persuasive and meritorious. *Zellweger* involved a situation in which the agency's notice was sent to the applicant, who was completely unable to evaluate the information contained in that notice, rather than to the applicant's representative who had been chosen to act on the applicant's behalf. In this case the agency followed the instructions of the applicant and sent the notice to the person and address designated by the applicant, as verified by the request for this hearing which included a portion of the agency's notice.

"The facts of this case demonstrate the need to keep track of the status of fair hearing requests."

This appeal is more akin to the situation in *Fieldston Lodge Nursing Home v. DeBuono*,² in which the Appellate Division held that a recipient's recognized representatives were the proper parties to receive notice of the agency's determination and that it was not necessary for the agency to notify the recipient. Therefore there is no basis to toll the statute of limitations in this case, since the record established that the notice was sent to the designated representative at the designated address.

The question then becomes whether the original request was abandoned. The record established that the original hearing was scheduled for December 7, 1999, and that the present request was made on February 14, 2000. The cited legal authority provides that this Office must be contacted within 45 days of the scheduled hearing if the scheduling notice had not been received. Since the contact was made more than 45 days after the date of the scheduled hearing, the original request must be considered abandoned, whether or not the scheduling notice had been received.

It is noted, moreover, that the appellant's representatives failed to establish nonreceipt of the scheduling notice. Administrative notice is taken that the scheduling notice was mailed by the Office of Temporary and Disability Assistance in the normal course of business, to the proper address, and that the scheduling notice was not returned to this Office as nondeliverable. Thus a presumption of mailing was established which the appellant's representatives did not overcome. Since the new request of February 16, 2000 was more than 60 days after the agency's denial, review of the denial is barred by the statute of limitations.

Editor's Comment

This case presents a little known mechanism for review of an adverse decision after fair hearing, and its facts highlight the need to track the status of fair hearing requests. It also raises serious questions of due process and compliance with federal fair hearing requirements.

First, the decision illustrates how a decision after fair hearing may be reopened and reissued to reach a different result under section 358-6.6 of the Regulations. While in this fair hearing the agency utilized this procedure in order to have a decision after fair hearing which was initially adverse to it reversed, the procedure is equally available to appellants. If the appellant is utilizing this procedure, care must be taken that the four-month period for commencing an Article 78 proceeding not be allowed to lapse, since if the initial decision is not revised, then any state court review will be untimely. If the request for revision is still pending shortly before the four-month statute of limitations will run out, the Office of Temporary and Disability Assistance may stipulate to extend the statute of limitations to avoid unnecessary litigation.

The facts of this case demonstrate the need to keep track of the status of fair hearing requests. This is somewhat difficult, since it can often take up to an hour on the phone to reach someone at the Office of Temporary and Disability Assistance to verify the status of the matter. Further, there is often no reliable time within which to anticipate that a fair hearing will be scheduled. This is particularly a problem if the hearing has been adjourned, in which case the rescheduled hearing often occurs months after the initial date.

This case presents serious questions of due process and compliance with the federal regulations concerning the timing of fair hearings. The statement in the decision after fair hearing that the request must be considered abandoned "whether or not the scheduling notice had been received" flies in the face of court decisions that actual notice is an essential element of due process. Equally problematic is the failure to consider the effect of the omission of the name of the Law Office in the address; consider what the Postal Service would likely do with a notice sent in the name of a client to your office but without the office name. There also was a substantial issue of whether the notice was properly addressed, since the name of the town was different on the notice from the Postal Service name. Given the apparent testimony by the appellant's representative that the notice had not been received, these factors should have led to a finding that the notice had not been received.

The timing of the reopened decision also was in violation of 42 C.F.R. § 431.244(f) which requires that final administrative action be taken by the agency within 90 days from the date of the request for a hearing. While the timing of the various steps in this matter is somewhat unclear from the decisions, the second hearing request was sent on February 16, 2000, and was decided, after several adjournments, on April 10, 2001, after a hearing held on March 27, 2001. The original fair hearing was requested September 23 and scheduled for December 7, some 75 days later. The April 10, 2001, decision after fair hearing was amended on June 20, 2001, 71 days after the initial decision after fair hearing. It thus appears quite likely that the June 20 amended decision was issued more

than 90 days after the hearing was requested, taking into account delays agreed to by the appellant. If so, did the Office of Temporary and Disability Assistance have jurisdiction to amend the initial decision, or was it too late?

The appellant at this fair hearing was represented by Edwin Black, Esq., and Jaime Lane, Esq., of Dix Hills, New York.

Endnotes

1. 74 N.Y.2d 404.
2. 690 N.Y.S.2d 606 (2d Dep't 1999),

Ellice Fatoullah is the principal of Fatoullah Associates, with offices in New York City and New Canaan, CT. She is Chair of the Long Term Care Reform Committee of the New York State Bar Association's Elder Law Section, a Fellow of the National Academy of Elder Law Attorneys, and a board member of FRIA, a New York City advocacy group monitoring quality of care issues in nursing homes. She was the founding Chair of the Elder Law Committee of the New York County Bar Association, founding Chair of the Public Policy Committee to the Alzheimer's Association-New York City Chapter, and a member of its board for seven years. In 1996, she served on the New York State Task Force on Long Term Care Financing. She writes and lectures regularly on issues of concern to the elderly and the disabled.

René H. Reixach, Jr., is an attorney in the law firm of Woods Oviatt Gilman LLP, where he is a member of the firm's Health Care Law Practice Group and responsible for handling all health care issues. He is Chair of the Committee on Insurance for the Elderly of the New York State Bar Association's Elder Law Section. Prior to joining Woods Oviatt, he was the Executive Director of the Finger Lakes Health Systems Agency. He authors a monthly health column in the *Rochester Business Journal* and has written for other professional, trade and business publications. He has lectured frequently on health care topics. He has been an Adjunct Assistant Professor in the Department of Health Science at SUNY Brockport. He also appeared as an expert witness on Medicaid eligibility for the New York State Supreme Court. He has also served on many advisory committees, including the New York State Department of Health Certificate of Need Reform Advisory Committee and the Community Coalition for Long Term Care. Among his civic and charitable involvements are serving as a Board Member and President of the Foundation of the Monroe County Bar, President of the Greater Upstate Law Project, and a Board Member of the Yale Alumni Corp. of Rochester.

LEGISLATIVE NEWS

By Howard S. Krooks and Steven H. Stern

Due to the events of September 11, 2001, there has been noticeably less legislative activity pertaining to issues that directly affect our elderly and disabled clientele. We have reported below some of this activity as well as a measure taken by Governor Pataki regarding an extension of the time to report Workers' Compensation claims for victims and families of the World Trade Center tragedy.



Howard S. Krooks

Ways and Means Approves Economic Stimulus Act

The House of Representatives Ways and Means Committee has officially approved the Economic Security and Recovery Act of 2001 (H.R. 3090), an economic stimulus package containing tax, unemployment and health proposals designed to combat recession. H.R. 3090 includes provisions to provide a two-year extension of the current Mental Health Parity law and medical savings accounts (MSAs). The bill also contains a provision to expand the exception from the 10 percent early distribution tax for retirement plan withdrawals taken by unemployed individuals which are used to pay health insurance premiums. The current exception applies only to IRAs and requires long-term unemployment. The new exception would shorten the period of required unemployment and apply the exception to employer-sponsored defined contribution plans as well.

The bill also provides for reduced long-term capital gains rates from 20 percent to 18 percent, relaxed depreciation rules and a retroactive elimination of the alternative minimum tax for businesses, which was reported by CNN to result in a cost savings of up to \$25 billion.

The bill was referred in the Senate on October 24, 2001.

Sources—*The Elder Law eBulletin* (October 22, 2001) and H.R. 3090.

New Law Opens Physician Information to Consumers

Legislation giving patients the right to find out about the record and background of the physicians treating them has been signed into law by Governor Pataki. The Physician Profiling Law (Public Health Law Art. 29-D; 2000 N.Y. Laws ch. 542, sponsored by Assembly Health Committee Chair Richard N. Gottfried and Senate Health Committee Chair Kemp Hannon) requires the New York State Department of Health to give patients access to information about a doctor's record. It will include education and practice background, plus the doctor's record on malpractice, loss of hospital privileges, professional discipline and any criminal convictions. When the Health Department gets the system running, information will be accessed through a toll-free telephone number and over the Internet.



Steven H. Stern

The new law also creates a Patient Safety Center within the Department of Health to help reduce medical errors. The Center will collect, analyze and publish data on health care quality, including "report cards" on hospitals, HMOs and other health plans and providers.

The Assembly Health Committee will be working to ensure that the implementation of the new law is effective immediately.

Source—*Health Update Newsletter from the New York State Assembly Health Committee* (January 2001).

Governor Pataki Signs Executive Order Extending Time to Report Workers' Compensation Claims for WTC Victims and Families

Governor George E. Pataki announced in a press release on October 15, 2001, that he issued an executive order to suspend the law requiring workers' compensation claimants to report their injuries or the death of a loved one within 30 days for cases stemming from the September 11 terrorist attacks.

“As we continue pulling together to respond to this time of crisis, we are taking the necessary steps to ensure the prompt delivery of benefits to those who suffered injuries or lost loved ones on September 11th,” Governor Pataki said, “This action will enable those who were directly impacted by this terrible tragedy to focus on the many immediate challenges they face—without having to worry that they might be denied workers’ compensation benefits.”

The Governor’s action suspends section 18 of the New York State Workers’ Compensation Law, which requires claimants, either injured workers or the dependents of deceased workers, to provide written notice of any injury or death sustained as a result of employment to their employer within 30 days of the incident. His executive order eliminates this time constraint for claims resulting from the attacks.

Workers’ Compensation Board Chairman Robert R. Snashall said, “Governor Pataki is exercising tremendous foresight and compassion in suspending this provision of the Workers’ Compensation Law. By suspending this statute, the Governor has eliminated the potential litigation that typically occurs in cases where injuries are reported late. This is the right thing

to do and it will help accelerate the movement of benefits to deserving recipients.”

At the urging of the Governor, the Workers’ Compensation Board voted to suspend its rule requiring death certificates to claim workers’ compensation death benefits at its September 24 meeting. The Board also created an affidavit that enables claimants to declare their dependent status on paper, sparing them the additional pain of testifying at a Board hearing with regard to their dead or missing loved one.

“Governor Pataki said, ‘This action will enable those who were directly impacted by this terrible tragedy to focus on the many immediate challenges they face—without having to worry that they might be denied workers’ compensation benefits.’”

Source—Press Release Issued by the Press Office of Governor George E. Pataki (October 15, 2001).

Howard S. Krooks, J.D., is a partner in the law firm of Littman Krooks & Roth PC, with offices in New York City and White Plains. Mr. Krooks devotes substantially all of his professional time to elder law and trusts and estates matters, including representing elderly clients and their families in connection with hospital discharge and nursing home admission issues, preservation of assets, Medicaid, guardianship and related elder law matters. Mr. Krooks is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association, where he serves as the Chair of the Medicaid Committee. Mr. Krooks co-authored a chapter (“Creative Advocacy in Guardianship Setting: Medicaid and Estate Planning including Transfer of Assets, Supplemental Needs Trusts and Protection of Disabled Family Members”) included in a book entitled *Guardianship Practice in New York State* published by the New York State Bar Association. Mr. Krooks is the author of the “Elder Law Update” column which appears in a publication of the Health Law Section of the New York State Bar Association entitled the *Health Law Journal*. Mr. Krooks has lectured frequently on a variety of elder law topics for the National Academy of Elder Law Attorneys, the National Guardianship Association and the New York State Bar Association. In addition, Mr. Krooks serves as an instructor for the Certified Guardian & Court Evaluator Training: Article 81 of the Mental Hygiene Law program sponsored by The Association of the Bar of the City of New York.

Steven H. Stern is a partner in the law firm of Davidow, Davidow, Siegel and Stern, LLP, with offices in Islandia and Melville, Long Island. Founded in 1913, the firm concentrates solely in the practice areas of elder law, business and estate planning. Mr. Stern is a member of the National Academy of Elder Law Attorneys and is the current Co-Chairman of the Suffolk County Bar Association’s Elder Law Committee. He also serves as a member of the Suffolk County Elder Abuse Task Force’s Consultation Team. With a strong commitment to educating the local senior community, he is a frequent speaker and published author and also hosts “Seniors Turn to Stern,” a radio program dedicated to the interests of seniors and their families on WLUX.

REGULATORY NEWS

More Trusts and Transfers, and Their Impact on the VA Pension

By Louis W. Pierro and Edward V. Wilcenski

In the Fall 2001 issue of the *Elder Law Attorney*, we looked at the impact of transfers and trusts on continuing participation in the Section 8 Housing program.¹ In this issue, we continue the inquiry in the context of another benefit program familiar to many elder law practitioners: veterans pensions.



Louis W. Pierro

The Veterans Administration (VA) is a mammoth, Cabinet-level department with a variety of programs and benefits with varying eligibility criteria and its own interpretive guidelines. In this article, we intend simply to highlight two decisions of the Office of General Counsel for the Department of Veterans Affairs (OGC) that provide some insight into the VA's treatment of a few planning techniques in the elder law attorney's arsenal.

For basic background information, we highly recommend *Tax, Estate and Financial Planning for the Elderly*, John J. Regan, et al. (Matthew Bender 2001) and the *New York Elder Law Handbook*, Brookdale Center on Aging (Practising Law Institute 2001) for thorough and readable discussions of the benefit programs available to veterans and their families. Veterans' benefits are governed by Title 38 of the United States Code, as interpreted in Title 38 of the Code of Federal Regulations. The VA maintains a comprehensive and well-designed Web site at www.va.gov. The decisions of the Office of General Counsel discussed below are available at www.va.gov/ogc, which contains a searchable database of past decisions.

The Improved Pension

There exists a wide range of benefits available to veterans, including medical benefits, nursing home care, burial funds and life insurance. In this article, we concentrate on something known as the "Improved Pension," which is a commonly encountered cash benefit available to elderly and disabled veterans and their survivors for "non-service-connected" disabilities sustained by the veteran (i.e., disabilities that are not the result of injuries sustained while in service to the country).² We focus on the non-

service-connected benefit because eligibility is premised, among other things, upon meeting income and resource limitations similar to those found in other benefit programs such as Medicaid, Supplemental Security Income (SSI), and Section 8 Housing.



Edward V. Wilcenski

To be eligible for the Improved Pension, the veteran upon whose record the claim is based must have met the military service requirement, and have been "permanently and totally disabled" from a non-service-connected disability. The discussion in this article presumes that both criteria have been met.

In addition to the service and disability requirements, the veteran must also meet the "net worth"³ and "countable income"⁴ limitations found in the law and regulations. It is the negotiation of these two financial rules that present familiar planning challenges for the elder law practitioner, and which serve as the basis of the two OGC opinions highlighted below.

The definition of "net worth" is particularly interesting because the regulations do not contain a fixed dollar limitation. Specifically, "net worth" (also referred to in the regulations as the "corpus" of the claimant's estate) is defined as: "The market value, less mortgages or other encumbrances of all real and personal property owned by the claimant except the claimant's dwelling . . . and personal effects *suitable to and consistent with the claimant's reasonable mode of life.*"⁵ (Emphasis added).

The regulations state that the Improved Pension shall be denied or discontinued:

When the [net worth] of the veteran, and of the veteran's spouse, are such that under all the circumstances, including consideration of the annual income of the veteran, the veteran's spouse, and the veteran's children, *it is reasonable that some part of the corpus of such estates be consumed for the veteran's maintenance.*⁶ (Emphasis added).

For elder law practitioners accustomed to the explicit income and resource limitations found in the Medicaid and SSI programs, these open definitions can be somewhat unsettling. The Brookdale text referenced above suggests that as a matter of practice, this net worth limitation falls in the \$50,000 range. Clearly there is some room for advocacy here.

In addition, the net worth of the claimant will include the value of property transferred to a relative living in the same household as a veteran, but will not include property transferred to someone other than a relative residing in the veteran's household, so long as the veteran has divested himself or herself of control and ownership.⁷

Presuming the claimant falls within permissible net worth limitations, the Improved Pension amount will then be subject to reduction based on other sources of income. Calculation of the Improved Pension begins with an annual maximum pension rate applicable to the veteran's living situation (i.e., married, with or without children, etc.), and that figure is then reduced on a dollar-for-dollar basis by the veteran's "countable income" from other sources. In general, the program defines the term "income" very expansively, and with certain specific exceptions (SSI payments are excluded, for example), all funds are counted in reducing the annual pension amount.⁸ Moreover, the income of a spouse and any dependent child is counted as income available to the veteran, and is used to reduce the annual pension amount. Maximum annual pension figures are published on an annual basis in the Federal Register. As a matter of reference, the maximum payment level for a single veteran permanently and totally disabled with no dependents was \$9,304 in the year 2000.⁹

VA Treatment of Various Planning Techniques

I. Special Needs Trusts

In a decision conveniently entitled "Treatment of Assets Placed in a Special Needs Trust in Determining Eligibility for Improved Pension" (VAOPGCPREC 33-97 (August 29, 1997)), the OGC determined that assets transferred to a Special Needs Trust which was established for (and funded by) the surviving spouse of a veteran will be counted in calculating the spouse's net worth for Improved Pension purposes.

The decision involved a pre-OBRA 93 trust which contained traditional SNT language restricting distributions to items other than those available through government benefit programs. Stating that "VA regulations do not establish specific criteria governing

when trust assets are to be considered in net worth determinations,"¹⁰ the OGC analysis focused instead on two issues: divestiture of control by the surviving spouse, and the availability of trust funds for the use of the surviving spouse.

As a preliminary matter, and as expected, the VA regulations do not recognize any particular preference for SNTs. More surprising is the fact that the regulations do not make any particular reference to trusts. Thus, being relegated to analyzing the trust in the context of divestiture and availability, one would think that a discretionary trust would work well in this context, as it did with the Medicaid program prior to OBRA 93. The regulations defining "net worth" and transfers (discussed above) certainly appear to provide this latitude.

"For elder law practitioners accustomed to the explicit income and resource limitations found in the Medicaid and SSI programs, these open definitions [in the Improved Pension] can be somewhat unsettling."

As one reads the decision, however, it becomes clear (at least to us) that this decision is based less on the language of the regulations and more on the notion of preventing the type of trust planning that is available under the Medicaid and SSI programs. The OGC cites as precedent an earlier decision that involved a life estate in real property, a legal instrument which is only partially analogous to the trust at issue in this case, and finds that both instruments (the life estate deed and the discretionary trust) provide a sufficient level of availability so as to render the underlying assets available for consideration in the net worth computation.

Even more perplexing is the discussion of the surviving spouse's purported continuing "control" over distributions from the trust because she (or her guardians) had, according to OGC, the ability to "provide specific instructions concerning the circumstances under which trust assets would be used for [her] benefit."¹¹ The OGC position ignores the trust instrument's grant of full and final discretion to the trustee, and smacks of the current debate over whether a testamentary limited power of appointment in a traditional Medicaid trust renders the trust assets somehow "available" under the Medicaid program rules, a stretch of the legal imagination that is now the subject of litigation in federal court.

If you think we may be overreacting, consider the portion of the decision which begins with the phrase: “Estate planning for the elderly has been used by persons with large estates to preserve assets for heirs while taking advantage of Medicaid benefits designed to assist the poor.”¹²

The reference for this comment is a Jane Bryant Quinn article published in the *Washington Post* in 1993. It’s probably fair to say that Jane Bryant Quinn is not considered the most liberal-minded commentator when it comes to the use of the Medicaid program for the elderly and disabled. Similar comments suggesting this philosophical predisposition can be found throughout the decision.

“Planning for those sustained by various means-tested government benefit programs requires the practitioner to be continually mindful of the fact that each agency serves as its own separate fiefdom, with its own rules, internal guidelines, and in some cases, predisposition for or against the type of planning that serves as the foundation of the elder law practice.”

If there is a glimmer of hope in the decision, it is the fact that the decision involved a pre-OBRA 93 trust with special needs language, and the beneficiary was the surviving spouse of the veteran. The decision appears to leave open the possibility that a third-party supplemental needs trust (i.e., a trust funded with assets other than the veteran’s or the veteran’s spouse’s) would fall sufficiently outside the control of the claimant that it would not be considered in determining eligibility. We should mention that a search of the Office of General Counsel database did not locate any additional decisions on special needs trusts, so such a statement is simply speculation.

This decision only reinforces the notion that the special needs trust occupies a position of preference only among the Medicaid (and more recently the SSI) programs, and as such, these trusts must be analyzed according to the specific income and resource limitations of the particular benefit programs in which a beneficiary may be participating.

II. Transfers of Assets to an Irrevocable Trust

In VAOPGCPREC 73-91, the Office of the General Counsel considered an irrevocable trust established

by a veteran for the benefit of his grandchildren, and the decision presents an interesting contrast to the OGC analysis of the special needs trust discussed above. The veteran inherited funds from a predeceased son, and wanted to use the assets to fund an irrevocable trust for his grandchildren, of which he would be trustee and over which he would have discretionary control.

The OGC initially confirms that the inherited funds are considered “nonrecurring countable income” to the veteran pursuant to 38 C.F.R. § 3.271. Subsequent divestiture (i.e., transfer) of the funds do not remove the funds from the *countable income* computation.

Turning its attention to the “net worth” component of eligibility, the OGC considers whether the subsequent transfer of the inherited property to an irrevocable trust would sufficiently divest the veteran of control so as to have the underlying property excluded in determining net worth. Citing earlier decisions, the OGC clarified that

[a]s a general rule, this office has held that property and income therefrom, including that held in trust, will not . . . be countable as belonging to the claimant unless (1) it is actually owned by the claimant; (2) the claimant possesses such control over the property that the claimant may direct it to be used for the claimant’s benefit; or (3) funds have actually been allocated for the claimant’s use. (citing OGC Prec. 72-90, and other OGC decisions with similar holdings).¹³

In the case of the veteran funding his grandchildren’s trust, the OGC holds that none of the three criteria were met, and as such, the veteran has sufficiently divested himself of control such that the underlying property would not be considered as part of the net worth computation; clearly the appropriate conclusion given the language of the regulations and the cited precedent.

More interesting to us is the fact that neither this decision, nor any of the precedent cited therein, was mentioned in the special needs trust decision discussed in point I above. None of the three crucial elements (ownership, control, or actual use) would apply in the SNT context. The two decisions appear to be at odds, and we think it fair to conclude, once again, that the determining factor has less to do with the letter of the law than a desire to achieve a given result.

Conclusion

Planning for those sustained by various means-tested government benefit programs requires the practitioner to be continually mindful of the fact that each agency serves as its own separate fiefdom, with its own rules, internal guidelines, and in some cases, predisposition for or against the type of planning that serves as the foundation of the elder law practice. Sometimes we get lucky and find some parity among programs, as we have with the SSI and Medicaid programs. More often we do not, and we need to plan accordingly.

2. 38 C.F.R. § 3.3(a)(2).
3. 38 C.F.R. § 3.275(b).
4. 38 C.F.R. § 3.273(a).
5. 38 C.F.R. § 3.275(b).
6. 38 C.F.R. § 3.274(a).
7. 38 C.F.R. § 3.276.
8. 38 C.F.R. § 3.272.
9. 66 Fed. Reg. 16,976 (Mar. 28, 2001).
10. VAOPGCPREC 33-97, at point 5.
11. *Id.* at point 7.
12. *Id.* at point 3.
13. VAOPGCPREC 73-91, at point 6.

Endnotes

1. Louis W. Pierro & Edward V. Wilcenski, *Same Issues, Different Agency: Transfer Penalties and Trust Rules Under the Section 8 Housing Program*, Elder Law Attorney (Fall 2001).

Louis W. Pierro is a graduate of Lehigh University and Albany Law School of Union University. Mr. Pierro was admitted to the bar in January 1984, and is licensed to practice in all New York State and federal courts. His practice focuses on representing individuals, families and small business owners on estate planning, long-term care planning, estate and trust administration and business succession planning. Mr. Pierro is also a frequent lecturer and author on the topics of estate planning, estate and gift taxation and elder law, and served as adjunct professor at Siena College from 1988-1995. Mr. Pierro is Chair of the New York State Bar Association Elder Law Section, and past Chair of its Committee on Insurance for the Elderly (1995-1998). He was appointed to serve on the Task Force on Long-Term Care Financing, formed by Governor Pataki and legislative leaders to study long-term care issues in New York State. Mr. Pierro also is Vice-Chair of the New York State Bar Association Trusts and Estates Law Section Committee on Estate Planning, and serves as a member of that Section's Executive Committee. Mr. Pierro is a member of the Estate Planning Council of Eastern New York, the National Academy of Elder Law Attorneys and the American Bar Association, Probate and Trust Section. He serves on the Board of Directors of the Capital Area Consortium on Aging and Disability, Senior Services of Albany and McAuley Living Services.

Edward V. Wilcenski practices in the areas of estate planning and administration, elder law, and future care planning for persons with disabilities. Mr. Wilcenski is a graduate of Albany Law School of Union University. He received his Bachelor of Science in Economics, *magna cum laude*, from Siena College in Loudonville, New York. Mr. Wilcenski is a member of the Board of Directors of PLAN of Northeastern New York, Inc., a nonprofit organization which advises members on traditional estate and financial planning, and assists with the development of "quality of life" plans for use by fiduciaries and guardians administering to the needs of individuals with disabilities. Mr. Wilcenski is a member of the National Academy of Elder Law Attorneys, the New York State Bar Association Elder Law Section and the Committee on Mental and Physical Disability, and the Estate Planning Council of Eastern New York. He is a volunteer for the New York State Commission on Quality of Care's Surrogate Decision Making Committee, and serves as a panel member for the New York State Office of Mental Retardation and Developmental Disabilities task force on the use of supplemental needs trusts to create independent housing options for the disabled.

PRACTICE NEWS

Time Management (Having a Tracking System)

By Vincent J. Russo

All we have to offer is time and we all know time is valuable. You have heard the expression “Time is Money.” As attorneys, we understand that we do not sell products, but provide professional services. One way of measuring the value of our services is to look at the time expended.



Since time is so important to us, we need to measure how we spend our time, so that we can place a value on the time that we spend. Hence, we need to record the time and analyze the time recorded to make such a valuation.

Timekeeping

It is important that all time be accounted for with regard to attorneys and paralegals who bill for their work. The elder law attorney should keep time even if he or she does not bill on an hourly basis. Attorneys who bill on a flat-fee basis need to know whether the flat fees are adequate. Timekeeping can also be a tool used in measuring progress. From an accounting standpoint, it will allow you the opportunity to analyze how time is being spent by each billable person in your office. For example, how much time is being spent on meetings with clients, supervision of staff, drafting of documents, marketing the firm, etc.? Timekeeping also allows you to monitor and analyze an attorney’s effort and the amount that can be billed to clients from that effort.

In addition to recording time, an analysis can be performed to compare the number of hours worked to the number of billable hours. This will give you an indication of the proficiency of the attorney and the types of matters that the attorney is working on. It is important to set goals for each billable person.

Further, timekeeping will allow you to project the revenue that will be coming in for the month based upon the total of billable hours spent by the billable people in your office (i.e., attorneys and paralegals).

A. Software

Manual recording of time can be tedious and inefficient. There are many good timekeeping software programs available, such as Timeslips and PCLAW.

B. Report of Hours per Timekeeper per Month

One of the benefits of timekeeping is that it enables you to see how many hours each timekeeper is working per month. Each timekeeper should be given a quota. For lawyers, the quota should be approximately 200 hours per month. This includes both billable and non-billable time. For non-attorney timekeepers, the quota should be approximately 150-160 hours per month. Depending on the timekeeper, a ratio of expectancy between billable and non-billable hours should be established. Timekeepers can quickly see how productive they are.

The time can be broken into billable and non-billable hours and into practice type, as well as categories for practice development and practice management. Practice management time can be further subdivided into significant project areas, such as development of business plans, marketing, etc. and unavoidable management, such as opening the mail and quick questions with staff.

It is suggested that everyone (partners, associates, paralegals, legal assistants and administrative personnel) keep a contemporaneous, on-the-spot recording of time, with direct input by the individuals. In order to maximize realization of time spent, you need to account for all hours, not just chargeable hours.

Your inventory is your time, and all attorneys should budget their use of their inventory, with monitoring at least weekly. Daily timekeeping is easier to track than weekly timekeeping. Keep a target in mind of chargeable hours. Care should be taken that no one self-edits.

“Real” realization is what goes into the bank versus what could have gone into the bank. Improved realization has a profound impact on profits—right to the bottom line!

C. Ratios

1. Ratio—Billable/Non-Billable

A goal for billable/non-billable time should be established. Lawyers need to be encouraged to spend time on non-billable matters, such as practice development and practice management. The billable/non-billable ratio should be approximately 75 percent billable, 25 percent non-billable. Depending upon the attorney’s responsibilities in the law firm, this ratio will vary. For example, it may be acceptable that the ratio

be 65 percent billable and 35 percent non-billable. By dispersing the practice development/practice management functions throughout the law firm, no one person is saddled with an extraordinary amount of non-billable time. On the other hand, it may be more effective to have one managing partner in the law firm while several attorneys market the practice. Depending upon the size of your law firm, you may want to employ an administrator who would oversee the law firm staff and day-to-day operations.

2. Practice Development

Each lawyer should be encouraged to spend 15-25 percent of his/her time on practice development. It is important to assess the different skills of your attorneys. One attorney may be better suited to give presentations while another may be more proficient in writing articles. It is also helpful to educate your staff on how to promote the law firm. You may want to consider giving bonuses or rewards to staff who generate new clients.

3. Practice Management

Lawyers should be encouraged to spend at least 10 percent of their time on significant practice management. These responsibilities could include: (1) development of a business plan; (2) a marketing plan; (3) a budget; (4) working on forms and new programs, such as a document assembly program; or (5) other activities of significant benefit to the law firm. Since these activities do have significant benefit to the law firm, they need to be rewarded.

4. Realization Ratio

The realization ratio is the ratio between what should be received and what is actually received in fees. This ratio should be analyzed by timekeeper and by practice area. What should be received can be determined by multiplying the timekeeper's hourly rate by the number of billable hours subdivided by category. As a guideline, if the realization ratio is less than 90 percent, then action needs to be taken. Something is amiss.

5. Hourly Billable Rate Received by Timekeeper

Let's suppose an attorney has an hourly rate of \$200 per hour. Is he/she actually receiving \$200 per hour? Is it more? Is it less? Why the difference? What

does it mean? One way to analyze this information is to divide the amount of money billed and collected by the number of billable hours. This calculation tells the attorney's realization rate.

6. Hourly Billable Rate Received by Practice Area

By flat-fee billing and having an efficient operation, it is possible to attain actual receipts significantly higher than the attorney's hourly rate. It is important to know which practice areas are the most lucrative and which are not. For example, an analysis of numbers can tell you that Medicaid planning is significantly more profitable than real estate. Once this is understood, you can direct your marketing efforts to those areas which yield the highest return. There may be certain practice areas which are losing money and should be abandoned. This is not to say that there may be a practice area which is important to you, even if not lucrative. But understanding the economics of each practice area will allow you to make an informed decision as to what areas you practice in and the economic consequences. This is not simply a matter of gross dollars, it's a matter of gross income less gross expense.

7. Hourly Total Rate Received, Billable Plus Non-Billable

A properly run law firm should spend 25-33 percent of its time on non-billable matters. This may vary depending upon the size of the firm. Practice development will enable the firm to attract clients, while practice management will enable the firm to run efficiently. Both are crucial to success. However, in order to establish realistic fees, this non-billable time needs to be factored in. Based on income actually received, divide your total income by the total billable and non-billable hours to learn your true hourly rate.

In conclusion, each of us needs to manage our time to maximize the value of the time we spend. By taking the above steps, you will be in a much better position to maximize your profits, or at the very least, you can give yourself a vacation—yes, you can take some "TIME OFF." You deserve it!

Note: This article was excerpted and modified from Demystifying The Numbers: Financial Tools To Keep Your Firm Moving Forward, by Thomas D. Begley, Jr., and Vincent J. Russo, published by The Elderlaw Report, Vol. XIII, No. 1 (July/August 2001).

Vincent J. Russo, J.D., LL.M., CELA, Managing Shareholder of the law firm of Vincent J. Russo & Associates, P.C. of Westbury/Islandia, New York, has a Master's of Law in Taxation, and is admitted to the New York, Massachusetts and Florida state bars. He is the co-author of *New York Elder Law Practice*, published by West Publications. Mr. Russo is a Founding Member and Past Chair of the Elder Law Section of the New York State Bar Association; a Founding Member, Fellow and Past President of the National Academy of Elder Law Attorneys (NAELA); and Founder of the Theresa Alessandra Russo Foundation, which supports children with disabilities.

TAX NEWS

Home Sale Exclusion: Tax Issues to Consider

By Ami S. Longstreet and Anne B. Ruffer

Effective May 7, 1997, new tax rules permit homeowners to exclude up to \$250,000 of gain realized (\$500,000 for certain joint returns) on the sale or exchange of real property if the property was owned and used as the taxpayer's principal residence for at least two years during the five-year period ending on the date of the sale or exchange.¹

Although the rules seem quite simple at first, as usual there are issues which emerge as homeowners, and their counsel, are asked to apply these rules. Furthermore, although the rules were meant to ease record keeping and provide tax simplification for homeowners, there are limitations, some of which are quite obvious while others have arisen somewhat unexpectedly. Some taxpayers are still having difficulty working with the rules because their own particular circumstances do not neatly fit within the rules. As such, elder law practitioners frequently are asked to assist their clients in applying these rules to their particular fact situation, either at the time of a sale or when transferring title for planning purposes.

Generally, in order for a taxpayer to be able to take advantage of the home sale exclusion rules, the taxpayer must have owned and used the home as his or her principal residence for at least two years during the five-year period ending on the date of the sale or exchange of the property.² The requirement that the property be used as a principal residence during at least two out of the last five years does not require use in the last two years, or even use for two years in a row, but rather an aggregate of two years within that five-year period.³ According to proposed regulations, the two-year ownership and use test can be satisfied if the taxpayer owned and lived in the property for either 24 full months or 730 days (365×2) during the five-year period ending on the sale date.⁴ Moreover, the ownership and use periods need not be concurrent (but both requirements must be met during the five-year period ending on the sale date).

Although the Internal Revenue Code section for the home sale exclusion does not define "principal residence," the application of that term will depend on all of the facts and circumstances surrounding the



Ami S. Longstreet

use and time spent at the particular property. This is an issue for those taxpayers who own and reside at more than one property. The principal residence usually is the home where the taxpayer spends a majority of time.⁵

What happens if a taxpayer sells his or her home before the two year residency requirement has been met, since the full exclusion can be used only if the two-year use and ownership requirements are satisfied?⁶ Under some circumstances, such as a change in the taxpayer's place of employment, health, or unforeseen circumstances, the taxpayer will be permitted to prorate the gain. The maximum gain that can be excluded under these circumstances is equal to the full \$250,000 exclusion (or \$500,000 in the case of certain joint returns) times a fraction, having as its numerator the shorter of either (1) the aggregate periods of ownership and use of the home by the taxpayer as a principal residence during the five years ending on the sale date, or (2) the period of time after the last sale to which the exclusion applied and before the date of the current sale, and as its denominator two years (or its equivalent in months or days).

For example, Monica (a single person) owns and resides in a home for ten months. She has to move due to new employment. Monica purchased her home for \$150,000 and sold it for \$200,000. Since Monica lived there for only ten months, she may exclude \$104,166 of gain from income and since her gain was only \$50,000, the entire amount is excluded ($\$250,000 \times 10 \div 24 = \$104,166$). A reduced exclusion is available only to taxpayers who fail to meet either the use or ownership requirement because of a change of place of employment, health, or unforeseen circumstances as provided in the regulations.⁷ Had the sale been motivated by reasons other than the foregoing, the taxpayer would not be entitled to exclude any of the gain on the sale of the home.⁸

What happens if the taxpayer enters a nursing home during the time period used in calculating qualification for the exclusion? Does his or her time in the nursing home count in calculating the use period required pursuant to the rules? According to the



Anne B. Ruffer

home sale exclusion rules, the nursing home resident's use requirement is eased when he or she is physically or mentally incapable of self-care and is now cared for in a licensed facility. If the taxpayer owned the property as a principal residence for at least one year, rather than two, out of the five-year period ending on the date of the sale or exchange, and owns the property while living in the licensed nursing home or other facility for a total of the two-year ownership requirement, the taxpayer will have met the time requirement in order to qualify for the full home sale exclusion.⁹

For example, William purchased his personal residence on January 1, 1999, and lived in his home until January 1, 2000, when it became necessary for him to enter into a nursing home because of a physical disability. William would have to wait until January 1, 2001, before he would qualify for the home sale exclusion. Although he only lived in his personal residence for one year, the use requirement was satisfied because of the time he spent in the nursing home. This "special rule"¹⁰ will not apply if a disabled individual, who can no longer care for him or herself moves in with a relative or friend, even if a licensed health care provider is hired to provide care.

What about the client who spends two months in his Arizona home every winter while also maintaining a residence in New York? Will the several months away from the personal residence count in determining the required use period? Short temporary absences for vacations or seasonal absences will count toward the use period.¹¹ Thus, a taxpayer who owned his New York home for 24 months but only lived there 20, because four out of the 24 months were spent in Arizona, will meet the use requirements if he desires to sell his New York property. The same is not true, however, for the same homeowner if one year out of his 24-month ownership period is spent away from home on sabbatical leave.¹²

What if a taxpayer owns two homes which both meet the ownership and use tests, and the taxpayer sells each home within two years of the other? Will the home sale exclusion apply to both sales? For example, a taxpayer owns a townhouse which he uses as a principal residence for two full years, 1998 and 1999. The taxpayer then purchases a house in the year 2000 and uses it as his personal residence for the next two years. In 2002, the taxpayer sells the townhouse and excludes the gain realized on its sale. When the taxpayer sells the house in the year 2003, the home sale exclusion will not apply to the sale of the house even though the taxpayer met the two-year ownership and use requirements because the taxpayer is only allowed to use the exclusion once every two years.¹³

What happens when the taxpayer above marries in the year 2000 when he purchases the house? Will his spouse be entitled to the exclusion when the taxpayer's second residence (the house) is sold in the year 2003? In general, the home sale exclusion permits married couples to exclude up to \$500,000 in gain from the sale of a principal residence on their joint tax return.¹⁴ The \$500,000 exclusion is available if either spouse meets the ownership requirements, or if both spouses meet the ownership requirements, as long as neither spouse excluded gain from a prior sale within the last two years.¹⁵ Under the preceding fact scenario, only the spouse who did not take the home sale exclusion within the preceding two years will be able to utilize the exclusion. Therefore, only up to \$250,000 will be available as a maximum exclusion on their joint tax return. The spouse who sold the townhouse less than two years before cannot use the exclusion.

What happens to the exclusion if one spouse dies and the personal residence is in decedent's name alone and decedent otherwise complied with the use and ownership requirements? In the case of the surviving spouse, that spouse is treated as owning the property during the period that the deceased spouse owned it.¹⁶ Not only would the ownership requirement be satisfied, but the use requirement would as well, even if the surviving spouse had not lived in the home for two years. For example, husband and wife married on January 1, 2000. Husband owned, in his name alone, and lived in the home for two years prior to the marriage. If husband dies shortly after the marriage and wife inherits husband's home, wife can take advantage of the husband's two-year use and ownership of the home in order to utilize the full home sale exclusion.¹⁷ The same would apply in the event one spouse transferred ownership of the residence to the other spouse. The transferee spouse would be entitled to utilize the transferor spouse's use and ownership interest in order to utilize the exclusion.¹⁸

Will the surviving spouse be able to use the \$500,000 exclusion amount when she sells the personal residence that was once owned by her, by her and her husband, or just by her husband, if all of the other home sale exclusion requirements are met, after her husband's death? It will depend on when she sells the home. If the home is sold in the same year that her spouse died, she would be able to exclude up to \$500,000 of gain on the final joint tax return. However, if she waits to sell in any year following the husband's death, her maximum home sale exclusion amount is \$250,000. In any of the following years, the surviving spouse will file as a single individual and, therefore, is not entitled to the larger exclusion amount.¹⁹

What if the residence is owned by a partnership which benefits only the taxpayers for a certain period of time? Will the ownership requirements be met during the time the partnership owned the property? In a recent ruling, the IRS originally found in favor of the taxpayer and determined that the individuals would be considered as owning the home during the period that the partnership held title to it. At the time the partnership owned the home, the partners were and a grantor trust (same individuals involved). The partnership then deeded the property back to the individuals and the grantor trust in their proportionate ownership interests. The Internal Revenue Service originally determined that as long as the individuals met the ownership and use requirements and had not used the exclusion on another home sale within the two years ending on the sale date, they would be able to count the time the partnership owned the home and each would be able to exclude up to \$250,000 of gain.²⁰ The first ruling reviewed the grantor trust rules, acknowledging that the grantor or another person with a beneficial interest is treated as the owner of a grantor trust and taxable items of the trust are attributable to that person rather than the trust. In its reversal, the Internal Revenue Service's sole explanation for doing so was that its earlier ruling was "not in accord with the current views of the Service."²¹

Recently, the Internal Revenue Service addressed whether real property adjacent to the principal residence would entitle the homeowners to the home sale exclusion rules. If the tract of land adjacent to the home is sold as part of a series of transactions involving the sale of the home, the home sale exclusion rules should apply as long as the use and ownership rules are met, and the use must coincide with the two years that the house is occupied as the principal residence. But, the gain on the land is taxed if the home is not sold.²²

Will the taxpayer be able to take advantage of the home sale exclusion if the primary residence was transferred to a trust and the trust in turn sells the residence? If the trust is revocable, the answer is "yes" since the revocable trust is taxed as if it were the taxpayer—all gains or exclusions pass through to the taxpayer. If the trust is irrevocable, the answer is "buyer beware." The availability of the exclusion will hinge upon whether the trust is considered a grantor trust or not.²³ For example, if the taxpayer transfers his personal residence to an irrevocable asset preservation trust and has otherwise met all of the home sale exclusion requirements necessary, as long as the trust is considered a grantor trust for all income tax purposes, the home sale exclusion would be available. All income tax consequences of the trust would apply to the grantor. However, if the trust does not

squarely fit into the grantor trust rules, the home sale exclusion will not be available to the grantor.

In a recent Letter Ruling, the Internal Revenue Service prohibited the home sale exclusion on a principal residence sold by a trust.²⁴ That ruling involved a husband and wife who transferred their residence to a revocable trust. When the wife died (well before the enactment of the new home sale exclusion rules), the revocable trust was divided into two trusts, one of which was an irrevocable trust to which the residence was allocated. The husband continued to live in the home for a total of 30 years until he entered a nursing home. The irrevocable trust gave the husband a noncumulative power to withdraw from the principal of the trust in each calendar year an amount not to exceed the greater of \$5,000 or 5 percent of the then-aggregate market value of all property in the trust (commonly referred to as the "5 and 5" power). The trust also provided the husband with all of the net income of the trust annually and the right to occupy all real property in the trust that was being used for residential purposes. The trust also permitted the husband to direct the trustee to sell any such property and replace it with, or rent or lease, another residence selected by the beneficiary of comparable or lower value. When the trust desired to sell the home, the Internal Revenue Service determined that the gain on the home would be taxable to the trust as the owner of the corpus, not the husband, except to the extent the husband was deemed the owner of a portion of the property pursuant to his 5 and 5 power. The remaining capital gains, according to the Internal Revenue Service, were to be deemed capital gains at the trust level.

The taxpayer argued that the gain on the sale should be excluded pursuant to the home sale exclusion rules because the trust was a grantor trust. The trust provided that the taxpayer had the right to direct the trustee to sell any residential property and replace it with, or rent or lease, another residence selected by the taxpayer. However, the Internal Revenue Service determined that this right did not go far enough. The right did not provide the taxpayer with the power to vest corpus in the taxpayer. Therefore, the right did not result in taxpayer being treated as an owner of the corpus of the trust.²⁵

What if gain on the sale of a principal residence is not excluded or fully excluded pursuant to the home sale exclusion rules and when might this happen? Such a situation might arise in the following circumstances: (1) the residence is rapidly appreciating in value whereby the gain may exceed the exclusion amount; (2) there is a possibility that the owner may claim a depreciation deduction for a home office or rental use of the residence; or (3) there is a possibility

that the owner may not use or own the residence long enough to qualify for the exclusion. Because of these and other potential scenarios, records of purchase price and capital improvements should always be kept.

As application of the home sale exclusion rules continues under varying circumstances, so will continued questions on its application. However, for the most part, the rules do ease the taxpayer's burden upon the sale of their home and, in most situations, the rules can easily be applied. For others, caution should be exercised in order to ensure that large capital gains exclusions are not otherwise lost, such as when a principal residence is transferred to an irrevocable trust or a partnership for other planning purposes. For example, because of several recent fair hearing decisions, which determined that trust assets were available resources for Medicaid purposes in otherwise irrevocable trusts because the trusts contained limited powers of appointment, many practitioners no longer draft asset preservation trusts with limited powers of appointment.²⁶ As a result, practitioners should take care before transferring a personal residence to an irrevocable trust without the power of appointment, unless other grantor trust language is included in the trust to tax principal to the grantor for income tax purposes. For example, the trust could give the trust beneficiary a power exercisable solely by himself to vest the corpus in himself.²⁷ Without appropriate grantor trust language, a taxpayer may find the home sale exclusion is no longer available. Although record keeping should be easier with the new rules in place, the prudent homeowner should continue to retain documents of capital improvements in the event the home sale exclusion rules should fail to apply or be insufficient to cover the gain under particular circumstances.

Endnotes

1. I.R.C. § 121.
2. I.R.C. § 121(a).
3. *Id.*
4. Prop. Reg. § 1.121(c).
5. Prop. Reg. § 1.121-1(b).
6. I.R.C. § 121(b)(3).
7. I.R.C. § 121(c)(2).
8. I.R.C. § 121 (c)(1); Prop. Reg § 1.121-3(a)(1).
9. I.R.C. § 121(d)(7).
10. I.R.C. § 121(d).
11. Prop. Reg. § 1.121-(f).
12. *Id.*
13. I.R.C. § 121(b)(3)(A); Prop Reg. §§ 1.121-1(f), 1.121-2(c).
14. I.R.C. § 121(b)(2)(A).
15. *Id.*
16. I.R.C. § 121(b)(2)(A)(i).
17. I.R.C. § 121(d)(2).
18. I.R.C. § 121(d)(3)(B)
19. I.R.C. § 121(b)(2).
20. Priv. Ltr. Rul. 2000-04-022.
21. Priv. Ltr. Rul. 2001-19-014.
22. Kiplinger Tax Letter, Oct. 12, 2001.
23. I.R.C. §§ 671-678.
24. Priv. Ltr. Rul. 2001-04-005.
25. Priv. Ltr. Rul. 2001-04-005; I.R.C. § 678(a)(1).
26. *In re F. Hopkins*, #3507751M; *In re Michael Chanko*, #3503546J.
27. I.R.C. § 678(a)(1).

Ami S. Longstreet is an attorney at MacKenzie Smith Lewis Michell & Hughes, LLP, and is also a Certified Public Accountant, admitted in Vermont. She was an adjunct professor at Syracuse University College of Law from 1996 through 1999 teaching Elder Law, and she is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association. Mrs. Longstreet concentrates her practice in the areas of estate planning, estate administration, trusts and elder law.

Anne B. Ruffer is an attorney in the law firm of Mackenzie Smith Lewis Michell & Hughes, LLP. She practices in the firm's Trusts and Estates Department. She is a member of New York State Bar Association's Elder Law and Trusts and Estates Sections. She is a graduate of the University of Wisconsin-Madison and Syracuse University College of Law. She specializes in estate planning and administration, elder law and a variety of business matters.

PUBLICATION NEWS

By Daniel G. Fish

What Your Clients Are Reading

Clients over the past several years have become much better informed before they come into your office. There are a great number of books available to families and caregivers that contain advice about elder law issues. They discuss advance directives, such as powers of attorney and health care proxies, guardianship proceedings and paying for long-term care. They also recommend seeking an elder law attorney rather than the family attorney, give sources for locating elder law attorneys and suggest questions to ask before making an appointment.



I recently went to my local bookstore and reviewed 20 books that I found on this topic. I looked in the index to see if there was a reference to elder law or legal issues. I also looked at the resources section, which most of these books had, to see which legal organizations were listed. What follows are the results of my survey. The large number of popular titles strongly suggest that the elder law attorney should read these books and be familiar with their approaches.

1. *How to Care for Aging Parents* by Virginia Morris.
2. *Coping With Alzheimer's* by Rose Oliver and Frances Bock.
3. *What You Need to Know About Alzheimer's* by John Medina.
4. *Keys to Understanding Alzheimer's Disease* by Giselle Wolf-Klein and Arnold Levy.
5. *You and Your Aging Parent* by Barbara Silverstone and Helen Hyman.
6. *Is It Alzheimer's?* by Roger Granet and Eileen Fallon.
7. *When Someone You Love Has Alzheimer's* by Marilyn Larkin.
8. *The 36-Hour Day* by Nancy Mace and Peter Robins.
9. *Alzheimer's Disease: A Guide for Families* by Lenore Powell.
10. *Caring for Your Aging Parent* by Donna Cohen and Carl Eisdorfer.
11. *Alzheimer's: A Caregivers Guide and Sourcebook* by Howard Gruetzner.
12. *Beat the Nursing Home Trap* by Joseph Matthews.
13. *Alzheimer's Early Stages* by Daniel Kuhn.
14. *There's Still a Person in There* by Michael Castleman.
15. *Caring for Yourself While Caring for Your Aging Parents* by Claire Berman.
16. *The Unofficial Guide to Eldercare* by Chris Adamec.
17. *As Parents Age* by Joseph A. Ilardo.
18. *The Alzheimer's Sourcebook for Caregivers* by Frena Gray-Davidson.
19. *The Medicaid Planning Handbook* by Alexander A. Bove.
20. *The Forgetting: Alzheimer's: Portrait of an Epidemic* by David Shenk.

Daniel G. Fish is a partner in the law firm of Freedman and Fish, whose practice is devoted to the representation of the interests of the elderly. Mr. Fish is a Past President, founding member and Fellow of the National Academy of Elder Law Attorneys. He was a member of the Board of Directors of Friends and Relatives of the Institutionalized Aged and a Fellow of the Brookdale Center on Aging. He was a delegate to the 1995 White House Conference on Aging. Prior to forming the firm, Mr. Fish was the Senior Staff Attorney of the Institute on Law and Rights of Older Adults of the Brookdale Center on Aging of Hunter College. He has taught as an adjunct professor at Cardozo Law School and Hunter College School of Social Work. He has authored several articles on the legal issues of elder law. He has been quoted in the *New York Times*, *Business Week*, *Fortune* and *Lawyers Weekly USA*.

ADVANCE DIRECTIVES NEWS

Points on the Compass

By Ellen G. Makofsky

Many of my clients are active people who travel often to visit family and friends. As an attorney concentrating in elder law, I try to incorporate a discussion of advance directives into most client conferences. Often the question comes up, What happens if I need a surrogate to make medical decisions for me when I am not in New York State? In light of the mobility of some of my clientele and the theme of this edition of the *Elder Law Attorney*, I thought it would be interesting to compare the requirements for advance directives in the border states of New Jersey, Connecticut, Massachusetts, Vermont and Pennsylvania to determine if properly executed documents in New York would suffice in these other states.



“Often the question comes up, What happens if I need a surrogate to make medical decisions for me when I am not in New York State?”

As reported previously in this column, the requirements for a valid health care proxy in New York are pretty straightforward. The statute requires that, at a minimum, the document identify the principal and agent and that the document indicate that the principal intends the agent to have the authority to make health care decisions on the principal’s behalf.¹ The health care proxy must be signed in the presence of two adult witnesses and the appointed health care agent may not serve as a witness. Finally, a statement from the witness that the principal appeared to execute the proxy willingly and free from duress must be incorporated into the health care proxy.² The New York statute places certain restrictions on who may serve as health care agent. An operator, administrator or employee of a hospital may not be appointed as a health care agent if the principal is a patient, resident or applied for admission to such hospital, unless the proposed health care agent is related to the principal by blood, marriage or adoption. A physician may be appointed as the health care agent but cannot serve

the dual roles of attending physician and health care agent simultaneously. An individual may not serve as health care agent for more than ten persons unless the proposed agent is a spouse, child, parent, brother, sister or grandparent of the principal.³

New Jersey, Connecticut, Massachusetts, Vermont and Pennsylvania each have differing laws regarding the appointment of a health care agent. What follows is an examination of the statutory requirements for each of the states and an analysis of whether a health care proxy created pursuant to New York State law is likely to be honored in those states.

New Jersey

A standard New York State health care proxy form, properly executed, should be recognized as a valid document in the state of New Jersey. New Jersey does not propound any specific form for an advance directive. As in New York, New Jersey law requires that an advance directive be signed and dated by the principal⁴ in the presence of two subscribing witnesses, and specifies that the appointed health care agent may not serve as a witness. The witnesses must attest that the principal is of sound mind and free of duress and undue influence. New Jersey law additionally provides that, in lieu of witnesses, the document may be executed before a notary public, attorney at law or other person authorized to administer oaths.⁵

Connecticut

Connecticut law provides three different forms for advance directives. Connecticut statute offers: a form for living wills;⁶ a combined form to provide health care instructions, the appointment of a health care agent, provision for an attorney-in-fact for health care decisions, the designation of conservator of the person for future incapacity and the opportunity to make an anatomical gift;⁷ and a third form to appoint a health care agent.⁸ A properly executed New York State Health Care Proxy will most likely be sufficient in Connecticut.⁹ Connecticut requires the document to be signed and dated by the principal in the presence of two adult witnesses who must also affix their signatures to the document. As in New York, a person appointed as health care agent may not act as a witness to the appointment. There are,

however, certain additional caveats in regard to acceptable witnesses in Connecticut. If the principal resides in a facility operated or licensed by the Department of Mental Health and Addiction Services or the Department of Mental Retardation, at least one witness must be someone not affiliated with the facility and one witness must be a physician or clinical psychologist with specialized training in treating mental illness.¹⁰

Massachusetts

Massachusetts law recognizes a properly executed New York State Health Care Proxy, but under certain circumstances medical providers in the state are not required to follow the directions given by the health care agent.¹¹ Massachusetts law provides that the health care provider is not required to enforce the proxy where the requested medical action is contrary to the moral or religious beliefs of the physician or health care provider¹² and/or the requested medical action is contrary to formally adopted policies of private facilities.¹³

The actual requirements for the appointment of a health care agent are very similar to those found in New York. The law requires that a health care proxy be signed by the principal in the presence of two subscribing witnesses and specifies that the appointed health care agent may not serve as a witness.¹⁴ The witnesses must attest that the principal is at least 18 years of age, of sound mind, and under no constraint or undue influence. Massachusetts law contains a presumption that the principal was competent at the execution of the health care proxy and presumes the document to be properly executed, unless a court determines otherwise.¹⁵

Vermont

A standard New York State Health Care Proxy form, properly executed, will suffice as valid document in the state of Vermont, as the state provides for reciprocity where another state's advance directive was executed in compliance with the law of that state.¹⁶ When the advance directive is executed in Vermont,¹⁷ there are specific requirements for a valid document. Vermont law provides a suggested form for the designation of a durable power of attorney for health care¹⁸ and additionally requires that the durable power of attorney for health care be accompanied by a specific disclosure statement which must be signed by the principal and serves as an overall summary of the content and purpose of the durable power of attorney for health care law.¹⁹ There are some restrictions regarding appropriate witnesses to

the document.²⁰ As in New York, the person appointed as the health care agent may not act as a witness. Among the other persons who may not serve as witnesses are the principal's health or residential care provider or the provider's employee, the principal's spouse, heir, or a person entitled to any part of the estate of the principal upon his or her death, or a creditor of the principal. Unlike New York law, Vermont law requires that if the principal is being admitted or is a resident of a nursing home or residential home, an ombudsman, recognized clergy member, attorney licensed to practice in the state or other individual designated by the probate court must sign a statement affirming that he or she has explained the nature and effect of the durable power of attorney for health care to the principal. When the principal is being admitted to, or is a patient in the hospital, the document is not effective unless at the time of execution, a person designated by the hospital signs a statement that he or she has explained the nature and effect of the durable power of attorney for health care to the principal.²¹

Pennsylvania

Although Pennsylvania provides a suggested form for use as an advance directive for health care, use of the specific form is not mandatory, and a standard New York State Health Care Proxy form, properly executed, should be a valid document in Pennsylvania. Pennsylvania law requires that the declaration be signed by the principal or by another on the principal's behalf and must be witnessed by two individuals over the age of 18. The only caution is that the witness shall not be the person who signed the declaration on behalf of and at the direction of the principal.²²

Conclusion

After reviewing the choices the border states have made in regard to advance directives, what advice can be given to visitors from those states to our own Empire State? The New York perspective is clear in regard to those who have executed advance directives outside New York. New York State law provides that a health care proxy or similar instrument executed in another state in compliance with the law of that state is considered validly executed and will be honored in New York State.²³

What is my advice to my clients who regularly visit the border states? After I tell them to stay healthy, I advise them to sit back and relax. A properly executed New York State Health Care Proxy will work north, south, east and west of the border.²⁴

Endnotes

1. N.Y. Public Health Law § 2981(5).
2. PHL § 2981(2).
3. PHL § 2981(3).
4. In the event the principal cannot sign the advance directive, New Jersey law permits an advance directive to be signed at the direction of the principal.
5. N.J. Stat. Ann. § 26:2H-56.
6. Conn. Gen. Stat. § 19a-575.
7. Conn. Gen. Stat. § 19a-575a.
8. Conn. Gen. Stat. § 19a-577.
9. Although Connecticut provides a form for the appointment of a health care agent, section 19a-577 of the Connecticut General Statute provides that the appointment need not be in the same substantial form as provided by statute.
10. Conn. Gen. Stat. § 19a-576.
11. Mass. Gen. Laws ch. 201D § 11.
12. Mass. Gen. Laws ch. 201D § 14.
13. Mass. Gen. Laws ch. 201D § 15.
14. In the event the principal cannot sign the health care proxy, Massachusetts law permits the health care proxy to be signed at the direction of the principal.
15. Mass. Gen. Law ch. § 201D § 2.
16. Vt. Stat. Ann. tit. 14, § 3461.
17. In the event the principal cannot sign the advance directive, Vermont law permits the advance directive to be signed at the express direction of the principal, in the principal's presence.
18. Vt. Stat. Ann. § 3466.
19. Vt. Stat. Ann. §§ 3454, 3465.
20. The document requires two or more subscribing witnesses. Vt. Stat. Ann. § 3456.
21. Vt. Stat. Ann. § 3460.
22. 20 Pa. Cons. Stat. § 5404.
23. PHL § 2990.
24. For my Long Island clients, I give no advice in regard to the eastern boundary, as maritime law is beyond my expertise!

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, New York. The firm's practice concentrates in elder law, estate planning and estate administration.

Ms. Makofsky is a member of the New York State Bar Association (NYSBA) and serves on its Elder Law Section's Executive Committee. She is Chair of the Health Care Committee of the Elder Law Section. She is also a member of the NYSBA's Trusts and Estates Law Section. Ms. Makofsky is a member of Nassau County Bar Association, Elder Law, Social Services and Health Advisory Committee and the Surrogate's Court Trusts and Estates Committee. She is a member of the National Academy of Elder Law Attorneys, Inc. (NAELA). Ms. Makofsky serves on the Long Island Alzheimer's Foundation (LIAF) Legal Advisory Board and is the current President of the Gerontology Professionals of Long Island, Nassau Chapter. She is the former Co-Chair of the Senior Umbrella Network of Nassau. Ms. Makofsky is the First Vice President of the Port Jewish Center in Port Washington, New York.

Ms. Makofsky writes on elder law and trust and estate topics frequently and co-authored "Balancing the Use of Public and Private Financing for Long-Term Care" and "The New Look of Long-Term Care Financing in the 90s" which appeared in the *Journal of the American Society of CLU & ChFC*. Ms. Makofsky has appeared on the radio and television and is a frequent guest lecturer and workshop leader for professional and community groups.

CAPACITY NEWS

A Few More Interesting Cases

By Michael L. Pfeifer

Here are a few cases that contain an interesting issue concerning capacity.

In Opinion No.: 98-2, the Nassau County Bar Association Committee on Professional Ethics (hereinafter “the Committee”) published an opinion involving *inter alia* the issue of what actions a lawyer should take where an attorney-in-fact may be taking advantage of his incapacitated principal. The attorney’s client is the principal.

This column is limited to capacity issues; thus that is the only aspect of the opinion that is covered herein. However, the reader may find the other issues addressed by the opinion equally interesting. (The main issue presented by the Committee is: “What are an attorney’s ethical obligations to an elderly client and the beneficiaries of the client’s will when the attorney believes that an attorney-in-fact may be taking advantage of the client?”)

The Committee stated that there are no disciplinary rules on point, only ethical considerations. “Therefore the opinion expressed by this Committee represents a strong suggestion, rather than an ethical mandate.”

The part of the Committee’s opinion that deals with capacity issues is reproduced here verbatim:

2. Is the Client Incapacitated?

In the situation described herein, the thorniest aspect is whether the client is incapacitated. She executed a power of attorney in favor of her nephew. We do not know whether the client was competent when she executed the power of attorney, nor whether it is a Durable Power of Attorney. If the attorney opts to meet with the client, these are issues that the attorney should probably explore.

EC 7-11 states that “[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. . . . Exam-



ples include the representation of an illiterate or an incompetent . . .”

EC 7-12 delineates the responsibilities of an attorney who is representing a person with diminished capacity:

Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. . . . If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent. (Emphasis added).

Thus, if feasible under the circumstances, it would be appropriate for the inquiring attorney to attempt to ascertain whether his client presently has capacity. He may do this by himself or he may seek the opinion of a qualified diagnostician.

3. If the Client Appears to be Competent to Make Decisions:

If the inquiring attorney ascertains that his client is presently capable of understanding the consequences of her actions, there is no issue of incapacity, and no need for further involvement on his part, except, perhaps, to advise his client about the power of attorney and the need to

make provisions for the future, including the possibility that she may, at some point, become incapacitated.

4. If the Client Does Not Appear to be Competent:

If, however, the attorney comes to believe that his client lacks the capacity to understand the consequences of her actions, then his responsibilities are more complicated. We believe that he does have a reasonable responsibility to attempt to protect his client's interests, while safeguarding any confidences or secrets. If the attorney believes that the client is presently incapacitated, then her interests might best be protected by the initiation of an Article 81 Guardianship proceeding. We believe that the attorney may initiate such a proceeding on his own, or may seek the involvement of an appropriate state or local social service, health or mental health agency, which could then initiate the proceeding. Either way, he must be mindful of the need to preserve client confidences and secrets. (DR 4-101)

Support for allowing the attorney to initiate the proceeding cannot be found in the Code of Professional Responsibility, but can be found in the text of Rule 1.14(b) of the Model Rules of Professional Conduct, which provides as follows:

A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Although New York has chosen not to adopt ABA Model Rule 1.14(b), additional support for allowing an

attorney to initiate an Article 81 proceeding can be found in *In the Matter of Nhan Thi Thanh Le*, 168 Misc.2d 384, 637 N.Y.S.2d 614 (S. Ct. Queens County, 1995), wherein an attorney for an incapacitated person petitioned jointly with a family member for the appointment of a Guardian.

* * *

In *In re Shepard*,¹ the issue was whether objectant should have been granted an adjournment so that an attorney witness could testify as to the testamentary capacity of decedent. Reversing the Surrogate's Court (Suffolk County), the Appellate Division, Second Department stated,

Although an application for an adjournment is addressed to the sound discretion of the trial court (see *Matter of Anthony M.*, 63 N.Y.2d 270, 283); it is an improvident exercise of discretion to deny such a request where the evidence is material, and the application is properly made and is not made for purposes of delay, and where the need for an adjournment does not result from the failure to exercise due diligence (see *Romero v. City of New York*, 260 A.D.2d 461; *Evangelinos v. Reifschneider*, 241 A.D.2d 508, 509). Here, the witness would have been available the next day, and the proffered testimony went to the heart of the issue of testamentary capacity and was therefore material. Under the circumstances, the failure to grant the objectant a brief adjournment was an improvident exercise of discretion.

* * *

I hope you find above cases helpful to you and your clients.

Endnotes

1. ____ A.D.2d ____, ____ N.Y.S.2d ____ (2d Dep't 2001).

Michael L. Pfeifer, Esq., practices in Garden City in the areas of estate planning, probate, elder law and real estate. He frequently writes and lectures on these topics. He is currently serving as Chairperson of the Solo/Small Firm Practice Committee of the Nassau County Bar Association.

GUARDIANSHIP NEWS

In re Katherine E and the *Cruz* Decision

By Robert Kruger

Introduction

I comment on guardianships for infants and the decision of Judge Diane A. Lebedeff in *In re Jose Angel Cruz, III*. The *Cruz* decision deals with a fairly uncomplicated topic—Article 81 covers infants or it doesn't—and made the summary of that decision fairly easy.



The Decision of Judge Diane A. Lebedeff, Justice of the Supreme Court, New York County, issued in *In re Cruz*, which appeared in the *New York Law Journal* on July 30, 1001, pg. 24, column 2, exhaustively analyzed the applicability of Article 81 to infant guardianships. Judge Lebedeff held that guardianship for Jason Angel Cruz, III, an infant who is permanently disabled, properly lies under Article 81 of the MHL.

Other than *In re Cruz*, there is almost no decisional law *directly* addressing the substantive issue of infant guardianships. *In re Cruz* tapped every known statutory and judicial vein and artery. This article succinctly summarizes the arguments for, and the arguments against, proceeding in infant guardianship cases under Article 81. The arguments in favor, all of which are drawn from *In re Cruz*, are as follows:

- (a) MHL § 81.19(a)(1) provides for the appointment as guardian of a parent under the age of 18 years. Obviously this provision necessarily contemplates a child as the incapacitated person.
- (b) MHL § 81.22 provides, among the property management powers, for authority over educational decisions, which ordinarily pertains to children more than to the elderly.
- (c) Historically, case law involving guardianships for infants passed muster *sub silentio*; the absence of controversy suggests acceptance.¹
- (d) Commentators agree.²
- (e) The National Conference of Commissioners on Uniform State Laws, proposes a single form of guardianship for “any individual, including a minor, if the court determines that, for reasons other than age . . . the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions.”³

- (f) The current relationship of MHL Article 81 to SCPA Article 17-A does not thwart the will of the legislature. SCPA Article 17-A continues as a simple guardianship device, based upon principles of *in loco parentis*, primarily securing for relatives the legal right to make health care decisions for a mentally disabled child or adult,⁴ while MHL Article 81 is available for more complex situations, e.g., where the ward has greater functional capacity or where assets support a greater range of choices.
- (g) Because no words in the statute explicitly restrict the application of MHL Article 81 to adults and words do exist which support that article’s application to minors, the appropriate rule is that “where a statute makes no exception of infants from its application, courts can make none on grounds of any inherent equity applicable to infants.”⁵
- (h) It is less complicated and less expensive to allow a relative to start on, and continue on, a single guardianship path, assuming that the necessary legal showing can be made.
- (i) The annual reporting and accounting requirements are more protective of the child, requiring that far more information about the medical, social and residential situation of the child than the purely financial reporting required by Article 17-A.

The arguments against allowing infant guardianships to proceed under Article 81 are

- (a) SCPA Article 17-A already provides for the appointment of a guardian with a disabled child and Article 81 is not needed.
- (b) Article 81 is more costly, at least initially.
- (c) Two cases reject the applicability of Article 81. See *In re Forcella*,⁶ where the court declined to apply Article 81 to a brain-injured child and held that a Mental Hygiene Law Article 81 guardianship was not a remedy generally available for minors. See also *In re Lavecchia*,⁷ where the infant was found to have no mental disability and the petition was determined to be unwarranted on the facts, the court observed that Article 81 of the Mental Hygiene Law was designated for adults and “was not intended as an alternative to the existing statutes governing infants and mentally retarded and developmentally disabled persons under SCPA articles 17 and 17-A.” Additionally,

Rosann Torres in her Note, *Article 81 of the Mental Hygiene Law: Designed to Protect the Elderly, but Prejudicing Children's Rights*,⁸ argued that Article 81 should not be applied to minors because an Article 81 guardian necessarily would expend compromise funds in a manner not permitted by CPLR 1200, *et seq.*

- (d) The critics observe that the current incapacity of an infant to manage financial or personal issues cannot be determined, because such incapacity is a necessary incident of infancy.

Article 81 has positive aspects which should not be ignored. With the permanently disabled child, the guardian of the child's property has greater flexibility in using the child's money appropriately than is possible under Article 17-A. Article 17-A may provide, in theory, the same flexibility as Article 81 provides, but the culture of the Surrogate's Court requires repeated applications. Conversely, the culture of Article 81 is to use the money appropriately for the child's benefit subject to annual accounting and review by a Court Examiner. The parents who have the burden of caring for the permanently disabled child should not be compelled to run an obstacle course to access the child's money for the child's benefit.

Nor should the parents be compelled to wait until the child reaches majority to go back to court and apply for a guardianship under Article 81 when it could have been done from the outset. Judicial economy is not served by forcing a family to Surrogate's Court until the child reaches majority and, then, permitting them to go to Supreme Court under Article 81.

Conclusion

The publication of the Inspector General's report on fiduciary appointments is due the last half of October.⁹ The Birnbaum Commission's report will probably be issued within a month thereafter. As a corollary, many attorneys, statewide, have complained about the administration of Article 81, not to mention fees.

Judge Edwin Kassoff, after speaking to Judge Jonathan Lippman, the Administrative Judge in charge of the Office of Court Administration (OCA), reports that Judge Lippman has promised to appoint a statewide Administrative Judge to be in charge of guardianships.

If this is done, the bar has a place to bring complaints about systematic abuses. I would suggest that any attorney dealing with guardianships where, for example, the Order to Show Cause was not signed within two weeks, or where the Court Evaluator had no clue or did not appear or manifested ignorance of the statute, or where matters languished because of neglect, or where the Incapacitated Person was compromised in some significant way or any other systematic abuse, including the appointment of an unqualified guardian, should e-mail or fax such anecdotes to me (with venue and index number). I am collecting such abuses to bring to the soon-to-be appointed statewide Administrative Judge as a Bar Association matter at an appropriate time.

I invite letters and comments from the bar and the judiciary. I can be reached at 225 Broadway, Suite 4200, New York, NY 10007, phone number: (212) 732-5556, Fax: (212) 608-3785 and e-mail address: RobertKruger@aol.com.

Endnotes

1. See *In re Le*, 168 Misc.2d 384 (Sup. Ct. Queens Co. 1995); *In re Vaneria*, 275 A.D.2d 221, 222 (1st Dep't 2000); *In re Marmol (Pineda)*, 168 Misc.2d 845 (Sup. Ct. N.Y. Co. 1996); *In re Addo*, n.o.r., N.Y.L.J., Sept. 30, 1997, p. 26, col. 4 (Sup. Ct. Bronx Co.); *In re Doe*, 181 Misc.2d 787, 790 (Sup. Ct. Nassau Co. 1999); see also *In re Ramos*, 111 Misc.2d 1078 (Sup. Ct. Bronx Co. 1981), under the predecessor statute to MHL Article 81, i.e., MHL Article 77.
2. See Lawrence R. Faulkner and Lisa Klee Friedman, *Distinguishing Article 81 and Article 17-A Proceedings*, II Guardianship Practice in New York State, p. 158, *et seq.* (New York State Bar Association 1997).
3. See Uniform Guardianship and Protective Proceedings Act § 401(2) (1997).
4. Lawrence R. Faulkner and Lisa Klee Friedman, *Distinguishing Article 81 and Article 17-A Proceedings*, II Guardianship Practice in New York State, *supra*, at p. 160.
5. 1 McKinney's Consol. Laws of N.Y., Statutes, § 114 at p. 238 (1977).
6. n.o.r., N.Y.L.J., May 30, 2001, p. 22, col. 2 (Sup. Ct., Suffolk Co.).
7. 170 Misc. 2d 211, 213 (Sup. Ct., Rockland Co. 1996).
8. 7 J. L. & Soc. Policy 303 (1998).
9. Editor's Note: At the time this article went to press, the Inspector General's report on fiduciary appointments was issued, as was the Birnbaum Commission's report.

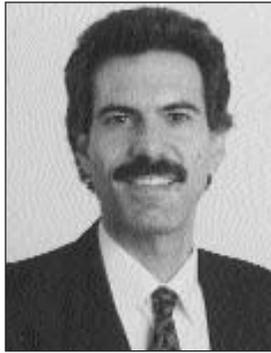
Robert Kruger is the Chairman of the Committee on Guardians and Fiduciaries, Elder Law Section of the New York Bar Association. He is also Chairman of the Subcommittee of Financial Abuse of the Elderly, Trusts and Estates Section, New York State Bar Association. Mr. Kruger is an author of the chapter on guardianship judgments in *Guardianship Practice in New York State* (NYSBA 1997) and Vice President (four years) and a member of the Board of Directors (ten years) for the New York City Alzheimer's Association. He was the Coordinator of Article 81 (Guardianship) training course from 1993 through 1997 at the Kings County Bar Association and has experience as guardian, court evaluator and court-appointed attorney in guardianship proceedings. Robert Kruger is a member of the New York State Bar (1964) and New Jersey Bar (1966). He graduated from the University of Pennsylvania Law School in 1963 and the University of Pennsylvania (Wharton School of Finance (B.S. 1960)).

PUBLIC POLICY NEWS

The Importance of *Blumer*—and Its Ramifications in New York

By Ronald A. Fatoullah and Stacey Meshnick

What MCCA giveth, CMS may be trying to taketh away. At the time of this writing, the Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration or HCFA) had just issued a proposed regulation that gives the states the option to use either the “income first rule” or the “resource first rule.” The timing of this proposed regulation is suspect and is quite disconcerting, as it comes just a couple of months prior to the time that the U.S. Supreme Court will hear the appeal of *Irene Blumer v. Wisconsin Department of Health and Family Services*.¹ The proposed regulation appears to be an attempt by CMS to derail the decision in *Blumer* that the income first rule impermissibly conflicts with federal law.



The federal Medicare Catastrophic Coverage Act of 1988, commonly referred to as “MCCA,” mandated that states create income and resource levels for the community spouse.² MCCA was intended to protect a spouse residing in the community from impoverishment when an ill spouse is institutionalized.³ Further, the intention was to avoid the reliance by a community spouse on public assistance once the institutionalized spouse died. New York State implemented this legislation in its Social Services Law.⁴

“What MCCA giveth, CMS may be trying to taketh away.”

The community spouse resource allowance (CSRA) in New York for 2001 is \$74,820, or one-half of the couple’s total resources, up to a maximum of \$87,000. The minimum monthly maintenance needs allowance (“MMMNA”) for the community spouse in New York for 2001 is \$2,175. Prior to MCCA, Medicaid rules required the couple to deplete their resources before the institutionalized spouse was eligible for benefits.

The federal statute at issue in *Blumer* is 42 U.S.C. § 1396r-5(e)(2)(C), which provides as follows:

Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse’s income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

“The timing of this proposed regulation is suspect and is quite disconcerting, as it comes just a couple of months prior to the time that the U.S. Supreme Court will hear the appeal of . . . Blumer.”

Therefore, federal law provides that if the community spouse’s income is below the MMMNA, then the CSRA can be increased or enhanced to an amount sufficient to generate income to bring the community spouse’s income up to the MMMNA. At issue in *Blumer* is whether 42 U.S.C. § 1396r-5(e)(2)(C) is clear on its face.

Many states, including New York, provide that the income of the institutionalized spouse must first be budgeted to the community spouse before his or her CSRA may be increased. This is known as the “income first rule.”

In New York, the use of the income first rule was affirmed in *Golf v. New York State Department of Social Services*.⁵ The Court in *Golf* stated that the “legislative scheme [does not] plainly and unequivocally require the application of solely the resource first rule.” The *Golf* Court concluded that the federal statute is ambiguous enough to permit states to use *either* the income first or resource first rule.

The following illustrates application of the “income first” rule:

Illustration

| | Income | Resources |
|--------------------------------------|-------------------|--|
| Community Spouse | \$500 Soc. Sec. | \$300,000----- (generates income of \$1,000 per month) |
| | +\$500 pension | |
| Total - | \$1,000 | \$300,000 |
| (Contribution From IS) | <u>+\$1,175</u> | |
| | \$2,175 | |
| Institutionalized Spouse (IS) | \$1,500 Soc. Sec. | \$0 |
| | +\$175 pension | |
| Total - | \$1,675 | |
| | <u>-\$1,175</u> | |
| | \$500 | |

The illustration shows that by using the income first rule, the local Department of Social Services (DSS) will first look to the income of the institutionalized spouse and allocate \$1,175 of his income to the community spouse in the Medicaid budget in order to raise her MMMNA to \$2,175. Therefore, the resources of the community spouse are in excess of the CSRA by \$213,000 (\$300,000 minus the CSRA of \$87,000). As a result, the community spouse could subject herself to a suit for support and recovery by DSS if she retained her assets and executed a spousal refusal letter.

In the above illustration, if New York used the "resource first" approach, the community spouse would be allowed to retain all of her resources, i.e., \$300,000. The income of \$1,000 generated by her resources would be allocated to her before attribution of the institutionalized spouse's income.

In New York, case law has provided some respite from the income first rule for community spouses. In *Robbins v. Debuono*, the court held that DSS cannot force an institutionalized spouse to alienate or assign Social Security benefits to the community spouse because to do so would violate the Social Security Act.⁶ For example, the applicant can choose to assign only his pension to the community spouse to raise her income to the MMMNA. In the illustration above, if the applicant does not assign his Social Security income to the community spouse, the community spouse will be able to keep all of her assets, totaling \$300,000, as these assets are needed to generate income to bring her income closer to the MMMNA of \$2,175. In this example, the institutionalized spouse's pension would also be budgeted to the community spouse as it is needed to bring her income up to the MMMNA.

There is ample case law that grants the states the option to use *either* the income first rule *or* the resource first rule. In *Thomas v. Commissioner of the Division of Medical Assistance*, a Massachusetts Supreme Judicial Court upheld a hearing officer's decision to use the income first rule to raise a community spouse's income to the MMMNA.⁷ The court noted that even if the institutionalized spouse transferred his half of the couple's resources to the community spouse, she would only have received an additional \$61 additional monthly interest income. The court stated that to exempt the institutionalized spouse's income would subvert the purpose of MCCA, which was to require couples to bear a reasonable amount of the cost of institutionalized care and thus preserve Medicaid resources. The court ruled that the Commissioner was not prohibited by the federal statute from deeming income to the community spouse. In response to the *Thomas* decision, the Massachusetts Legislature examined the income first rule and changed Massachusetts law to compel the use of the resource first method to avoid the impoverishment of spouses.

In *Cleary v. Waldman*, the Federal District Court in New Jersey held that the income first method adopted by New Jersey was not contrary to MCCA.⁸

The court in *Blumer* came to a very different conclusion. It decided that Wisconsin's income first rule, set forth in Wisconsin Statute § 49.455(8)(d), conflicts with federal law and remanded it to the Department of Health and Family Services (DHFS) to increase Mr. Blumer's CSRA to an amount that would permit him to have income sufficient to meet the MMMNA.

Irene Blumer was admitted to a nursing home in 1994 and applied for Medicaid in December of 1996.

Upon admission to the nursing home the couple had total assets of \$145,644. The Green County Department of Human Services established a CSRA of \$72,822 for Mr. Blumer and \$2,000 for Mrs. Blumer, totaling \$74,822 and denied the application because the assets at time of application were \$89,335, or \$14,513 above the \$74,822.

In order to increase the CSRA to bring him up to the allowable MMMNA of \$1,727, Mr. Blumer requested a fair hearing, at which it was determined that his income was \$1,702.45, which included interest, dividends, Social Security and annuity payments.

At the hearing, it was determined that pursuant to Wisconsin statute, the CSRA could not be raised until Mrs. Blumer first made all of her income available to her husband.

“Some elder law attorneys have intimated that Blumer is not very significant for New York community spouses in light of the Robbins decision last year. This is simply not true.”

The issue argued in *Blumer* was not that the agency misinterpreted the state statute, but rather that the state provision relied upon by DHFS “directly conflicts with federal law.” DHFS argued that the applicable federal spousal impoverishment provisions are ambiguous, and that while income first is not mandated under federal law, it is permissible. The court disagreed with DHFS’s assertion regarding ambiguity and concluded that the language in the federal statute (42 U.S.C. § 1396r-5(e)(2)(C) set forth above) is specific and directs the increase of the CSRA to an amount sufficient to bring the community spouse’s income up to the MMMNA. The court concluded that 42 U.S.C. § 1396r-5(e)(2)(C) is clear in providing for an enhanced CSRA if the community spouse’s income (not *both* the institutionalized spouse’s income and the community spouse’s income) is below the MMMNA.

The court in *Blumer* further stated that establishment of a CSRA is a *pre-eligibility* determination, not a *post-eligibility* one. 42 U.S.C. § 1396r-5(d)(1) directs the institutionalized spouse to transfer income to the community spouse only *after* eligibility has been determined. 42 U.S.C. § 1396r-5(d)(1) provides:

Protecting income for community spouse. (1) Allowances to be offset

from income of institutionalized spouse. *After* an institutionalized spouse is determined or redetermined to be eligible for medical assistance . . . , there shall be deducted from the spouse’s monthly income . . . a community spouse monthly income allowance . . . but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse. (Emphasis added).

As a result, the court concluded that the transfer of income is limited to post eligibility and the increase in the CSRA is not so limited. Therefore, the court asserted, increasing the CSRA via resources is the only method that could give the community spouse more income for the MMMNA at the time eligibility is being determined. The court disagreed with the construction of the term “community spouse’s income” as including a pre-eligibility transfer of income from institutionalized spouse to community spouse.

Most importantly, the court acknowledged that under the income first rule, the community spouse would be impoverished once the institutionalized spouse dies. The court recognized that allowing the community spouse to retain more of the assets “further the purpose behind the spousal impoverishment provisions of MCCA.”

Some elder law attorneys have intimated that *Blumer* is not very significant for New York community spouses in light of the *Robbins* decision last year. This is simply not true. Although the decision in *Robbins* was an enormous help for many community spouses, a large portion of community spouses may be left impoverished upon the death of the institutionalized spouse unless the resource first rule is used. For example, during the writing of this column, our firm had a consultation with a community spouse who had Social Security income of \$415, while her institutionalized spouse had Social Security income of only \$89 and a pension of \$4,750. Upon the death of her husband, the community spouse will be left with fixed monthly income of a mere \$415! It is clear that the intent of MCCA cannot be realized unless the resource first rule is used in all states.

As elder law attorneys, we are cognizant of the emotional, physical and financial toll that having a sick spouse inflicts on the well spouse. We must do our part to ensure that the spousal protections set forth in MCCA are not watered down either directly with affirmative legislation, or through a proposed regulation such as the one proffered by CMS.

Endnotes

1. 615 N.W.2d 647 (Wis. App. Ct.), *review denied*, 619 N.W.2d 92 (Wis. 2000), *petition for cert. filed*, 69 U.S.L.W. 3418 (U.S. Dec. 11, 2000) (No. 00-952).
2. 42 U.S.C. § 1396 r-5(d).
3. H.R. Rep. No. 100-105(II), at 65 (1988).
4. Social Services Law § 366-c.
5. 91 N.Y.2d 656, 674 N.Y.S.2d 600 (1998).
6. 218 F.3d 197 (2d Cir. 2000).
7. 682 N.E.2d 874.
8. 959 F. Supp. 222 (D.N.J. 1997).

Ronald A. Fatoullah, Esq., is the senior attorney of Ronald Fatoullah & Associates, elder law and estate planning attorneys with offices in Forest Hills, Great Neck and Brooklyn. Mr. Fatoullah serves on the board of directors of the National Academy of Elder Law Attorneys. He is Chair of the Legal Advisory Committee of the Alzheimer's Association, Long Island Chapter, and is a member of the Executive Committee of the Elder Law Section of the New York State Bar Association.

This article was written with the assistance of Stacey Meshnick, Esq. Ms. Meshnick supervises the Medicaid Department at the firm.



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Snowbird News

Life and Death—Difficult Decisions for All

By Julie Osterhout

In *Guardianship of Theresa Marie Schiavo v. Schiavo*, our society is faced with one of the starkest examples of difficult decisions. The case involved a dispute between the husband and guardian of Theresa Marie Schiavo and Theresa Marie's parents. Theresa Marie's husband and guardian believed that Theresa Marie, who was in a persistent vegetative state with no chance of recovery, should be allowed to die with dignity. This would require the removal of food and hydration which were being provided by artificial means. Theresa Marie's parents, on the other hand, did not want to give up hope of some miracle of recovery and therefore opposed the withdrawal of food and water as that would spell the more immediate death of Theresa Marie.



Theresa Marie was a young woman who fell into the condition after suffering cardiac arrest. She had not executed a written living will and the case proceeded under Chapter 765 Florida Statutes 1997, and the authority of *In re Guardianship of Browning*.¹ The Second DCA reviewed three points, the first point being whether or not a guardian *ad litem* was required to be appointed. The second point was whether or not the court could survey evidence as to society's views as to discontinuance of life support and the meaning of the use of words and expressions by Americans in discussing these life and death decisions. The final item that the court reviewed was whether the trial court met the clear and convincing standard in making its decision.

As to the guardian *ad litem* issue, the Second DCA reaffirmed its prior position in its lower court opinion in *Guardianship of Browning* that the trial court in essence becomes the surrogate decision maker in these difficult decisions when the matter is brought before the court by one of the parties. The court ultimately held that the appointment of a guardian *ad litem* in these cases is a discretionary decision for the trial court judge and that there was no error in this case when the trial court did not appoint a guardian *ad litem*. The particular facts that gave rise to this dispute were allegations that the parties were motivated by the potential inheritance that could result. In this

case, the appellate court believed that the parties were opposed sufficiently that a full hearing on the facts and issues had been presented to the court and that a guardian *ad litem* would have done nothing but duplicate services and provided nothing additional to the trier of fact. A significantly different situation could arise in those cases in which the guardian brings the matter before the court in an uncontested setting, as no family members could be found. In that instance, the trial court may decide that a disinterested third person may be appointed to ensure that a full review of the facts and surrounding circumstances are provided to the court for decision.

"[Guardianship of Theresa Marie Schiavo v. Schiavo] is a prime example of situations faced by surrogate decision makers, whether they be guardians, health care surrogates, proxies, or a court in determining what the patient would have wanted in the life-continuing decisions."

In this case, the court considered the use of the survey testimony by an expert in American cultural views as to life-continuing decisions. The court very clearly reaffirmed Florida case law in that it held that this decision was not a "best interest" decision but a decision based upon what the ward would have wanted if she were able to make the decision. This issue is closely tied with the final issue that the court dealt with, being whether or not clear and convincing evidence had been presented as to the ward's wishes. The court pointed out that the only evidence it had as to the ward's wishes were a few oral statements to friends and family about the dying process. The court also made reference to "other evidence about Theresa" that gave the trial court a sufficient basis to make the decision. The appellate court did not detail the specific testimony or evidence that the trial court used to divine Theresa's intent. This case is a prime example of situations faced by surrogate decision makers, whether they be guardians, health care surrogates, proxies, or a court in determining what the patient would have wanted in the life-continuing decisions. All too often, these surrogate deci-

sion makers have little information other than a friend or family's testimony that "I believe this is what the ward would have wanted."

Oftentimes, the surrogate decision maker is faced with so little information that the so-called "substitute decision" becomes in essence a "best interest" decision. This opposite decisional framework represents our grappling with the images of a Big Brother society making our personal care decisions for our best interests with the avoidance of unnecessary suffering by the ward, friends and family in situations that to any rational mind would indicate a total absence of hope. These principles of decision-making can be polarized by rhetoric and fear.

As the court did not provide further instruction as to the specific testimony or evidence that was used by the court to determine the ward's beliefs and desires, we are left with two principles. These principles are the same ones that are used daily in the court

system to interpret people's communication. First, oral statements, even if few in number and description, are evidence as to a person's wishes. Second, the court will consider the surrounding circumstances of those comments and the person making them to divine their intentions. Clear and convincing proof is not measured by the volume of the proof, but the consistency and quality of that information. In some ways, it is probably better that the appellate court did not provide the "magic words" for indicating a person's wish to end life-continuing care when in a terminal condition. Instead, we are left with the freedom and burden to view each situation as it stands alone and grapple with these very difficult decisions.

Endnotes

1. 568 So. 2d 4 (Fla. 1990).

Julie Osterhout has been practicing law in the Fort Myers, Florida, area since 1980. She received her Juris Doctorate in 1980 from Mercer Law School and opened her private practice in 1990. She has concentrated on the laws and issues affecting the elderly since 1982. Her practice includes estate planning, probate, guardianship, asset protection planning and Medicaid qualification. In 1995, Julie was certified as an elder law attorney by the National Elder Law Foundation. Julie is the immediate past Chair of the Elder Law Section of The Florida Bar. Julie is a current member of the Board of Directors of the National Academy of Elder Law Attorneys, and was named a Fellow of the National Academy of Elder Law Attorneys in 1997.

REQUEST FOR ARTICLES

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Elder Law Attorney Editor
Lawrence Davidow, Esq.
Davidow, Davidow, Siegel & Stern LLP
One Suffolk Square, Suite 330
Hauppauge, NY 11749
(631) 234-3030

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PUBLIC ELDER LAW ATTORNEY NEWS

Legal Services Update—Programs Face Cuts in Government Funding and Attorneys Fees

By Valerie J. Bogart

Two separate forces are conspiring to limit funding for legal services organizations—budget cuts and a setback in court-awarded attorneys fees by the U.S. Supreme Court. The attorneys fee decision also affects private lawyers who do civil rights litigation that is funded by federal fee-shifting statutes.



1. Budget Cuts for Legal Services

New York's legal services programs are preparing for cuts in programs and personnel, since the decrease in tax revenues and the demand for spending on relief and rebuilding efforts caused by the terrorist attack in Manhattan have made it unlikely that the state Legislature will reauthorize funding for legal services, which has been included in the state budget each year since 1993. The Legislature, which passed a bare-bones budget with no allocation for legal services on September 13, 2001, is unlikely to pass a supplemental budget—depriving not only legal services but dozens of nonprofit social services agencies that serve the elderly, poor, and disabled of funding, expected to be \$800 million before the terrorist attack. State funding for legal services over the last few years had grown to \$8.3 million, partly filling a gap created by cuts in federal legal services funding and by diminishing Interest On Lawyer Accounts (IOLA) reserves that plummeted with the interest rates. While funding dedicated to providing legal services for the elderly poor through Title III of the Older Americans Act is not directly affected by these cuts, that funding supports only a small percentage of work done by legal services offices statewide.

Two organizations that support and monitor legal services programs are the Brennan Center for Justice at NYU School of Law, which issues a weekly e-Alert of developments (subscribe or see the archives at http://www.brennancenter.org/programs/prog_ht_legal_elert.html), and the Greater Upstate Law Project (GULP) (www.gulpny.org). Anne Erickson, Executive Director of GULP said,

Legal services programs in New York City and around the state are in crisis. The loss of jobs due to the recent

disaster in New York City and layoffs around the state means that increasing numbers of New Yorkers are coming to our doors for assistance with legal matters, even as legal services programs themselves are laying off staff and limiting their office hours due to lack of funding.

The impact of failing to restore state funding will mean:

- A loss of \$3.4 million for the Legal Aid Society and Legal Services of New York (LSNY) in New York City, plus additional cuts in City government funding, requiring layoffs of an unknown number of staff attorneys and possible office closings.
- Neighborhood Legal Services in Erie County will have to reduce staff by as much as 33 percent with a cut of \$243,680.
- Public Interest Law Office of Rochester (PILOR)—With no state funding for this office serving a nine-county area, two vacant positions will go unfilled and two more positions will be cut.
- Nassau/Suffolk Legal Services will have to lay off four staff attorneys without \$304,730 in state funds.
- Legal Assistance of Finger Lakes faces a 20 percent cut in staff (two attorneys) without \$58,120 in state funds.

2. U.S. Supreme Court Strikes a Blow to Attorneys Fees

In a 5-4 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,¹ the U.S. Supreme Court drastically changed the definition of “prevailing party” status in the context of federal statutes that award attorneys fees to the prevailing party, holding that a plaintiff whose lawsuit induced voluntary change in defendant’s conduct is not entitled to fees. The Court abolished the “catalyst theory” as a basis for establishing prevailing party status, under which a plaintiff whose suit catalyzed the desired relief could be awarded fees, even if the suit was settled or mooted prior to issuance of a final judgment. *Buckhannon* was

brought under the Fair Housing Act Amendments of 1988 and the Americans with Disabilities Act, which are two of the numerous civil rights and anti-discrimination statutes with provisions which award fees to the prevailing party. After the state defendant's motion to dismiss the complaint was denied, the state Legislature repealed the offending state statute which plaintiffs had challenged, and the case was dismissed as moot. Though the filing of the lawsuit doubtless catalyzed the state Legislature's repeal of the state law, the Supreme Court affirmed the denial of fees by the lower courts, relying on *Black's Law Dictionary* for a rigid definition of prevailing party as a "party in whose favor a judgment is rendered." The Court found the legislative history of the Civil Rights Attorneys Fees Awards Act of 1976 "clearly insufficient to alter the accepted meaning of the statutory term." In her dissent, Justice Ginsburg stressed that the "catalyst rule is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights."

This decision will not only reduce funding available to legal services and private attorneys for public interest litigation, but is likely to have an impact on the conduct of state and local governments as well as private businesses that are defendants in these cases. Despite the fact that years of litigation may lead to a positive result, there can be no fee award for that work if, in the end, the defendant simply "moots out" the lawsuit by changing the policy or practice. Of course an ethical attorney would have no basis to

reject full relief for his or her client if "voluntarily" offered outside of a formal consent judgment. As Ellen Yacknin of the Greater Upstate Law Project observed, "[P]laintiffs who seek only injunctive and declaratory relief will be most susceptible of being mooted out. These are precisely the plaintiffs who will have the most difficulty in obtaining representation in the absence of court-awarded fees since there is no possibility of a contingency arrangement."²

"This [Buckhannon] decision will not only reduce funding available to legal services and private attorneys for public interest litigation, but is likely to have an impact on the conduct of state and local governments as well as private businesses that are defendants in these cases."

Valerie Bogart, Legal Services for the Elderly (NYC), with information provided by the Brennan Center for Justice and Greater Upstate Law Project.

Endnotes

1. 532 U.S. 598 (2001).
2. GULP Legal Services Journal, Oct. 2001, available at www.gulpny.org.

Valerie Bogart has been a senior attorney with Legal Services for the Elderly in New York City since 1990, specializing in litigation, training and policy in Medicaid and access to long-term care services. Since 1997, with a grant from the New York Foundation, she founded and has directed on a part-time basis The Home Care Project at the Center for Disability Advocacy Rights (CeDAR), a nonprofit organization established in part to do class actions prohibited by federal restrictions on legal services offices. She is a graduate of NYU School of Law.

Younger Disabled Client News

Proper Distribution of SNT Funds

By Beth Polner and Candace Appleton

Increasingly, practitioners are incorporating the use of supplemental needs trusts (SNTs) into estate and elder law plans, and most attorneys provide able guidance on how to establish and fund an SNT and on the proper selection of trustees.

However, one question frequently arises about the administration of the trust when the beneficiary receives



Beth Polner

Supplemental Security Income (SSI): What can the SNT be used for and how will its use affect SSI? The question occurs whether the trust is a 'payback' SNT or a third-party SNT (for example, a testamentary SNT). This article will provide an introductory outline to the use of trust funds for SSI beneficiaries and the consequent effects.

The goal of the trustee is to distribute the trust funds in such a way as to maximize, but not diminish, the beneficiary's receipt of available public benefits/government entitlements. Most SNTs contain the following language to guide trustees in the use of income and principal:

The Trustee may, in its sole discretion, make distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care, *but only if* the Trustee determines (i) that the beneficiary's basic needs will be better met if such distribution is made, and (ii) that it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance . . .

It is the testator's/settlor's intent that the trustee, in the exercise of its best judgment and fiduciary duty, seek support and maintenance for such beneficiary from all available public resources, including Supplemental Security Income (SSI), Medicaid, Federal Social Security Disability Insurance (SSDI), and the appropriate regional center for the disabled.

Supplemental Security Income (SSI) is a federal entitlement program which provides minimum monthly income¹ for low income persons over age 65, the blind, or disabled. It is a need-based program; as such, the actual amount received will depend not only upon resources, but also upon other income and living arrangements.²



Candace Appleton

Much of the precautionary trust language unique to SNTs and quoted above arises out of the strict budgeting rules for SSI recipients. In general, the Social Security Administration will exclude properly executed supplemental needs trusts from resources so long as the beneficiary cannot use the conserved funds for food, shelter and clothing.³

A. What Is Income for SSI Purposes?

The Social Security Administration (SSA) considers all types of income to the SSI recipient. Income may be earned or unearned; cash or in-kind; countable or not countable; excluded or deemed. For SSI, income is anything received in cash, or "in-kind," that can be used to meet the beneficiary's needs for food, clothing or shelter.

B. What Is In-kind Support and Maintenance (ISM)?

ISM, sometimes called in-kind income, is the most problematic type of income that SSA considers. This is what the SNT administrator must be vigilant not to inadvertently generate or provide. ISM is any food, clothing or shelter given to an SSI beneficiary or received by a beneficiary because someone else paid for these items. SSA's rationale is that the SSI grant is specifically earmarked to pay for these basic necessities of life. The agency views any outside contribution as diminishing the federal government's obligation to meet these needs. The precautionary language in the SNT, itself, instructs the SNT trustee to weigh the beneficiary's basic needs and whether those needs will be better met if such a distribution is made, and that it is in the beneficiary's best interests to suffer any consequent effect on the eligibility for or receipt of government benefits or assistance.

The in-kind income accredited to the SSI beneficiary is normally valued at the current market value of the actual goods and/or services received. If a beneficiary receives an item (for example, a rental) for less than market value, he or she will be charged with "in-kind" income amounting to the difference between the current market value for the item and the amount the claimant is responsible to pay.⁴

C. What Does "Shelter" Mean?

Shelter includes room rent, mortgage payments, real estate taxes, heating fuel, gas, electric, water, sewage and garbage collection. However, where the trust owns the home, payment for shelter-related items should not affect SSI benefits. In addition, telephone, cable television, or Internet hookup are not considered in-kind shelter payments as long as these costs are paid directly to a provider from the SNT. These latter "utility" items are excluded presumably because they are deemed luxuries rather than necessities. A general rule of thumb is that SNT monies can be used to pay for luxuries (i.e., vacations, movies, entertainment, transportation, etc.) but not for food, shelter or clothing.

D. How Is In-kind Income Valued by SSI?

In addition to the "current market value" calculation discussed in B., *supra*, there are three categories used for valuing in-kind income: the one-third reduction rule, the presumed maximum value rule, and noncountable income.

1. What Is the One-Third Reduction Rule?

This rule applies to SSI beneficiaries living in the household of another for at least a full calendar month, and who receives *both* food and shelter from that person. Rather than calculating the actual value of the subsidy for food and shelter received, the Social Security Administration presumes its value to be one-third the applicable federal benefit.⁵ The SSI check is reduced by that amount for the first full calendar month during which the in-kind support and maintenance is received. The presumption is irrebuttable.

However, there are many group living situations that can escape the one-third reduction rule. For instance, a trust beneficiary who is living in an institution which is providing some treatment or services in addition to food and shelter for four or more unrelated persons is not considered "living in the household of another." Similarly, beneficiaries are not considered "living in the household of another" and subject to the one-third rule if

1. they reside in a commercial establishment such as a boarding house or hotel;

2. they reside in their own home, or own a life estate in a home;
3. they are liable to the landlord for payment of any part of the rent;
4. they live in a noninstitutional care situation or a public assistance household; or
5. they pay a *pro rata* share of household operating expenses where they reside. A beneficiary is considered to be paying his *pro rata* share of household operating expenses if he or she pays an amount equal to the total household's average monthly expenditures for food, rent, mortgage, property, taxes, heating fuel, gas, electricity, water, sewage and garbage collection, divided by the number of people in the household.

2. What Is the Presumed Maximum Value Rule and When Is It Applied?

The presumed maximum value rule creates a rebuttable presumption that the value of food, clothing, or shelter provided is equal to one-third the applicable federal rate, plus \$20 as a general income exclusion. The rule generally applies when in-kind support and maintenance exists, yet the one-third reduction rule does not apply. Although the explanation for this rule appears simple on its face, it is quite complex and difficult to understand.

Generally, this rule applies when the SSI beneficiary lives in the household of another but does not receive both food *and* shelter. Usually, some food, clothing, or shelter is received for free or at less than fair market value. The rule can also apply when the beneficiary is living in his or her own household (including those seen as living in their own household under the rules outlined *supra*, at D.1.) and receiving some food, clothing or shelter for free or for less than fair market value. In addition, the beneficiary may be living in a nonmedical institution, educational or vocational training institution, or a private, nonprofit retirement home and receive *countable* in-kind support and maintenance.

Since the presumption is rebuttable, the beneficiary may present the Social Security Administration with proof of what was actually paid for food, clothing or shelter, or the current fair market value of those received items. If a showing is made that the value is less than the presumed maximum value (one-third plus \$20), the beneficiary will be charged only with the amount actually paid. In the event that the beneficiary received a benefit greater than the presumed market value, he or she will only be charged for the PMV (i.e., the one-third reduction).

3. What Is Noncountable In-Kind Support or Maintenance?

In-kind support and maintenance (ISM) is not generally charged against beneficiaries who live in any of the five living arrangements described below. If there is any countable in-kind support and maintenance after the application of this rule, it is charged against the beneficiary under the presumed value rule.

ISM is not counted in the following living arrangements: nonprofit retirement homes; public assistance households; temporary shelter placements due to a disaster; noninstitutional care setting (such as foster or family care); and nonmedical for-profit institution under certain circumstances.⁶

4. What Is Nonincome, Excluded Income and Noncountable Income?

Generally, any in-kind support and maintenance that cannot be converted to food, clothing or shelter is not considered income, and therefore not budgeted by the Social Security Administration. For example, certain medical care and services such as medical care or services given to the beneficiary for free or paid for directly to the provider by someone else (i.e., the SNT trustee) are not counted as income. Additionally, SSI also does not count as income medical insurance premiums paid directly to the insurer for the SSI beneficiary by another person or the value of room and board furnished during medical confinement in a government-approved medical facility. Moreover, certain social services are not counted, such as vocational rehabilitation; money or assistance borrowed by the SSI recipient which he or she is required to repay; monies paid which are excluded by federal statute such as food stamps, HEAP, and Section 8 housing vouchers; and educational scholarships and grants.⁷

The Social Security Administration also recognizes other income exclusions. Some examples include: the first \$20 of unearned income; up to \$20 of infrequent unearned income; up to \$10 of infrequent or irregular earned income; earned income of a blind recipient used to meet work-related expenses; \$65/month of earned income⁸; and \$20/month general income exclusion.

5. What Are the Reporting Requirements for In-Kind Support and Maintenance?

SSI regulations require that all recipients, and/or their representative payees, report a lengthy list of changes in financial circumstance to the Social Security Administration.⁹ The list includes change of address, household income, living arrangement or

resources. It also mandates notification of marriage, admission to a medical facility, medical improvement or leaving the country. Clearly, the receipt of in-kind income would fall under the purview of this reporting requirement. Unreported receipt of ICM will result in the imposition of an overpayment of SSI which can then be recouped from the monthly benefit.¹⁰

E. What Strategies Can the SNT Trustee Employ to Minimize the Negative Impact of Purchasing Food, Clothing and Shelter for an SSI Beneficiary?

If the SNT trustee has weighed the factors as set forth in the language of the trust document and determines it is in the beneficiary's best interests to make payments for food, shelter or clothing, there are ways to minimize the impact on the receipt of public benefits. It may be in the beneficiary's best interests for the trustee to make a large clothing or food purchase (if living with others or in their own home) once or twice (seasonally) per year.¹¹ The SNT beneficiary may reside in a group home where food and shelter are provided but clothing is not provided and the allowance from the SSI grant will not cover all items needed. The beneficiary might also reside in the family home (or a home purchased with SNT funds, in the name of the trust) where parents and/or siblings also reside and clothing purchases are needed. Assuming the purchase is made before the end of a month and the beneficiary has no other available resources, eligibility will automatically be restored the next month. Then, when the beneficiary receives a notice from SSI demanding repayment, there is nothing in the law which would prevent the SNT trustee from repaying the SSI overpayment directly from trust funds.

Where the trust owns the home, payment for shelter-related items should not affect SSI benefits.¹²

For other special needs, the trustee should take care to develop strategies which will not inadvertently reduce the SSI benefit. This usually means paying for special needs items directly from the trust. For example, if a trip is planned for the disabled beneficiary, payments for motels, air fare, car rentals, etc., should be made directly by the SNT trustee. The administration of SNTs can be complicated and confusing for trustees, who are often family members. The role of the estate and elder law practitioner must be to guide clients through the complex and sometimes frustrating rules associated with trust expenditures, assisting trustees in balancing the needs of the SSI/SNT beneficiary with SSI budgeting rules.

Endnotes

1. SSI is governed by a complex maze of federal statutes, regulations and administrative policies (called POMS), as well as case law beyond the scope of this article. The federal statutory scheme includes 42 U.S.C. §§ 1382a *et seq.* and 20 C.F.R. §§ 416 *et seq.* An excellent Internet site is www.ssa.gov (click on SSI). In addition, an excellent overview of SSI, Medicaid and other government entitlement programs is found in *New York Elder Law Handbook: Institute on Law and Rights of Older Adults, Brookdale Center on Aging*, Practising Law Institute (1998), edited by Annette Levinson Kasle.
2. New York State has eight basic living arrangements and some of these arrangements vary depending upon the county of residence. The rates are: Living Alone; Living with Others; Living in the Household of Another; Level I Congregate Care-Family Care; Level II Congregate Care (for adult facilities, community residence, residential substance abuse treatment program or residential care center for adults); Level III Congregate Care (schools for mentally retarded); Medicaid Institution; Other—Residents of public institutions. For 2001, the basic combined federal and New York State supplement is \$617/mo. for an individual living alone; \$553 for an individual living with others but paying his or her own expenses; \$376.34 for an individual living in the household of others and receiving support and maintenance; and \$35 for an individual living in a Medicaid approved long-term care facility or public general hospital for more than 90 days. The rates for couples is different but uses the same categories for living arrangements. The rates for congregate care may vary by county. The rates may be slightly higher based upon an adjustment resulting from the correction in the Consumer Price Index.
3. New York State residents who are disabled may receive Medicaid even if, through use of income and principal of an SNT, they do not receive \$1 of SSI. That is because New York State has an independent regulatory methodology for determining disability for qualified Medicaid applicants. 18 ADM § 360-5.1 *et seq.*
4. There are special rules for SSI beneficiaries under age 18. Generally, children under 18 are not charged with in-kind support and maintenance received from a parent or spouse of a parent living with a child; however other complex budgeting rules such as deeming may apply. The practitioner is cautioned to review the regulations and relevant case law before advising a client with a disabled child under age 18.
5. The current federal benefit rate is \$530.
6. In all these living situations, no in-kind support and maintenance will be charged for the value of food, clothing or shelter provided by the institution if the beneficiary is paying or is legally responsible for the amount accepted by that institution as payment in full, even if the required payment is less than the current market value for that food, clothing or shelter. However, if the institution is paid by someone else (other than a public or private social services agency) on the SSI beneficiary's behalf, the beneficiary will be charged by the Social Security Administration with ISM.
7. However, only the portion of the income received that is used to pay tuition, fees or other necessary educational expenses is not counted for SSI purposes. Any portion set aside or used for the cost of food, shelter or clothing is countable.
8. After applying all the earned income exclusions, SSI will disregard one-half of the SSI recipient's remaining earned income in every month. This is one of SSA's many "work incentive" efforts.
9. See 20 C.F.R. § 416.708.
10. Imposition of an overpayment requires written notice to the SSI beneficiary and his or her designated representative. The notice provides the right to challenge the recoupment via a "waiver" process. Denials are also appealable.
11. This is a simple but common example. However, there are complex considerations for a trustee when the disabled beneficiary is a minor or when court approval is required for expenditures. Generally, the considerations (and case law) center around the parental duty of support for a minor for necessities.
12. Other considerations unrelated to SSI budgeting may come into play, particularly with minors or where court approval is required. Generally, this issue centers around purchase of items which may also benefit family members who reside with the SSI/SNT beneficiary. For example, the installation of a pool to provide therapy for the SSI beneficiary where the pool will also be used by parents or siblings.

Beth L. Polner is the senior associate with Davidow, Davidow, Siegel & Stern and practices in the areas of estate planning and estate administration, Supreme Court Article 81 and Surrogate Court 17-A guardianship litigation, and elder law. Ms. Polner, who has worked for Nassau/Suffolk Law Services Committee, Inc., L.I., Housing Services, and the FDIC during the past 19 years, devotes a significant amount of time *pro bono* representing disabled clients in the guardianship and SNT subject areas, and advising nonprofit advocacy and service providers who assist the disabled. Ms. Polner is the author of several articles on the subject of SNTs, guardianship, and Medicaid-related issues. She is a member of the local bar associations and the New York State Bar Association, is currently the Co-Chair of the Senior Umbrella Network of Nassau, and is a member of the Board of Trustees of North Shore Synagogue in Syosset, New York.

Candace Scott Appleton is a senior staff attorney at Nassau/Suffolk Law Services where she has worked for 21 years. She currently supervises the Disability Advocacy Project (DAP) which has lawyers and paralegals situated in Hempstead, Islandia and Riverhead. The Project provides information, referral, training and representation to Long Island's disabled seeking to obtain Social Security or SSI benefits.

Ms. Appleton specializes in federal court litigation, including a major Social Security impact case, *De Leon v. HHS*, 734 F.2d 930 (2d Cir. 1984). She also pursues legislative advocacy: drafting, lobbying for and seeing through to passage RPAPL § 711 (amendment giving due process rights to rooming-house residents) and SSL § 461-a(3) (giving lawyers access to their clients residing in adult homes). She has testified before congressional and New York State Assembly committees, contributed articles to *Newsday* and other periodicals, and written extensively and done training on many areas of poverty law.



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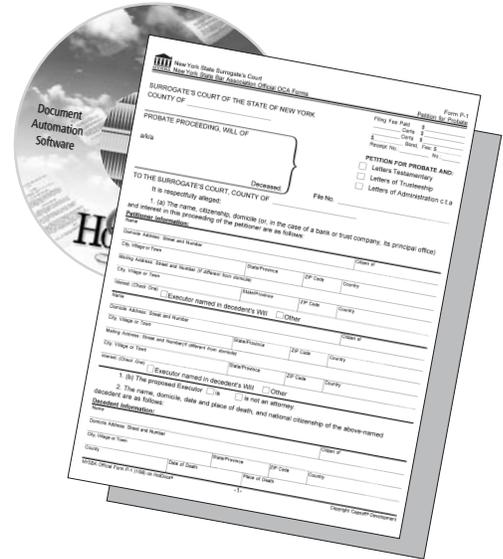
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New York State Bar Association
One Elk Street
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Lawrence Eric Davidow
Davidow, Davidow, Siegel
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White Plains, NY 10601
(914) 684-2100
Fax: (914) 684-9865

Beth L. Polner
Davidow, Davidow, Siegel
& Stern, LLP
One Suffolk Square, Suite 330
Hauppauge, NY 11749
(631) 234-3030
Fax: (631) 234-3140

Joan L. Robert
Kasoff Robert Lerner & Robert
100 Merrick Road, Suite 508W
Rockville Centre, NY 11570
(516) 766-7700
Fax: (516) 766-0738

Ronald A. Spirn
Vincent J. Russo & Associates, PC
1600 Stewart Avenue, Suite 300
Westbury, NY 11590
(516) 683-1717
Fax: (516) 683-9393

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